

BEFORE THE COMMISSIONER
OF THE
BUREAU OF LABOR AND INDUSTRIES

In the matter of rules regulating)
prevailing wage rates on public works) PROPOSED RULES

839-025-0004
Definitions

As used in these rules, unless the context requires otherwise:

(1) "Apprentice" means:

(a) A person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Bureau of Apprenticeship and Training (BAT) or with any state apprenticeship agency recognized by BAT; or

(b) A person in probationary employment as an apprentice in such an apprenticeship program, but who is not individually registered in the program, but who has been certified by the BAT or a state apprenticeship agency to be eligible for probationary employment as an apprentice.

(2) "The Basic Hourly Rate of Pay" or "Hourly Rate" means the rate of hourly wage, excluding fringe benefits, paid to the worker.

(3) "Bureau" means the Bureau of Labor and Industries.

(4) "Commissioner" means the Commissioner of the Bureau of Labor and Industries, or designee.

(5) "Construction" means the initial construction of buildings and other structures, or additions thereto, and of highways and roads. "Construction" does not include the transportation of

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material or supplies to or from the public works project by employees of a construction contractor or construction subcontractor.

(6) "Division" means the Wage and Hour Division of the Bureau of Labor and Industries.

(7) "Employ" includes to suffer or permit to work.

(8) "Fringe benefits" means the amount of:

(a) The rate of contribution irrevocably made on a regular basis and not less often than quarterly by a contractor or subcontractor to a trustee or to a third person pursuant to a plan, fund or program; and

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state or local law to provide any of such benefits. Other bona fide fringe benefits do not include reimbursement to workers for meals, lodging or other travel expenses, nor contributions to industry advancement funds (CIAF for example).

(9)(a) **"Funds of a public agency" includes any funds of a public agency that are directly or indirectly used, as described below.**

(A) "Directly used funds of a public agency" means any revenue, money, or that which can be valued in money that is collected for a public agency or that is derived from a public

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agency's immediate custody and control, and, except as provided in ORS 279C.810(1)(a)(H) and (J), includes but is not limited to any money loaned by a public agency including the loan of proceeds from the sale of conduit or pass-through revenue bonds for the specific purpose of financing a project, and public property or other assets that is used as payment for all or part of a project.

(B) "Indirectly used funds of a public agency" means that a public agency ultimately bears the cost of all or part of the project, even if a public agency is not paying for the project directly or completing payment at the time it occurs or shortly thereafter. A public agency does not indirectly use funds of a public agency when it elects not to collect land rent that is due. Examples of when an agency "ultimately bears the cost" of all or part of a project include but are not limited to:

(i) Amortizing the costs of construction over the life of a lease and paying these costs with funds of a public agency during the course of the lease;

(ii) A public agency subsidizing the costs of construction that would normally be borne by the contractor.

(iii) Using insurance proceeds that belong to a public agency to pay for construction. Insurance proceeds represent "money collected for the custody and control of a public agency" and therefore are funds of a public agency, whether the contractor obtains payment directly from the insurance company or the public agency; or

(iv) Using or creating a private entity as a conduit for funding a project when the private entity is in fact an alter ego of the public agency.

(b) "Funds of a public agency" does not include:

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(A) Funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction, reconstruction, major renovation or painting;

(B) Building and development permit fees paid or waived by the public agency;

(C) Tax credits or tax abatements;

(D) Land that a public agency sells to a private entity at fair market value;

(E) The difference between:

(i) The value of land that a public agency sells to a private entity as determined at the time of the sale after taking into account any plan, requirement, covenant, condition, restriction or other limitation, exclusive of zoning or land use regulations, that the public agency imposes on the development or use of the land; and

(ii) The fair market value of the land if the land is not subject to the limitations described in subparagraph (i) of this paragraph;

(F) Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project;

(G) Staff resources of the public agency used to design or inspect one or more components of a project;

(H) Moneys derived from the sale of bonds that are loaned by a state agency to a private entity, unless the moneys will be used for a public improvement;

(I) Value added to land as a consequence of a public agency's site preparation, demolition of real property or remediation or removal of environmental contamination, except for value added in excess of the expenses the public agency incurred in the site preparation,

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demolition or remediation or removal when the land is sold for use in a project otherwise subject to ORS 279C.800 to 279C.870; or

(J) Bonds, or loans from the proceeds of bonds, issued in accordance with ORS chapter 289 or ORS 441.525 to 441.595, unless the bonds or loans will be used for a public improvement.

[(9)](10) "Housing" has the meaning given that term in ORS 279C.800.

[(10)](11) "Major renovation" means the remodeling or alteration of buildings and other structures within the framework of an existing building or structure and the alteration of existing highways and roads, the contract price of which exceeds \$50,000.

[(11)](12) "Nonprofit organization," as used in subsection [*OAR 839-025-0100(1)(c)(A)(i)*]

(9)(b)(A) of this rule, means an organization or group of organizations described in section 501(c)(3) of the Internal Revenue Code that is exempt from income tax under section 501(a) of the Internal Revenue Code.

[(12)](13) "Normal business hours" means the hours during which the office of the contractor or subcontractor is normally open for business. In the absence of evidence to the contrary, the Division will consider the hours between 8:00 a.m. and 5:00 p.m., excluding the hours between 12:00 noon and 1:00 p.m., on weekdays as normal business hours.

[(13)](14) "Overtime" means all hours worked:

- (a) On Saturdays;
- (b) On the following legal holidays:
 - (A) Each Sunday;
 - (B) New Year's Day on January 1;
 - (C) Memorial Day on the last Monday in May;

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- (D) Independence Day on July 4;
- (E) Labor Day on the first Monday in September;
- (F) Thanksgiving Day on the fourth Thursday in November;
- (G) Christmas Day on December 25.

- (c) Over 40 hours in a week; and either
- (d) Over eight (8) hours in a day; or
- (e) Over 10 hours in a day provided:

- (A) The employer has established a work schedule of four consecutive days (Monday through Thursday or Tuesday through Friday) pursuant to OAR 839-025-0034; and
- (B) The employer operates in accordance with this established work schedule.

[(14)]**(15)** "Overtime rate" means the basic hourly rate of pay multiplied by one and one-half.

[(15)]**(16)** "Overtime wages" means the overtime hours worked multiplied by the overtime rate.

[(16)]**(17)** "Person" includes a public or private corporation, a partnership, a sole proprietorship, a limited liability company, a government or governmental instrumentality.

[(17)]**(18)** "Prevailing wage rate claim" means a claim for wages filed by a worker with the Division.

[(18)]**(19)** "Public agency" means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any [*of their instrumentalities*] **instrumentality thereof** organized and existing under law or charter. [*"Public funds" means any revenue, money or that which can be valued in money collected for, or in the custody and control of a public agency.*]

[(19)]**(20)(a)** "Public work," "public works" or "public works project" includes but is not limited to:

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(A) *[roads]* **Roads**, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency *[the primary purpose of which is]* to serve the public interest *[regardless of whether title thereof is in a public agency but does not include the reconstruction or renovation of privately owned property which is leased by a public agency.]*;

(B) A project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and \$750,000 or more of funds of a public agency; or

(C) A project for the construction of a privately owned road, highway, building, structure or improvement of any type that uses funds of a private entity and in which 25 percent or more of the square footage of the completed project will be occupied or used by a public agency.

(b) “Public works” does not include:

(A) The reconstruction or renovation of privately owned property that is leased by a public agency; or

(B) The renovation of publicly owned real property that is more than 75 years old by a private nonprofit entity if:

(i) The real property is leased to the private nonprofit entity for more than 25 years;

(ii) Funds of a public agency used in the renovation do not exceed 15 percent of the total cost of the renovation; and

(iii) Contracts for the renovation were advertised or, if not advertised, were entered into before July 1, 2003, but the renovation has not been completed on or before the effective date of this 2007 act.

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[(20)]**(21)** "Public works contract" or "contract" means any contract, agreement or understanding, written or oral, into which a public agency enters for any public work.

[(21)]**(22)** "Reconstruction" means highway and road resurfacing and rebuilding, the restoration of existing highways and roads, and the restoration of buildings and other structures.

[(22)]**(23)** "Reconstruction or renovation of privately owned property which is leased by a public agency" includes improvements of all types within the framework or footprint of an existing building or structure. [*Reconstruction and renovation of privately owned property which is leased by a public agency" does not include:*

(a) New construction that is initiated with the intent to lease to an identified public agency, either exclusively or as a primary tenant. A primary tenant is one who leases 51% or more of the space.

