

Public Agency Responsibilities

Public agencies must comply with a host of legal contracting requirements. This guide covers only those requirements related to the PWR law. The Oregon Attorney General's Public Contracts Manual has information about other statutes, rules and guidelines that apply to public contracting.

Planned Public Improvement Summary

An agency must submit to BOLI a list of public improvements it plans to fund during the coming budget period. The agency must submit the list at least 30 days before it adopts a budget, and should revise the list if its plans change. The list must state whether the public agency intends to perform the construction through a private contractor.

Public Improvement Project Cost Analysis

If an agency plans to use its own personnel or equipment to perform construction work on a public improvement and the estimated value of the public agency's personnel or equipment exceeds \$200,000, or exceeds \$125,000 if the public improvement involves the resurfacing of highways, roads or streets at a depth of two or more inches, the public agency must file with BOLI an analysis that shows the decision to use the public agency's personnel or equipment conforms to the policy that public agencies shall make every effort to construct public improvements at the least cost to the public agency. The analysis must be submitted to BOLI at least 180 days before construction begins on the public improvement. For more information on this requirement, see ORS 279C.305. Once filed, all documents are public records. Filings should be made with the Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon Street #1045, Portland, Oregon 97232. Forms are available for providing this information (WH-118 and WH-119); they can be found in the back of every PWR rate book and on BOLI's website at www.oregon.gov/boli. ORS 279C.305; OAR 839-025-0008

Notice of Public Works

Agencies are required to notify BOLI within 30 days after awarding any public works contract subject to PWR law. Agencies must provide BOLI's Notice of Public Works form (WH-81), and include a copy of the disclosure of first-tier subcontractors submitted by the contractor to the public agency pursuant to ORS 279C.370. These must be provided to the Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon Street, #1045, Portland, Oregon 97232.

When a project is a public works project of the type described in ORS 279C.800(6)(a)(B), (C), (D) or (E) (i.e., a public works project for which no public agency awards a construction contract), the public agency that enters into an agreement to provide funds, occupy or use the project, or allow construction to occur on public property must submit the WH-81 form to BOLI. The form is due at the time the agency enters into an agreement for the project. ORS 279C.835; OAR 839-025-0013

Prevailing Wage Fee

On all projects subject to the PWR law, the public agency must pay a fee to BOLI's PWR Unit for every contract awarded to a contractor. The amount of the fee due is one-tenth of one percent (.001) of the contract price; however, there is a minimum fee of \$250 and a maximum fee of \$7,500. The fee is due at the same time the public agency submits the Notice of Public Works (WH-81) form. If a public agency awards multiple contracts on a single project, a fee is due for each contract awarded. The public agency must submit a Public Work Contract Fee Information form (WH-39) with payment of the fee. This form

can be found in the back of all PWR rate books, and also on BOLI's website at www.oregon.gov/boli. BOLI issues a Certificate of Payment as proof of payment.

The public agency must submit a Fee Adjustment form (WH-40) to BOLI within 30 days of the final progress payment after completion of the contract when change orders increase or decrease the original contract by \$100,000 or more. If the fee would change by \$100 or more, the public agency must pay any additional fee and submit the adjustment form. If BOLI owes the public agency a refund, the bureau issues it once the adjustment form is processed.

If a contract does not have a "hard" bid amount, the public agency should base the initial fee on the guaranteed maximum. Once the project is complete, the public agency may file an adjustment form that reflects the actual cost of the project. If there is no guaranteed maximum amount, the agency must make a good faith estimate of the contract price and calculate the fee based on this estimated amount. ORS 279C.825; OAR 839-025-0200 *et seq.*

When a project is a public works project of the type described in ORS 279C.800(6)(a)(B), (C), (D), or (E), (i.e., a public works project for which no public agency awards a construction contract), the public agency that enters into an agreement to provide funds, occupy or use the project, or allow construction to occur on public property must pay a PWR fee to the PWR Unit. The amount of the fee is based on the total project amount. If the total project amount is not known, the public agency must base the fee on the guaranteed maximum amount of the project or must make a good faith estimate of the contract price. If multiple agencies commit funds or will occupy or use the space, if not otherwise previously agreed upon by the agencies, the fee will be pro-rated proportionately based on the amount of funds provided or the space occupied or used by each agency. OAR 839-025-0230

Contracts and Contract Specifications Require Specific Provisions

Public agencies must include certain items in the contract specifications and in the contracts for projects subject to the PWR law.