(b) Tenant improvements that meet the following criteria:

(A) Are paid for with public funds, either directly or indirectly as defined in OAR 839-025-0100(1)(c)(A), (B) and (C); and

(B) Are performed according to plans, specifications, or criteria furnished by one or more identified public agencies; and

(C) Comprise 51% or more of the value of the building or structure. When the cost of the tenant improvements are borne by more than one public agency, prevailing wage coverage will not be found unless the public agencies act as a joint enterprise for the purposes of the construction project.

(i) For buildings or structures constructed within the past three years, the value will be determined by the total construction cost.

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(ii) For buildings constructed more than three years before the tenant improvements, the value will be the real market value determined for property tax purposes.]

[(23)]**(24)** "Residential construction project" means:

(a) A public work project [*that is not exempt under the provisions of ORS 279C.810*] for the construction, reconstruction, major renovation or painting of a single family house or apartment building of [no]**not** more than four (4) stories in height and all incidental items such as site work, parking areas, utilities, streets and sidewalks pursuant to the U.S. Department of Labor's "All Agency Memorandum No. 130" -- "Application Of The Standard of Comparison 'Projects Of a Character Similar' Under the Davis-Bacon and Related Acts" dated March 17, 1978. (See Appendix 6.)

(b) Notwithstanding the provisions of subsection (a) of this rule, where it is determined that a different definition of "residential construction" has been adopted by local ordinance or code, or that the prevailing practice of a particular trade or occupation regarding what is considered "residential construction" differs from the U.S. Department of Labor definition of residential construction, the commissioner may consider such information in determining a project to be a "residential construction project."

[(24)]**(25)** "Site of work" is defined as follows:

(a) The site of work is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed, and other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site.

(b) Except as provided in paragraph (c) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards and similar facilities, are part of the site of work

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provided they are dedicated exclusively, or nearly so, to the performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them. Such facilities which are established by a supplier of materials for the project after the opening of bids are deemed to be dedicated exclusively to the performance of the contract or project.

(c) Not included in the site of work are permanent home offices, branch plant establishments, fabrication plants, and tool yards of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, and similar facilities of a commercial supplier or materialman which are established by a supplier of materials for the project before opening of bids and not on the project site, are not included in the site of work. Such permanent, previously established facilities are not part of the site of the work, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract or project.

[(25)]**(26)** "Special wage determination" means a wage determination made at the request of a public [*contracting*] agency and which is applicable only to specific job classes. A special wage determination is issued in those cases where there is no current wage determination applicable to specific job classes and the use of such job classes is contemplated on a public works project.

[(26)]**(27)** "Trade" or "occupation" is defined in accordance with the prevailing practices of the construction industry in Oregon.

[(27)]**(28)** "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S.

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Department of Labor, Bureau of Apprenticeship and Training as meeting its standards for on-the-job training programs and which has been so certified by that bureau.

[(28)]**(29)** "Wage determination" includes the original decision and any subsequent amendments made by the commissioner in accordance with ORS 279C.815.

[(29)]**(30)** "Wages" or "Prevailing Wages" means the basic hourly rate of pay and fringe benefits as defined in sections (2) and (8) of this rule.

(31) "Worker" means a person employed on a public works project and whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental, professional or managerial. The term "worker" includes apprentices, trainees and any person employed or working on a public works project in a trade or occupation for which the commissioner has determined a prevailing rate of wage. (See OAR 839-025-0035.)

839-025-0005

Determination Requests

(1) A request for a determination as to whether a project or proposed project is a public works under Section 43 of House Bill 2140 (Enrolled), OR Laws 2007, must meet the following requirements before it will be considered by the commissioner:

(a) The request must be in writing, describe all relevant details of the project or proposed project, and be submitted to: Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon St., #1045, Portland, OR, 97232.

(b) A copy of the request must be sent to any public agency known to be associated with the project at the time it is submitted to the Prevailing Wage Rate Unit. The request must identify the public agencies receiving a copy of the request.

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(c) In addition to the written request, the requester must provide all documents, records, and other information necessary to enable the commissioner to make the determination.

This information includes, but is not limited to, copies of advertisements, project plans and specifications, development and disposition agreements, contracts, project financing information, loan agreements, and any other relevant information related to the project or proposed project. When the requester is not a public agency and information necessary for a determination is in the custody or control of a public agency, it is the requester's responsibility to obtain the information from the public agency and provide it with the request.

(2) The requester has a continuing duty to provide the Prevailing Wage Rate Unit with all relevant documents, records and other information until a determination is made. If any information submitted in connection with a request is modified or superseded in any material respect after the request is made, the requester must promptly submit the updated information to the Prevailing Wage Rate Unit.

(3) The commissioner will inform the requester if additional documents, records, or other information is necessary to enable the commissioner to make the determination.

(4) If the commissioner informs a requester that the Prevailing Wage Rate Unit has not received all the documents, records, or other information necessary to make a determination, the request will remain pending for 90 calendar days. If the Prevailing Wage Rate Unit does not receive the information the commissioner deems necessary to make a determination while the request is pending, the requester may be required to submit a new request in order to obtain a determination.

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(5) If a requester fails or refuses to provide documents, records, or other information necessary to enable the commissioner to make the determination and the commissioner has reasonable grounds to believe such documents, records, or other information exist, the commissioner may inform the requester that the commissioner is unable to issue a determination.

(6) The commissioner's determination will be issued to the requester, with copies mailed to any public agencies identified on the request.

(7) After the commissioner issues a determination, the requester or any public agency served with a copy of the determination may request that the commissioner reconsider the determination.

(a) A request for reconsideration must be received within 15 calendar days of the date the determination was mailed. Requests must be submitted to the Prevailing Wage Rate Unit. A request for reconsideration does not toll the time period for requesting a contested case hearing on the determination.

(b) The reconsideration request must be in writing and include the reason or reasons for the request and any documents in support of the request.

(c) The commissioner will accept or reject the request within 15 business days of receipt of the request by the Prevailing Wage Rate Unit. If the commissioner does not accept the request within 15 business days, it shall be deemed denied.

839-025-0007

Purpose and Procedure for Special Wage Determination

(1) In planning a public works project, public [*contracting*] agencies periodically require the use of a trade not normally included in wage determinations. Special wage determinations allow the commissioner to recognize a trade and establish a rate for it. This procedure also allows the

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commissioner to respond in a timely fashion to the needs of the [*contracting*]**public** agency.

Special wage determinations are not available when the wage determination is applicable.

(2) Any public [*contracting*] agency may submit a written request for a special wage

determination to the Prevailing Wage Rate Unit. The request must contain:

(a) A written description of the work to be performed; and

(b) An identification of the requested trade(s).

(3) Within two weeks the PWR Coordinator will recommend to the commissioner whether or not a special wage determination should be established.

(4) If a special wage determination is to be allowed, the PWR Coordinator will provide the requesting agency with the instruments, procedures, and minimum requirements for conducting a wage survey. The requesting agency will conduct the wage survey in accordance with bureau procedures and submit the results to the PWR Coordinator.

(5) The PWR Coordinator will review the data for methodological compliance and accuracy and submit it to the commissioner with a recommendation.

(6) The commissioner will approve or disapprove the special wage determination request after considering the PWR Coordinator's recommendation. The [*contracting*]**public** agency will be notified, in writing, of the commissioner's final decision.

(7) If the special wage determination is approved, it is valid only for the locality specified in the special wage determination and only until the first day of July following the date of approval unless amended prior to that date.

(8) A copy of the approved special wage determination will be kept on file by the PWR Coordinator and the Wage and Hour Division.

839-025-0008

List of Planned Public Improvements

Note: Material in [brackets] and *italics* is material that is deleted. Material that is **underlined** and **bold** is material to be added.

(1) As used in this rule the term "Public improvement" has the same meaning as it does in ORS 279A.010[(aa)](cc).

(2) Each public agency must prepare and file with the commissioner a list of every public improvement known to the agency that the agency plans to fund during the subsequent budget period. The list must be submitted to the Prevailing Wage Rate Unit not less than 30 days prior to the adoption of the agency's budget. If the agency revises its list after the adoption of its budget, the agency must file the revised list with the commissioner at that time.

(3) Copies of the lists of planned public improvements filed with the commissioner by public agencies as required by ORS 279C.305(2) are available to the public upon written request to the Prevailing Wage Rate Unit. The request must contain the following information:

(a) The name of the public agency;

(b) The name of any division, section or department of the public agency, if applicable; and

(c) The approximate date of the budget period for which the list was filed.

(4) The cost of supplying copies requested in section (3) of this rule will be calculated in accordance with OAR 839-030-0010, which sets forth the fees to be charged by the bureau when responding to requests for copies of public records.

(5) To assist public [*contracting*] agencies in complying with the provisions of ORS 279C.305 and these rules, the commissioner has prepared two forms, **WH-118** and **WH-119**. The use of these forms by the public [*contracting*] agency is optional. However, the statutory requirements of ORS 279C.305(2) are satisfied when these forms are completed and mailed to the Prevailing Wage Rate Unit. The forms should be completed as follows:

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(a) The Planned Public Improvement Summary form, WH-118, should be used to summarize all planned projects in the subsequent fiscal year, noting the project information requested on the form;

(b) ORS 279C.305 requires public [*contracting*] agencies to show that they are conforming to state policy when they plan to use their own personnel and equipment on projects estimated to exceed \$125,000. The Capital Improvement Project Cost Comparison Estimate form, **WH-119**, should be completed for the purpose of complying with this provision. In developing cost comparisons, unit costs which can be substantiated by the agency's cost accounting system should be used. Contractor unit prices that reflect bidding data should also be used.

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

Forms Prescribed by the Labor Commissioner

839-025-0010

Payroll and Certified Statement

(1) The form required by ORS 279C.845 is the Payroll and Certified Statement form, **WH-38**.

This form must accurately and completely set out the contractor's or subcontractor's payroll for each week during which the contractor or subcontractor employs a worker upon a public works project.

(2) The contractor or subcontractor may submit the weekly payroll on the **WH-38** form or may use a similar form providing such form contains all the elements of the **WH-38** form. When submitting the weekly payroll on a form other than **WH-38**, the contractor or subcontractor must attach the certified statement contained on the WH-38 form to the payroll forms submitted.

(3) Each Payroll and Certified Statement form must be submitted by the contractor or subcontractor to the public [*contracting*] agency by the fifth business day of each month following a month in which workers were employed upon a public works project.

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(4) The Payroll and Certified Statement forms received by the public [*contracting*] agency are public records subject to the provisions of ORS 192.410 to 192.505. As such, they must be made available upon request. Pursuant to ORS 279C.845(2), information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 through 279C.870.

(5) If the contractor fails to submit its payroll and certified statement forms to the public [*contracting*] agency as required by subsection (3) above, the public [*contracting*] agency must retain 25 percent of any amount earned by the contractor until the contractor has submitted the required payroll and certified statements to the public [*contracting*] agency.

(a) The amount to be retained shall be calculated at 25 percent of the unpaid amount earned by the contractor at the time each payroll and certified statement are due. For example, if the contractor fails to submit its payroll and certified statement by the fifth of the month and the contractor earned \$100,000 in the period since its last payroll and certified statement were submitted to the public [*contracting*] agency, the public [*contracting*] agency must retain 25 percent of \$100,000 (\$25,000), until such time as the required payroll and certified statement are submitted.

(b) When calculating the amount to be retained, amounts previously retained shall not be included as amounts earned by the contractor.

(c) Once the required payroll and certified statement have been submitted to the public [*contracting*] agency, the public [*contracting*] agency must pay the amount retained to the contractor within 14 days.

(6) If a first-tier subcontractor fails to submit a payroll and certified statement form to the public [*contracting*] agency as required by subsection (3) above, the contractor must retain 25 percent

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of any amount earned by the first-tier subcontractor until the first-tier subcontractor has submitted the required payroll and certified statements to the public [*contracting*] agency.

(a) The amount to be retained shall be calculated at 25 percent of the unpaid amount earned by the first-tier subcontractor at the time each payroll and certified statement are due. For example, if the first-tier subcontractor fails to submit the payroll and certified statement by the fifth of the month and the first-tier subcontractor earned \$100,000 in the period since the last payroll and certified statement were submitted to the public [*contracting*] agency, the contractor must retain 25 percent of \$100,000 (\$25,000), until such time as the required payroll and certified statement are submitted.

(b) When calculating the amount to be retained, amounts previously retained shall not be included as amounts earned by the first-tier subcontractor.

(c) The contractor must verify that the first-tier subcontractor has filed the required payroll and certified statement(s) with the public [*contracting*] agency before the contractor may pay the first-tier subcontractor any amount retained under this section.

(d) Once the first-tier subcontractor has filed the required payroll and certified statement with the public [*contracting*] agency, the contractor must pay the amount retained to the first-tier subcontractor within 14 days.

(7) Notwithstanding ORS 279C.555 or 279C.570(7), amounts retained pursuant to the provisions of this rule shall be in addition to any other amounts retained.

(8)(a) If a project is a public works of the type described in ORS 279C.800(6)(a)(B), and no public agency awards a contract to a contractor for the project, the contractors and any subcontractors employing workers upon the public works project shall submit weekly

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payrolls as required by ORS 279C.845 and this rule to the public agency or agencies providing funds for the project.

(b) When more than one public agency provides funds for a project, the public agencies may designate one agency to receive the contractor's and any subcontractor's payrolls.

(9)(a) If a project is a public works of the type described in ORS 279C.800(6)(a)(C), and no public agency awards a contract to a contractor for the project, the contractors and any subcontractors employing workers upon the public works project shall submit weekly payrolls as required by ORS 279C.845 and this rule to the public agency or agencies that will occupy or use the completed project.

(b) When more than one public agency will occupy or use the completed project, the public agencies may designate one agency to receive the contractor's and any subcontractor's payrolls.

[ED. NOTE: Forms and Publications referenced are available from the agency.]

839-025-0013

Notice of [*Award*] Public Works Form

(1) The notification form required by ORS 279C.835 is the Notice of [*Award of*] Public Works [*Contract*] form, **WH-81**.

(2) **Except as provided in sections (4) and (5),** [*The*] **the** public [*contracting*] agency must file the Notice of [*Award of*] Public Works [*Contract*] form, **WH-81**, with the Prevailing Wage Rate Unit within 30 days of the date [*the*] **a public works** contract [*was*]**is** awarded.

(3) Pursuant to ORS 279C.835, the Notice of [*Award of*] Public Works [*Contract*] form, **WH-81**, must include a copy of the disclosure of first-tier subcontractors submitted to the public [*contracting*] agency by the contractor **if a public agency awards a contract to a contractor for a public works project.**

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(4) When a project is a public works project pursuant to ORS 279C.800(6)(a)(B) and no public agency awards a contract to a contractor for the project, the Notice of Public Works form shall be filed by the public agency providing public funds for the project at the time the public agency commits to the provision of funds for the project.

(5) When a project is a public works project pursuant to ORS 279C.800(6)(a)(C) and no public agency awards a contract to a contractor for the project, the Notice of Public Works form shall be filed by the public agency when the agency enters into an agreement to occupy or use the completed project.

(6) Public [*contracting*] agencies are not required to file a Notice of [*Award of*] Public Works [*Contract*] form when the contract awarded is not regulated under the provisions of ORS 279C.800 to 279C.870.

[ED. NOTE: Forms and Publications referenced are available from the agency.]

839-025-0020

Public Works Contracts and Contract Specifications; Required Conditions

(1) For purposes of this rule:

(a) "Construction Manager/General Contractor contract" (or "CM/GC contract") means a contract that typically results in a general contractor/construction manager initially undertaking various pre-construction tasks that may include, but are not limited to: design phase development, constructability reviews, value engineering, scheduling, and cost estimating, and in which a guaranteed maximum price for completion of construction-type work is typically established by amendment of the initial contract, after the pre-construction tasks are complete or substantially complete. "CM/GC" refers to the general contractor/construction manager under this form of contract. Following the design phase, the CM/GC may then act as a General

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Contractor and begin the subcontracting process. The CM/GC typically coordinates and manages the construction process, provides contractor expertise, and acts as a member of the project team;

(b) "Construction specifications" include the detailed description of physical characteristics of the improvement, design details, technical descriptions of the method and manner of doing the work, quantities or qualities of any materials required to be furnished, descriptions of dimensions, required units of measurement, composition or manufacturer, and descriptions of any quality, performance, or acceptance requirements.

(2) Every public works contract must contain the following:

(a) A condition or clause that, if the contractor fails, neglects, or refuses to make prompt payment of any claim for labor or services furnished to the contractor or a subcontractor by any person, or the assignee of the person, in connection with the public works contract as such claim becomes due, the proper officer or officers of the public [*contracting*] agency may pay such claim and charge the amount of the payment against funds due or to become due the contractor by reason of the contract (Reference: ORS 279C.515);

(b) A condition that no person will be employed for more than 10 hours in any one day, or 40 hours in any one week except in cases of necessity, emergency, or where the public policy absolutely requires it, and in such cases the person so employed must be paid at least time and one-half the regular rate of pay for all time worked:

(A) For all overtime in excess of eight hours a day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

(B) For all overtime in excess of 10 hours a day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and

(C) For all work performed on Saturday and on any legal holiday specified in ORS 279C.540.