Specifications for contracts must include:

- A provision stating the applicable prevailing wage rates, including any appropriate amendment. (See the next two pages for information about applicable rates for public works projects.) A statement incorporating the rates by reference will satisfy this requirement, but the reference must include the title and date of the publication that applies, and the date of any amendment that applies. ORS 279C.830(1)(a); OAR 839-025-0020(6) and (7)
- A provision 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. ORS 279C.830(2)(a); OAR 839-025-0020(6)(e)

On projects subject to both Oregon's PWR law and the federal Davis-Bacon Act, **specifications** for contracts must also include:

- A requirement that the contractor pay the higher of the applicable state or federal prevailing rate of wage. ORS 279C.830(1)(b); OAR 839-025-0020(6)(c)

Contracts must include:

- A provision that workers must be paid not less than the applicable prevailing rate of wage in accordance with ORS 279C.838 and 279C.840. ORS 279C.830(1)(c); OAR 839-025-0020(5)(a)
- A provision that if the contractor fails to pay for labor and services, the agency can pay for them

and withhold these amounts from payments to the contractor. ORS 279C.515; OAR 839-025-0020(2)(a)

- A provision that the contractor must pay daily, weekly, weekend and holiday overtime as required in ORS 279C.540. ORS 279C.520(1); OAR 839-025-0020(2)(b)
- A provision that the employer must give written notice to the workers of the number of hours per day and days per week they may be required to work. ORS 279C.520(2); OAR 839-025-0020(2)(c)
- A provision that the contractor must make prompt payment for all medical services for which the contractor has agreed to pay, and for all amounts for which the contractor collects or deducts from the worker's wages. ORS 279C.530; OAR 839-025-0020(2)(d)
- A provision that requires the contractor to have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt. ORS 279C.830(2)(b)(A); OAR 839-025-0020(3)(a)
- A provision that requires the contractor to include in every 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. ORS 279C.830(2)(b)(B); OAR 839-025-0020(3)(b)

On projects subject to both Oregon's PWR law and the federal Davis-Bacon Act, **contracts** must also include:

- A requirement that the contractor pay the higher of the applicable state or federal prevailing rate of wage. ORS 279C.830(1)(b); OAR 839-025-0020(6)(c)

Public agencies are jointly and severally liable for any unpaid prevailing wages unless they have included a statement in the contract documents, such as the contract, specifications or the advertisement for bid, that all workers must be paid the applicable prevailing wage rate. ORS 279C.855(3); OAR 839-025-0080(4)

If a public works project is subject to the Davis-Bacon Act but the public agency fails to include the state and federal prevailing rates of wage in the specifications, or fails to provide in the contract that workers on the public works must be paid not less than the higher of the applicable state or federal prevailing rate of wage, and the workers on the project are paid the lower rather than the higher prevailing wage rate, the public agency is liable to the workers for the difference between the lower and the higher rate, plus an equal amount as liquidated damages, for every hour worked. ORS 279C.855(4); OAR 839-025-0080(6)

Applicable Rates for Public Works Projects

Generally, the applicable prevailing wage rates for a public works project are those in effect at the time the initial specifications are first advertised for bid solicitations by the public agency. The rates in effect at that time are the rates that are to be used for the duration of the project.

Additional provisions exist for determining the applicable rates for the following:

- **Projects Subject to Both State and Federal PWR Laws**
If the project is subject to both the state prevailing wage rate law and the federal Davis-Bacon Act, the public agency may opt to use the federal method described in 29 CFR 1.6 to establish the applicable state prevailing wage rates for the project. OAR 839-025-0020(6)(d)
- **Projects Using a Construction Manager/General Contractor (CM/GC)**
When a public agency uses a CM/GC on a public works project, the CM/GC will generally perform various pre-construction tasks such as design phase development, constructability

reviews and cost estimating. A guaranteed maximum price for completion of the construction-type work is typically established by amendment of the initial contract after the pre-construction tasks are complete. The CM/GC then typically acts as the General Contractor and begins the subcontracting process. Use of a CM/GC to manage public works projects for a public agency does not relieve the agency or the CM/GC of their responsibilities under the prevailing wage rate regulations.

The rates in effect at the time the CM/GC contract becomes a public works contract are the applicable rates to be used for the duration of the project. 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, or when the CM/GC contract enters the construction phase, whichever occurs first.

For example, the CM/GC will have a binding and enforceable obligation to perform or arrange for the performance of construction after the public agency and CM/GC commit to the guaranteed maximum price. The CM/GC contract enters the “construction phase” when the agency first authorizes the performance of early construction-type work directly related to the public works project. OAR 839-025-0020(8)

- **Public/Private Projects**

For projects that meet parts (B), (C), (D), or (E) of the definition of “public works” (i.e., projects on which no public agency awards a construction contract), the applicable rates are those in effect at the time the public agency first 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. ORS 279C.830(1)(e)

Residential Projects and Rates

BOLI has modeled its definition of “residential construction” after the U.S. Department of Labor’s definition of such projects. Generally, residential construction projects are projects for the construction, reconstruction, major renovation or painting of a single family house or apartment building of no more than four stories in height. The residential project includes all incidental items associated with the project, such as site work, parking areas, utilities, streets and sidewalks. OAR 839-025-0004(24)(a)

BOLI does not survey or publish residential rates, so residential construction projects as defined in OAR 839-025-0004(24) and subject to Oregon’s PWR law generally use the federal residential Davis-Bacon wage rates. These rates can be found on the U.S. Department of Labor’s website, www.wdol.gov. The federal residential rates apply to residential construction projects subject to Oregon’s PWR law, even if the project is not subject to the federal Davis-Bacon Act. However, if the federal residential rate for a particular trade or classification is ever less than Oregon’s minimum wage rate required by ORS 653.025, no less than Oregon’s minimum wage must be paid to the worker.