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(c) A condition that an employer must give notice to employees who work on a public works contract in writing, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work (Reference: ORS 279C.520);

(d) A condition that the contractor must promptly, as due, make payment to any person, co-partnership, association or corporation, furnishing medical, surgical and hospital care or other needed care and attention, incident to sickness or injury, to employees of such contractor, of all sums which the contractor agrees to pay for such services and all moneys and sums which the contractor collected or deducted from the wages of the contractor's employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service (Reference: ORS 279C.530)[;

(e) A provision that the contractor must pay to the commissioner a fee equal to one tenth of one percent (.001) of the contract price but no less than \$100 nor more than \$5,000 regardless of the contract price; that the fee must be paid no later than 10 days after receipt of the first progress payment or 60 days after work on the contract has begun, whichever comes first; that final adjustments to the fee must be made within 30 days of the final progress payment after completion of the contract].

(3) Every public works contract and subcontract must contain a provision that each worker in each trade or occupation employed in the performance of the contract either by the contractor, subcontractor or other person doing or contracting to do or contracting for the whole or any part of the work on the contract, must be paid not less than the applicable state prevailing rate of wage, or the applicable federal prevailing rate of wage, whichever is higher.

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(4)(a) Except [*for CM/GC contracts, the specifications for every public works contract must contain a provision stating the existing state prevailing rate of wage and, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act (40 U.S.C. 276a). The*]**as provided in subsections (6) and (7) of this rule, the** existing rate of wage is the rate in effect at the time the initial specifications were first advertised for bid solicitations.[*For CM/GC contracts, the specifications must contain a provision stating the prevailing rate of wage as provided in section (7) of this rule.*]

(b) If a public agency is required under [*paragraph*]**subsection** (a) of this [*subsection*]**section or section (6)** to include the state and federal prevailing rates of wage in the specifications **for a contract for public works**, the public agency also shall include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality, as determined by the Commissioner of the Bureau of Labor and Industries under ORS 279C.815(2)(b).

(5) The provisions described in sections (3) and (4), **and sections (6) and (7) if applicable**, must be included in all specifications for each contract awarded on the project, regardless of the price of any individual contract, so long as the combined price of all contracts awarded on the project is \$50,000 or more (Reference: ORS 279C.830).[*A statement incorporating the applicable prevailing wage rate publication and any amendments thereto or Davis-Bacon wage rate determination into the specifications by reference will satisfy these requirements. Such reference must include the title of the applicable wage rates publication or determination and the date of the publication or determination as well as the date of any applicable amendments.*]

(a) A statement incorporating the applicable prevailing wage rate publication and any amendments thereto or Davis-Bacon wage rate determination into the specifications by

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reference will satisfy these requirements. Such reference must include the title of the applicable wage rates publication or determination and the date of the publication or determination as well as the date of any applicable amendments.

(b) When the prevailing wage rates are available electronically or are accessible on the Internet, the rates may be incorporated into the specifications by referring to the electronically accessible or Internet-accessible rates and by providing adequate information about how to access the rates. Such reference must include the title of the applicable wage rates publication or determination and the date of the publication or determination as well as the date of any applicable amendments.

(6) [All specifications for each contract awarded on the project must contain a provision stating that the contractor must pay to the commissioner a fee equal to one tenth of one percent (.001) of the contract price but no less than \$100 nor more than \$5,000 regardless of the contract price pursuant to ORS 279C.825. The fee must be paid no later than 10 days after receipt of the first progress payment or 60 days after work on the contract has begun, whichever comes first; that final adjustments to the fee must be made within 30 days of the final progress payment after completion of the contract (Reference: ORS 279C.830).

(7)]When a public agency is a party to a CM/GC contract, the CM/GC contract becomes a public works contract either when the contract first constitutes a binding and enforceable obligation on the part of the CM/GC to perform or arrange for the performance of construction, reconstruction, major renovation or painting of an improvement that is a public works or when the CM/GC contract enters the construction phase, whichever occurs first. The prevailing wage rate in effect at that time shall apply and must be included with the construction specifications for the CM/GC contract. For example, the CM/GC will have a binding and enforceable

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obligation to perform or arrange for the performance of construction, reconstruction, major renovation or painting of an improvement after the public agency and CM/GC commit to the guaranteed maximum price. For purposes of this rule, the CM/GC contract enters the construction phase when the agency first authorizes the performance of early construction, reconstruction, major renovation or painting work directly related to the improvement project.

(7) A public works project described in ORS 279C.800(6)(a)(B) or (C) that is not a CM/GC contract subject to section (6) is subject to the existing state prevailing rate of wage or, if applicable, the federal prevailing rate of wage required under the Davis-Bacon Act that is in effect at the time a public agency enters into an agreement with a private entity for the project. After that time, the specifications for any contract for the public works shall include the applicable prevailing rate of wage.

(8) If a project is a public works of the type described in ORS 279C.800(6)(a)(B) or (C), a public agency will be deemed to have complied with the provisions of ORS 279C.830 if the public agency requires compliance with the provisions of section (5) of this rule in any agreement entered into by the public agency committing to provide funds for the project or to occupy or use the completed project.

(9) Public [*contracting*] agencies may obtain, without cost, a copy of the existing prevailing rate of wages for use in preparing the contract specifications by contacting the Prevailing Wage Rate Unit or any office of the bureau.

839-025-0025 Required Records

(1) All contractors and subcontractors performing work on public works contracts **subject to ORS 279C.800 to 279C.870** shall make and maintain for a period of three (3) years from the

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completion of work upon such public works records necessary to determine whether the prevailing rate of wage and overtime has been or is being paid to workers upon public works.

(2) In addition to the Payroll and Certified Statement, Form WH-38, records necessary to determine whether the prevailing wage rate and overtime wages have been or are being paid include but are not limited to records of:

- (a) The name and address of each employee;
 - (b) The work classification or classifications of each employee;
 - (c) The rate or rates of monetary wages and fringe benefits paid to each employee;
 - (d) The rate or rates of fringe benefit payments made in lieu of those required to be provided to each employee;
 - (e) Total daily and weekly compensation paid to each employee;
 - (f) The daily and weekly hours worked by each employee;
 - (g) Apprenticeship and Training Agreements;
 - (h) Any deductions, rebates or refunds taken from each employee's total compensation and actual wages paid;
 - (i) Any payroll and other such records pertaining to the employment of employees upon a public work.
- (3) When apprentices and/or trainees are employed on a public works project, the records must clearly distinguish them from other employees.
- (4) When a contractor or subcontractor employs a worker on public works projects and non public works projects during the same work week and the worker is paid a rate of pay which is less than the prevailing wage rate when working on a non public works project, the contractor or

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subcontractor must separately record the hours worked on the public works projects and those hours worked elsewhere.

(5) [*Contractors*]**For all public works contracts subject to ORS 279C.800 to 279C.870 first advertised or solicited on or before January 1, 2008, contractors** shall maintain records documenting that the appropriate fee was paid. Such records shall be maintained for a period of two years and shall include but are not limited to:

- (a) Contract documents showing the contract price;
- (b) Change orders or other adjustments to the final contract price;
- (c) Receipts showing amounts paid.

839-025-0035

Payment of Prevailing Rate of Wage

(1) Every contractor or subcontractor employing workers on a public works project must pay to such workers no less than the applicable prevailing rate of wage for each trade or occupation, as determined by the commissioner, in which the workers are employed.

[(a)]**(2)** When a public works project is subject to [*ORS 279C.800 to 279C.870 and*] the Davis-Bacon Act (40 U.S.C. [276a]):

(A) *If* **3141 et seq., if** the state prevailing rate of wage is higher than the federal prevailing rate of wage, the contractor and every subcontractor on the project shall pay no less than the state prevailing rate of wage as [*required by ORS 279C.800 to 279C.870; and*

(B) *If the federal prevailing rate of wage is higher than the state prevailing rate of wage, the contractor and every subcontractor on the project shall pay no less than the federal prevailing rate of wage as required by the Davis-Bacon Act* **determined under ORS 279C.815.**

[(2)]**(3)** Every person paid by a contractor or subcontractor in any manner for the person's labor in the construction, reconstruction, major renovation or painting of a public work is employed

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and must receive no less than the applicable prevailing rate of wage, regardless of any contractual relationship alleged to exist. Thus, for example, if partners are themselves performing the duties of a worker, the partners must receive no less than the prevailing rate of wage for the hours they are so engaged.

[(3)]**(4)** Persons employed on a public works project and who are spending more than 20% of their time during any workweek in performing duties which are manual or physical in nature as opposed to mental or managerial in nature are workers and must be paid the applicable prevailing rate of wage. Mental or managerial duties include, but are not limited to, administrative, executive, professional, supervisory or clerical duties.

[(4)]**(5)** Persons employed on a public works project for the manufacture or furnishing of materials, articles, supplies or equipment (whether or not a public agency acquires title to such materials, articles, supplies or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) are not workers required to be paid the applicable prevailing rate of wage unless the employment of such persons is performed in connection with and at the site of the public works project.

[(5) *Persons*]**(6) Except as provided in ORS 279C.838, persons** employed on a public works project who are employed by a commercial supplier of goods or materials must be paid no less than the applicable prevailing rate of wage when the work is performed at the "site of work" as that term is defined in OAR 839-025-0004[(23)]**(25)** or when the work is performed in fabrication plants, batch plants, barrow pits, job headquarters, tool yards or other such places that are dedicated exclusively or nearly so to the public works project.

[(6) *Persons*]**(7) Except as provided in ORS 279C.838, persons** employed on a public works project by the construction contractor or construction subcontractor to transport materials or

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supplies to or from the public works project are required to be paid the applicable prevailing wage rate for work performed in connection with the transportation of materials or supplies at the "site of work" as that term is defined in OAR 839-025-0004[(23)](25).

[(7)](8) Persons employed on a public works project for service work as opposed to construction work are not workers required to be paid the prevailing rate of wage.

[(8)](9) Every apprentice, as defined in these rules, must be paid not less than the appropriate percentage of the applicable journeyman's wage rate and fringe benefits as determined pursuant to ORS 279C.800 to 279C.870. Any worker listed on a payroll at an apprentice wage rate, who is not an apprentice as defined in these rules must be paid not less than the applicable prevailing rate of wage for the classification of work actually performed. In addition, if the total number of apprentices employed exceeds the ratio permitted in the applicable standards, all apprentices so employed must be paid not less than the applicable journeyman's prevailing wage rate for work actually performed.

[(9)](10) Every trainee, as defined in these rules, must be paid not less than the appropriate percentage of the applicable journeyman's wage rate and fringe benefits determined pursuant to ORS 279C.800 to 279C.870. Any worker listed on a payroll at a trainee wage rate, who is not a trainee as defined in these rules must be paid not less than the applicable prevailing rate of wage for the classification of work actually performed. In addition, if the total number of trainees employed exceeds the ratio permitted in the applicable standards, all trainees so employed must be paid not less than the applicable journeyman's prevailing wage rate for work actually performed.

839-025-0037
Residential Construction Projects

Note: Material in [brackets] and *italics* is material that is deleted. Material that is **underlined** and **bold** is material to be added.

(1)(a) For residential construction projects subject to ORS 279C.800 to 279C.870, public agencies shall use federal Davis-Bacon wage rates for residential construction projects unless there is no applicable federal rate for a particular trade or classification on the residential project.

(b) If the applicable federal Davis-Bacon wage rate determination does not include a rate for a particular trade or classification needed on a specific residential construction project, and the project is subject to ORS 279C.800 to 279C.870 but not the federal Davis-Bacon Act, the public agency is required to request a special wage rate, identifying the specific trade or classification, pursuant to OAR 839-025-0007.

(c) The commissioner may consider and approve a residential wage determination for a trade or classification issued by any federal agency within twelve months of the date of any request for a special wage rate pursuant to subsection (b).

(d) Requests for special wage rate determinations for projects subject to both ORS 279C.800 to 279C.870 and the federal Davis-Bacon Act shall be submitted pursuant to Title 29 CFR, Part 5.5(a)(1)(ii) as amended November 20, 2000.

(e) Copies of any special federal wage rate determinations requested and subsequent determination(s) issued pursuant to subsection (d) must be provided to the commissioner by the *[contracting]***public** agency.

(2) Notwithstanding subsection (1) of this rule, the commissioner, consistent with statutory authority, may survey and issue residential rates.

(3) Requests for special wage rates for residential construction projects pursuant to subsection (1)(b) of this rule must be submitted to the Bureau of Labor and Industries by the *[contracting]***public** agency no fewer than fifteen (15) business days prior to the date the specifications for the project are first advertised.

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(4) If a [*contracting*]**public** agency fails to request special wage rates for a residential construction project pursuant to subsection (1)(b) at least fifteen (15) business days before the date the specifications for the project are first advertised for the project, the Prevailing Wage Rates for Public Contracts published by the Commissioner of the Bureau of Labor and Industries in effect when the specifications are first advertised shall apply to those trades or classifications for which there is no applicable federal residential rate.

(5) The federal Davis-Bacon wage rates apply to residential construction projects subject to ORS 279C.800 to 279C.870 regardless of whether federal law requires Davis-Bacon rates on the project.

(6) Notwithstanding the provisions of this rule, unless otherwise exempt, under no circumstances may a rate less than the minimum wage rate required by ORS 653.025 be paid to any worker on a residential construction project subject to ORS 279C.800 to 279C.870.

839-025-0080
Liability to Workers

(1) Any contractor or subcontractor or any surety thereof who fails or refuses to pay at least the prevailing wages and fringe benefits as determined by the Commissioner or any overtime wages as required by ORS 279C.540 is liable to the workers affected for all the unpaid prevailing wages, including fringe benefits, and unpaid overtime wages.

(2) The contractor or subcontractor or surety thereof, referred to in section (1) of this rule, is also liable to all unpaid workers for an amount equal to the unpaid prevailing wages, including fringe benefits, as liquidated damages.

(3) The contractor or subcontractor or surety thereof, referred to in section (1) of this rule, is also liable to all unpaid workers for an amount equal to the unpaid overtime wages as liquidated

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damages, except that if the unpaid overtime results from willful falsification of payroll records, these liquidated damages shall be twice the amount of unpaid overtime.

(4) Any public agency which fails to include a provision in the advertisement for bids, the request for bids, the contract specifications, the accepted bid or elsewhere in the contract documents that the contractor and any subcontractor shall comply with ORS 279C.840 shall be jointly and severally liable, with any contractor or subcontractor that had notice of the requirement to comply with ORS 279C.840, to the workers affected for any unpaid minimum wages.

(5) As used in section (4) of this rule, "minimum wages" means the prevailing wage, including fringe benefits, as determined by the Commissioner. "Minimum wages" does not mean overtime wages required by ORS 279C.540 nor liquidated damages referred to in sections (2) and (3) of this rule.

(6) When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.) and a public agency fails to include the state and federal prevailing rates of wage in the specifications for the contract for public works as required under ORS 279C.830(1)(a), or fails to include in the specifications information showing which prevailing rate of wage is higher for workers in each trade or occupation in each locality as required under ORS 279C.830(1)(b), the public agency is liable to each affected worker for:

(a) The worker's unpaid minimum wages, including fringe benefits, in an amount that equals, for each hour worked, the difference between the applicable higher rate of wage and the lower rate of wage; and

(b) An additional amount, equal to the amount of unpaid minimum wages due under paragraph (a) of this subsection, as liquidated damages.

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839-025-0085

Contract Ineligibility

(1) Under the following circumstances, the commissioner, in accordance with the Administrative Procedures Act, may determine that for a period not to exceed three years, a contractor, subcontractor or any firm, limited liability company, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for a public work:

(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed on a public works project as required by ORS 279C.840;

(b) The subcontractor has failed to pay [*its employees*] the prevailing rate of wage **to workers employed on a public works project as** required by ORS 279C.840 and the contractor has paid the [*employees*]**workers** on the subcontractor's behalf; or

(c) The contractor or subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279C.840(4) and these rules.

(2) When the contractor or subcontractor is a corporation, the provisions of section (1) of this rule will apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing wage rates.