In some instances, there are no applicable federal residential wage rates for certain trades or classifications. If a wage rate is needed on a residential project subject to both state and federal prevailing wage rate law, a request for a special wage rate determination should be submitted according to the federal requirements in Title 29 CFR, Part 5.5(a)(1)(ii).

If a wage rate is needed on a residential project that is subject only to Oregon's PWR law, the public agency must submit a request for a special wage rate determination to BOLI at least 15 days prior to the date the specifications for the project are first advertised. If a public agency fails to request a special wage rate determination as required, the rates in the applicable BOLI rate book will apply to those trades or classifications for which there is no applicable federal residential rate. OAR 839-025-0037

Ensuring a Payment Bond is Filed When Required

The public agency should verify that the contractor files a payment bond or posts another security when required pursuant to ORS 279C.380 and 279C.390. If the agency fails to do so, it is jointly liable with the contractor for any unpaid prevailing wages. The agency may pay any claims for unpaid labor and deduct the amount of the claims from the amount it pays the contractor. ORS 279C.625

Withholding Retainage

In addition to any other retainage obligated by the Public Contracting Code, the PWR law requires public agencies to withhold 25 percent of any amount earned by the prime contractor if the prime contractor does not turn in its certified payroll reports each month. Once the certified payroll reports have been submitted, the public agency must pay the 25 percent withheld within 14 days. ORS 279C.845(7); OAR 839-025-0010(5)

BOLI Prohibits Dividing Projects to Avoid PWR

Public agencies may not divide a project to avoid compliance with the PWR law. ORS 279C.827; OAR 839-025-0310

BOLI treats separate contracts for the same project as a single project for PWR purposes and may issue an order compelling the violating agency to treat the contracts as a single project.

The bureau looks at a number of factors to decide if separate contracts actually constitute a single project, such as:

- The physical separation of project structures;
- Whether a single public works project includes several types of improvements or structures;
- The anticipated outcome of the particular improvements or structures the agency plans to fund;
- Whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function;
- Whether the work on the project is performed in one time period or in several phases as components of a larger entity;
- Whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project;
- The manner in which the public agency and the contractors administer and implement the project;
- Other relevant matters as may arise in any particular case.

If a public works project is of the type described in ORS 279C.800(6)(a)(B) or (C), the Commissioner of the Bureau of Labor and Industries will divide the project if appropriate, considering the above factors, so that the parts of the project that do not include public funds or that will not be occupied or used by the public agency will not be subject to the PWR law.

Additionally, if a project includes parts that are publicly owned and parts that are privately owned, the commissioner will divide the project if appropriate, considering the above factors, so that the parts of the project that are privately owned are not subject to the PWR law. Interested parties must submit a

coverage determination request to BOLI when considering such a division of a project. ORS 279C.827; OAR 839-025-0310; ORS 279C.815

Agreements with Agencies of Other States

A public agency in Oregon is prohibited from entering into an agreement with another state, or a political subdivision of another state, that allows a contractor or subcontractor to pay less than the applicable prevailing wage rate on a public works project. ORS 279C.829

A Checklist for Public Agencies

Required:

- Submit the Planned Public Improvement Summary (WH-118) to BOLI prior to each budget period.
- Submit the Public Improvement Project Cost Analysis (WH-119), if applicable, to BOLI at least 180 days before beginning construction.
- Include the prevailing wage rates, public works bond requirement and other required language in the contract and the contract specifications.
- Submit the Notice of Public Works form (WH-81) and copy of the disclosure of first-tier subcontractors to BOLI within 30 days after awarding the contract.
- Submit the PWR fee and Public Works Fee Information form (WH-39) to BOLI for every public works contract awarded, within 30 days after awarding the contract or committing funds to the project.
- Verify that the agency has not contracted with any of the contractors on BOLI's current *List of Contractors Ineligible to Receive Public Works Contracts*. This list of debarred contractors is on BOLI's website at www.oregon.gov/boli.
- Require that the contractor has a payment bond or has obtained a cashier's check or certified check, unless exempt.
- Withhold 25 percent of any amount earned by the prime contractor if the prime contractor fails to submit its certified payroll reports as required.

Suggested:

- Verify that the project manager has knowledge of construction and worker classifications.
- Verify that subcontractors know that the job is a prevailing wage rate job.
- Verify that none of the subcontractors working on the project are on BOLI's current *List of Contractors Ineligible to Receive Public Works Contracts*.
- Confirm that the correct prevailing wage rates and the details of any benefit plans are conspicuously posted on the project site.
- Verify that all contractors and subcontractors are using the correct work classifications.
- Confirm that all contractors and subcontractors are filing complete and accurate certified payrolls, and are paying employees the correct prevailing wage rate.

Public Contracting Requirements

For information about public contracting requirements that fall outside of the PWR law, see the Oregon Attorney General's Public Contracts Manual.