(3) As used in section (2) of this rule, any corporate officer or corporate agent responsible for the failure to pay or post the prevailing wage rates or for the failure to pay to a subcontractor's employees amounts required by ORS 279C.840 that are paid by the contractor on the subcontractor's behalf includes, but is not limited to, the following individuals when the individuals knew or should have known the amount of the applicable prevailing wages or that such wages must be posted:

(a) The corporate president;

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- (b) The corporate vice president;
 - (c) The corporate secretary;
 - (d) The corporate treasurer;
 - (e) Any other person acting as an agent of a corporate officer or the corporation.
- (4) The Wage and Hour Division will maintain a written list of the names of those contractors, subcontractors and other persons who are ineligible to receive public works contracts and subcontracts. The list will contain the name of contractors, subcontractors and other persons, and the name of any firms, corporations, partnerships or associations in which the contractor, subcontractor or other persons have a financial interest. Except as provided in OAR 839-025-0095, such names will remain on the list for a period of three (3) years from the date such names were first published on the list.
- (5) Before placing a name on the ineligible list referred to in section (4) of this rule, the commissioner will serve a notice of intended action upon the contractor or subcontractor in the same manner as service of summons or by certified mail, return receipt requested. The Notice will include:
- (a) A reference to ORS 279C.840;
 - (b) A short and concise statement of the matters which constitute intentional failure or refusal to pay or post the prevailing rate of wage;
 - (c) A statement of the party's right to request a contested case hearing and to be represented by counsel at such hearing, provided that any such request must be received by the commissioner in writing within 20 days of service of the notice;

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(d) A statement that the party's name will be published on a list of persons ineligible to receive public works contracts or subcontracts, unless the party requests a contested case hearing as provided in subsection (5)(c) of this rule;

(e) A statement that failure to make written request to the commissioner for a contested case hearing within the time specified will constitute a waiver of the right thereto; and

(f) A statement that if a hearing is requested, the contractor or subcontractor will be given information on procedures and rights as required by ORS 183.413(2).

(6) Upon the failure of the contractor or subcontractor to request a contested case hearing within the time specified, the commissioner or the commissioner's designee will enter an order supporting the bureau's action.

(7) If a contractor or subcontractor makes a timely request for a contested case hearing a hearing will be held in accordance with the Attorney General's Model Rules of Procedure under the Administrative Procedure Act by the commissioner or the commissioner's designee.

839-025-0090

List of Ineligibles

(1) The name of the contractor, subcontractor or other persons and the names of any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest whom the Commissioner has determined to be ineligible to receive public works contracts shall be published on a list of persons ineligible to receive such contracts or subcontracts.

(2) The list of persons ineligible to receive contracts or subcontracts on public works shall be known as the List of Ineligibles. In addition to names referred to in section (1) of this rule the list shall contain the date the name was placed on the list and the period of time for which they are ineligible.

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(3) The List of Ineligibles shall be published quarterly and amended as needed at any time. Such list shall be furnished to the public upon request, and made available to public [contracting] agencies as published or amended.

839-025-0100
Exemptions

(1) All public works are regulated under ORS 279C.800 to 279C.870 except as follows:

(a) Projects for which the total price does not exceed \$50,000. As used in this section, the price of a project includes, but is not limited to, the value of work performed by every person paid by a contractor or subcontractor in any manner for the person's work on the project, but does not include the value of donated materials or work performed on the project by individuals volunteering to the public agency without pay. **If the price of a project exceeds \$50,000 at any time during the project, the project shall not be exempt from ORS 279C.800 to 279C.870.**

(b) Contracts of a People's Utility District which are regulated under ORS 261.345.

(c) Projects for which no funds of a public agency are directly or indirectly used.

[(A) As used in this section, "Funds of a public agency" does not include:

(i) Funds provided in the form of a government grant to a nonprofit organization, unless the government grant is issued for the purpose of construction;

(ii) Building and development permit fees paid or waived by the public agency;

(iii) Staff resources of the public agency used to manage a project or to provide a principal source of supervision, coordination or oversight of a project;

(iv) Staff resources of the public agency used to design or inspect one or more components of a project; or

(v) A public agency's election not to collect land rent.

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(B) "Directly used public funds" means any revenue, money or that which can be valued in money derived from a public agency's immediate custody and control or any money loaned by a public agency, including the loan of proceeds from the sale of conduit or pass-through revenue bonds, for the specific purpose of financing a project. Payment for all or part of a project with public property or other assets constitutes payment with public funds.

(C) "Indirectly used public funds" means that a public agency ultimately bears the cost of all or part of the project, even if a public agency is not paying for the project directly or completing payment at the time it occurs or shortly thereafter. A public agency will "ultimately bear the cost" of all or part of a project in situations including, but not limited to:

(i) Amortizing the costs of construction over the life of a lease and paying these costs with public funds during the course of the lease;

(ii) A public agency subsidizing the costs of construction that would normally be borne by the contractor.

(iii) Using insurance proceeds that belong to a public agency to pay for construction. Insurance proceeds represent "money collected for the custody and control of a public agency" and therefore are public funds, whether the contractor obtains payment directly from the insurance company or the public agency; or

(iv) Using or creating a private entity as a conduit for funding a project when the private entity is in fact an alter ego of the public agency.]

(d) Projects:

(A) That are privately owned;

(B) That use funds of a private entity;

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(C) In which less than 25 percent of the square footage of a completed project will be occupied or used by a public agency; and

(D) For which less than \$750,000 of funds of a public agency are used.

(e) Projects for residential construction that are privately owned and that predominantly provide affordable housing. As used in this paragraph:

(A) “Affordable housing” means housing that serves occupants whose incomes are no greater than 60 percent of the area median income or, if the occupants are owners, whose incomes are no greater than 80 percent of the area median income.

(B) “Predominantly” means 60 percent or more.

(C) “Privately owned” includes:

(i) Affordable housing provided on real property owned by a public agency if the real property and related structures are leased to a private entity for 50 or more years; and

(ii) Affordable housing owned by a partnership, nonprofit corporation or limited liability company in which a housing authority, as defined in ORS 456.005, is a general partner, director or managing member and the housing authority is not a majority owner in the partnership, nonprofit corporation or limited liability company.

(2) The provisions of ORS 279C.840 and these rules that regulate payment of the prevailing rate of wage do not apply to:

(a) Inmates of the Oregon Department of Corrections assigned to:

(A) A work release program or otherwise working in gainful private employment pursuant to ORS 144.480, relating to prison inmate labor; or

(B) State Parks and Recreation Department projects to improve, maintain and repair buildings and property at state parks and recreation areas pursuant to ORS 390.195(1).

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(b) Oregon Youth Conservation Corps members.

[Publications: Publications referenced are available from the agency.]

839-025-0150

Definitions

(1) As used in this rule and OAR 839-025-0155, unless the context requires otherwise, the terms used herein will have the same meaning as that given them in OAR 839-025-0004.

(2) Notwithstanding the meaning given it in OAR 839-025-0004[(29)](**31**), the term "worker" does not include an individual whose primary duty consists of the performance of work that is original and creative in character in a recognized field of artistic endeavor (as contrasted to work which can be produced by an individual endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the individual.

(3) Notwithstanding the meaning of the terms "construction," "reconstruction" and "major renovation" as defined in OAR 839-025-0004(5), [(21)](**22**), and [(9)](**11**), such terms do not include the installation of applied art.

(4) The installation of applied art includes, but is not limited to, the installation of pictures (including paintings, etchings, drawings and photographs), all hangings, pieces of sculpture, statues and other artistic pieces which are independent unto themselves and are not necessary to the structural integrity of the public work.

(5) Installation work necessary to the structural integrity of a public work includes, but is not limited to, the installation of windows, ceiling tiles, brick and concrete masonry, sheet metal or other fascia materials, siding of any kind, lights, support beams and any item necessary to the construction of the actual public work itself, or to the health and safety of persons who use or

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will use the public work. The painting of a public work, or any of its parts is considered necessary to the structural integrity of the public work.

(6) Work considered to be "de minimus" means work not regulated under ORS 279C.800 to 279C.870 or these rules.

839-025-0200

Fees to Be Paid by [Contractor]Public Agency

(1) [*Every contractor awarded a*]**Public agencies must pay a fee to the Prevailing Wage Rate Unit for every contract awarded to a contractor** for a public work which is regulated under the Prevailing Wage Rate Law (ORS 279C.800 to 279C.870)[*must pay a fee to the Prevailing Wage Rate Unit*].

(2) The amount of the fee must be one tenth of one percent (.001) of the contract price. However, the fee must be no less than \$100 nor more than \$5,000 regardless of the contract price. **[Note: Pursuant to Section 8 of House Bill 2021 (Enrolled), OR Laws 2007, for public works contracts first advertised or solicited on or after January 1, 2008 and before January 1, 2011, the fee must be no less than \$250 nor more than \$7,500 regardless of the contract price.]**

(3) [*The fee must be paid no later than 10 days following receipt by the contractor of the first progress payment on the contract or 60 days after work on the project has begun, whichever date is earlier*]**The public agency must pay the fee at the time the public agency enters into the public works contract.**

(4) In order to assist [*contractors*]**public agencies** in the proper calculation of the fee, the bureau has prepared a form for this purpose. The form is available, on request, from the Prevailing Wage Rate Unit.

(5) As used in this rule[:

Note: Material in [brackets] and *italics* is material that is deleted. Material that is **underlined** and **bold** is material to be added.

(a) "*Contract*], **“contract price”** means the dollar amount of the contract on the date it was awarded to the contractor and the dollar amount of any subsequent change orders or other adjustments.

[(b) "Work on the project" means work performed after the date the contract was awarded and for which the contractor is paid as part of the contract price.

(c) The "date work on the project has begun" means the date the contractor actually starts work on the project or, if the contractor cannot determine the date the contractor actually started working on the project, the date the contracting agency establishes as the date work actually started on the project or, if neither the contractor nor the contracting agency can determine the date the contractor actually started work on the project, the date the contracting agency authorized the contractor to begin work on the project.

(d) "Progress payment" means a partial payment to the contractor by the contracting agency for work performed on the contract.]

839-025-0210

Adjustment of Fees

(1) Within 30 days of the final progress payment to the contractor by the [*contracting*]**public** agency after completion of the contract, the [*contractor*]**public agency** must determine the final contract price. The [*contractor*]**public agency** must consider all change orders or other adjustments to the contract price in making the determination.

(2) The [*contractor*]**public agency** must calculate the fee in accordance with OAR 839-025-0200(2) and must credit the amount paid pursuant to OAR 839-025-0200(3). The difference, if any, must be determined as follows:

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(a) In the case of a reduction of more than \$100 in the amount of the fee, the [contractor]**public agency** may submit a request to the bureau for a refund of the difference and the bureau will pay a refund to the [contractor or subcontractor]**public agency**;

(b) In the case of an increase of more than \$100 in the amount of the fee, the [contractor]**public agency** must pay the difference to the bureau.

(3) Requests for refunds and additional payments must be submitted with sufficient documentation to show how the amount to be refunded or to be paid was calculated. All such requests or payments must be made to the Prevailing Wage Rate Unit within 30 days of the date the final progress payment was made to the contractor by the [contracting]**public** agency after completion of the contract.

(4) In order to assist [contractor]**public agencies** in the proper calculation of the fee, the bureau has prepared a form for this purpose. The form is available, on request, from the Prevailing Wage Rate Unit.

839-025-0220

Fees for Contract Without Specific Award Amounts

(1) When [the]**a** project [for]**is** a public work [*is anticipated to equal or exceed \$50,000*]**subject to ORS 279C.800 to 279C.870,** but the contract is awarded without stating any specific amount, the contract price for purposes of calculating the fee shall be based on the amount the public agency anticipates to be the guaranteed maximum amount of the project.

(2) [*When the contract is awarded without stating any specific amount, the fee shall be calculated on the guaranteed maximum amount referred to in section (1) of this rule and the fee is payable pursuant to OAR 839-025-0200.*]

(3)]When the contract is completed, adjustments in the fees shall be calculated and paid or a refund may be requested as provided in OAR 839-025-0210.

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[(4)]**(3)** When the agency has not determined the guaranteed maximum amount, the agency shall [provide to the contractor with]**make** a good faith estimate of the contract price. The fee shall be calculated on this estimated amount.

839-025-0230

Special Circumstances[/No General Contractors]

(1) [*While the general contractor is normally the party that will pay the required fee, there are circumstances when this may not be the case. When the public contracting agency chooses to act as its own general contractor or when the agency contracts with another to act as the construction manager of a public works project, several parties may be responsible for paying a fee.*]

(2) [*The required fee must be paid by the contractor who is awarded the public works contract (See ORS 279C.825). Therefore, when a contracting agency acts as its own general contractor and enters into one or several contracts in connection with a public works project of \$50,000 or more, each contractor shall be required to pay the fee in connection with the contract awarded to the contractor. The fee is required on all contracts, regardless of the contract price of any individual contract, so long as the combined price of all contracts awarded on the project is \$50,000 or more.*]

(3) [*Section (2) of this rule is also applicable to the circumstance where the contracting agency contracts with a contractor to act as the general manager of a public works project. The contract for general manager services is a public works contract for purposes of these rules and a fee is required just as any other public works contract, since the contract would not have been entered into but for the public works project.*]

(4)] When a [contracting]**public** agency enters into an agreement for construction management services or chooses to act as its own general contractor or construction manager **in connection**

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with a public works project subject to ORS 279C.800 to 279C.870, the contract price for purposes of determining whether the project is regulated under the law shall be the sum of all contracts associated with the project or, if the actual sums are not known at the time work begins, the contract price shall be the guaranteed maximum amount for the project or the agency's good faith estimate of the contract price of the project if there is no guaranteed maximum amount.

[Under these circumstances, when the guaranteed maximum amount of the project or the agency's estimate of the price of the project meets or exceeds \$50,000, each contractor that enters into a contract with the agency shall be responsible for paying a fee pursuant to OAR 839-025-0200.]

(2) When a public agency contracts with a contractor to act as the general manager of a public works project the contract for general manager services is a public works contract for purposes of these rules and a fee is required just as any other public works contract, since the contract would not have been entered into but for the public works project.

(3) When a public agency acts as its own general contractor and enters into one or several contracts in connection with a public works project subject to ORS 279C.800 to 279C.870, the public agency shall be required to pay the fee in connection with each contract awarded to each contractor. The fee is required on all contracts, regardless of the contract price of any individual contract, so long as the combined price of all contracts awarded on the project is \$50,000 or more.

(4) When a project is a public works project pursuant to ORS 279C.800(6)(a)(B) and no public agency awards a contract to a contractor for the project, the required fee must be paid by the public agency or agencies providing public funds for the project at the time the public agency or agencies commit(s) to the provision of funds for the project. When the

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amount of the project is not known by the public agency or agencies providing public funds for the project, the public agency or agencies shall pay the required fee pursuant to the provisions of OAR 839-025-0220.

(5) When a project is a public works project pursuant to ORS 279C.800(6)(a)(C) and no public agency awards a contract to a contractor for the project, the required fee must be paid by the public agency or agencies that will occupy or use the completed project when the agency or agencies enter(s) into an agreement to occupy or use the completed project.

When the amount of the project is not known by the public agency or agencies that will occupy or use the completed project, the public agency or agencies shall pay the required fee pursuant to the provisions of OAR 839-025-0220.

(6) When more than one public agency is required to pay a fee pursuant to subsections (4) and (5), the amount of the fee owed by each public agency shall, if not otherwise previously agreed upon by the agencies, be pro-rated proportionately based on the amount of public funds provided or space occupied or used by each agency.

839-025-0310

[*Dividing*]Division of Projects[*Prohibited*]

(1)(a) A [*Public*]public [*contracting agencies*]agency [*must*]may not divide a public works project into more than one project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

[(2)](b) When making a determination of whether the public agency divided a public works project to avoid compliance with ORS 279C.800 to 279C.870, the commissioner will consider the facts and circumstances in any given situation including, but not limited to, the following matters:

[(a)](A) The physical separation of project structures;

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[(b)](B) Whether a single public works project includes several types of improvements or structures;

[(c)](C) The anticipated outcome of the particular improvements or structures the agency plans to fund;

[(d)](D) Whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function;

[(e)](E) Whether the work on the project is performed in one time period or in several phases as components of a larger entity;

[(f)](F) Whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project;

[(g)](G) The manner in which the public [*contracting*] agency and the contractors administer and implement the project;

[(h)](H) Other relevant matters as may arise in any particular case.

[(3)](c) When the commissioner determines that a public [*contracting*] agency has divided a public works project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner will issue a written order compelling compliance with ORS 279C.800 to 279C.870. The order will offer the public [*contracting*] agency the opportunity to contest the order pursuant to OAR 839-050-0000 through 839-050-0420.

(2) If a project is a public works of the type described in ORS 279C.800(6)(a)(B) or (C), the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsection (1)(b) of this section to separate the parts of the project that include funds of a public agency or that will be occupied or used by a public agency from the parts of the project that do not include funds of a public agency and that will not be occupied or

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used by a public agency. If the commissioner divides the project, any part of the project that does not include funds of a public agency and that will not be occupied or used by a public agency is not subject to ORS 279C.800 to 279C.870.

(3) If a project includes parts that are owned by a public agency and parts that are owned by a private entity, the commissioner shall divide the project, if appropriate, after applying the considerations set forth in subsections (1)(b) and (2) of this section to separate the parts of the project that are public works from the parts of the project that are not public works. If the commissioner divides the project, parts of the project that are not public works are not subject to ORS 279C.800 to 279C.870.

(4) When a private project for the construction, reconstruction, major renovation or painting of a privately owned road, highway, building, structure or improvement of any type that is already underway becomes a public works project by virtue of the provisions of ORS 279C.800(6)(a)(B) or (C), the provisions of ORS 279C.800 to 279C.870 apply prospectively to the project once any public agency commits to the provision of funds for the project or any public agency enters into an agreement to occupy or use any portion of the completed project. If a public agency delays a commitment to the provision of funds or delays entry into an agreement for occupancy or use for the purpose of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner may determine that the provisions of ORS 279C.800 to 279C.870 shall apply to the entire public works project under subsection (1) of this rule.

839-025-0340

[*Other*] Circumventions of the Prevailing Wage Rate Law

(1) A [*contracting*]**public** agency circumvents the payment of the prevailing rate of wage when it knowingly or intentionally:

Note: Material in [brackets] and *italics* is material that is deleted. Material that is **underlined** and **bold** is material to be added.

- (a) Fails or refuses to include a provision stating the existing prevailing rate of wage in the contract specifications in violation of ORS 279C.830;
- (b) Fails or refuses to include a provision in the contract that workers on the contract shall be paid no less than the specified minimum hourly rate of wage in violation of ORS 279C.830;
- (c) Divides a project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870 in violation of [*ORS 279C.810(2)*]**HB 2140 Section 44 (Engrossed) OR Laws 2007.**
- (d) Awards a contract to a contractor whose name appears on the list of ineligibles maintained pursuant to ORS 279C.860.
- (2) The "specified minimum hourly rate of wage" as used in subsection (1)(b) of this rule means the applicable prevailing rate of wage.

(3) A contractor circumvents the payment of the prevailing rate of wage when it knowingly or intentionally awards a contract to a contractor whose name appears on the list of ineligibles maintained pursuant to ORS 279C.860.

839-025-0500
Definitions

As used in OAR 839-025-0500 to 839-025-0540, a person acts knowingly when the person has actual knowledge of a thing to be done or omitted or should have known the thing to be done or omitted. A person should have known the thing to be done or omitted if the person has knowledge of facts or circumstances that would place the person on reasonably diligent inquiry. A person acts knowingly if the person has the means to be informed but elects not to do so. For purposes of the rule, the contractor, subcontractor and [*contracting*]**public** agency are presumed to know the circumstances of the public works construction project.

839-025-0520
Criteria to Determine Civil Penalty

Note: Material in [brackets] and *italics* is material that is deleted. Material that is **underlined** and **bold** is material to be added.

(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or [*contracting*]public agency and shall cite those the commissioner finds to be applicable:

(a) The actions of the contractor, subcontractor or [*contracting*]public agency in responding to previous violations of statutes and rules;

(b) Prior violations, if any, of statutes and rules;

(c) The opportunity and degree of difficulty to comply;

(d) The magnitude and seriousness of the violation;

(e) Whether the contractor, subcontractor or [*contracting*]public agency knew or should have known of the violation.

(2) It shall be the responsibility of the contractor, subcontractor or [*contracting*]public agency to provide the commissioner with evidence of any mitigating circumstances set out in section (1) of this rule.

(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or [*contracting*]public agency for the purpose of reducing the amount of the civil penalty to be assessed.

839-025-0530

Violations for Which a Civil Penalty May Be Assessed

(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279C.800 to 279C.870) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

Note: Material in [brackets] and *italics* is material that is deleted. Material that is underlined and **bold** is material to be added.

(2) Civil penalties may be assessed against any contractor, subcontractor or [*contracting*]**public** agency regulated under the Prevailing Wage Rate Law and are in addition to, not in lieu of, any other penalty prescribed by law.

(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

(a) Failure to pay the applicable prevailing rate of wage in violation of ORS 279C.840;

(b) Failure to post the applicable prevailing wage rates in violation of ORS 279C.840(4);

(c) Failure to post the notice describing the health and welfare or pension plans in violation of ORS 279C.840(5);

(d) Failure to include a provision in a subcontract that workers shall be paid not less than the specified minimum hourly rate of wage in violation of ORS 279C.830(1)(c);

(e) Failure to include in a subcontract a provision requiring the subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt in violation of ORS 279C.830(3);

(f) Failure to file with the Construction Contractors Board a public works bond as required pursuant to Oregon Laws 2005, chapter 360, section 2, before starting work on a contract or subcontract for a public works project subject to the provisions of ORS 279C.800 to 279C.870;

(g) Failure to verify that a subcontractor has filed a public works bond as required or has elected not to file a public works bond pursuant to the provisions of Oregon Laws 2005, chapter 360, section 2, prior to permitting a subcontractor to start work on a public works project.

(h) Failure to file certified statements in violation of ORS 279C.845;

(i) Filing inaccurate or incomplete certified statements in violation of ORS 279C.845;

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(j) Failure to retain 25 percent of the amount the first-tier subcontractor earned when the first-tier subcontractor fails to submit payroll and certified statement forms to the public [*contracting*] agency in violation of ORS 279C.845;

(k) Paying the prevailing rate of wage in violation of ORS 279C.840(6);

(l) Reducing an employee's pay in violation of ORS 279C.840(7);

(m) Taking action to circumvent the payment of the prevailing wage, other than subsections (i) and (k) of this section, in violation of ORS 279C.840(7);

(n) Failure to submit reports and returns in violation of ORS 279C.815(3);

(o) Failure to certify the accuracy of reports and returns in violation of ORS 279C.815(3);

(p) Failure to timely pay the fee required by ORS 279C.825 **on public works contracts first advertised or solicited prior to January 1, 2008;**

(q) Receiving a public works contract or subcontract while on the List of Ineligibles in violation of ORS 279C.860;

(r) Awarding a contract to a contractor whose name appears on the list of ineligibles maintained pursuant to ORS 279C.860.

(4) The commissioner may assess a civil penalty against a public [*contracting*] agency for any of the following violations:

(a) Failure to include a contract provision stating that workers must be paid the applicable prevailing rate of wage in violation of ORS 279C.830(1)(c);

(b) [*Failure to include a contract provision stating that a fee is to be paid to the commissioner in violation of ORS 279C.830(2);*

(c)]Failure to include in the contract specifications a provision stating the applicable existing prevailing wage rate in violation of ORS 279C.830(1);

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[(d) Failure to include in the contract specifications a provision stating that a fee is required to be paid to the commissioner in violation of ORS 279C.830(2);]

*[(e)]**(c)** Failure to include in the specifications for a contract for a public works stating that the contractor and every subcontractor must have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt in violation of ORS 279C.830(3);*

*[(f)]**(d)** Failure to include in a contract for a public works a provision requiring the contractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt in violation of ORS 279C.830(3)(a);*

*[(g)]**(e)** Failure to include in a contract for a public works a provision requiring the contractor to include in every subcontract a provision requiring the contractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt in violation of ORS 279C.830(3)(b);*

*[(h)]**(f)** Failure to notify the commissioner when a contract is awarded in violation of ORS 279C.835;*

*[(i)]**(g)** Dividing a public works project in violation of [ORS 279C.810(2)]**HB 2140 Section 44 (Engrossed) OR Laws 2007;***

*[(j)]**(h)** Failure to include a copy of the disclosure of first-tier subcontractors with the Notice of Award in violation of ORS 279C.835;*

*[(k)]**(i)** Failure to retain 25 percent of the amount the contractor earned when the contractor fails to submit payroll and certified statement forms to the public [*contracting*] agency in violation of ORS 279C.845[.];*

(j) Failure to timely pay the fee required in violation of ORS 279C.825;

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**(k) Awarding a contract to a contractor whose name appears on the list of ineligible
maintained pursuant to ORS 279C.860.**

839-025-0540

Schedule of Civil Penalties

(1) The civil penalty for any one violation will not exceed \$5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

(2) For purposes of this rule "repeated violations" means violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.

(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279C.840 regarding the payment of the prevailing rate of wage, the minimum civil penalty will be calculated as follows:

(a) An equal amount of the unpaid wages or \$1,000, whichever is less, for the first violation;

(b) Two times the amount of the unpaid wages or \$3,000, whichever is less, for the first repeated violation;

(c) Three times the amount of the unpaid wages or \$5,000, whichever is less, for second and subsequent repeated violations.

(4) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for violations of ORS 279C.825, OAR 839-025-0200, or 839-025-0220 regarding fees to be paid by [*the contractor*]**a public agency**, the minimum civil penalty to be assessed will be calculated as follows:

(a) An equal amount of the unpaid fee or \$1,000, whichever is greater, for the first violation;

(b) Two times the amount of the unpaid fee or \$3,000, whichever is greater, for the second violation;

Note: Material in [brackets] and *italics* is material that is deleted. Material that is **underlined** and **bold** is material to be added.

(c) Three times the amount of the unpaid fee or \$5,000, whichever is greater, for the third and subsequent violations.

(5) The civil penalty for all other violations will be set in accordance with the determinations and considerations referred to OAR 839-025-0520.

(6) The civil penalties set out in this rule are in addition to any other penalty assessed or imposed by law or rule.

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