

APPENDIX A

Oregon Revised Statutes Chapter 279A and 279C - Public Contracting

279A.110 Discrimination in subcontracting prohibited; remedies. (1) A bidder or proposer who competes for or is awarded a public contract may not discriminate against a subcontractor in the awarding of a subcontract because the subcontractor is a minority, women or emerging small business enterprise certified under ORS 200.055.

(2) A contracting agency may debar or disqualify, under ORS 279B.130 or 279C.440, as appropriate, a bidder or proposer if the contracting agency finds that the bidder or proposer has violated subsection (1) of this section in the awarding of a subcontract in connection with a contract advertised by the contracting agency or a contract between the contracting agency and the bidder or proposer. A debarred or disqualified bidder or proposer may appeal the debarment or disqualification under ORS 279B.425 or ORS 279C.445 and 279C.450, as appropriate.

(3) A contracting agency may not allege an occurrence of discrimination in subcontracting as a basis for debarring or disqualifying a bidder or proposer under subsection (2) of this section more than three years after the alleged discriminatory conduct occurred or more than three years after the contracting agency, in the exercise of reasonable diligence, should have discovered the conduct, whichever is later.

(4) A bidder or proposer shall certify in the documents accompanying the bidder's or proposer's offer to enter into a public contract that the bidder or proposer has not discriminated and will not discriminate, in violation of subsection (1) of this section, against any minority, women or emerging small business enterprise in obtaining any required subcontract.

(5) After a contractor is awarded a public contract, if the contractor violates the certification made under subsection (4) of this section, the contracting agency may regard the violation as a breach of contract that permits:

- (a) Termination of the contract; or
- (b) The contracting agency to exercise any remedies for breach of contract that are reserved in the contract.

279A.120 Preference for Oregon goods and services; nonresident bidders. (1) As used in this section:

(a) "Nonresident bidder" means a bidder who is not a resident bidder.

(b) "Resident bidder" means a bidder that has paid unemployment taxes or income taxes in this state during the 12 calendar months immediately preceding submission of the bid, has a business address in this state and has stated in the bid whether the bidder is a "resident bidder" under this paragraph.

(2) For the purposes of awarding a public contract, a contracting agency shall:

(a) Give preference to goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal; and

(b) Add a percent increase to the bid of a nonresident bidder equal to the percent, if any, of the preference given to the bidder in the state in which the bidder resides.

(3) When a public contract is awarded to a nonresident bidder and the contract price exceeds \$10,000, the bidder shall promptly report to the Department of Revenue on forms to be provided by the department the total contract price, terms of payment, length of contract and such other information as the department may require before the bidder may receive final payment on the public contract. The contracting agency shall satisfy itself that the requirement of this subsection has been complied with before the contracting agency issues a final payment on a public contract.

(4) The Oregon Department of Administrative Services on or before January 1 of each year shall publish a list of states that give preference to in-state bidders with the percent increase applied in each state. A contracting agency may rely on the names of states and percentages so published in determining the lowest responsible bidder without incurring any liability to any bidder.

279A.125 Preference for recycled materials. (1) Notwithstanding provisions of law requiring a contracting agency to award a contract to the lowest responsible bidder or best proposer or provider of a quotation and subject to subsection (2) of this section, a contracting agency charged with the procurement of goods for any public use shall give preference to the procurement of goods manufactured from recycled materials.

(2) A contracting agency shall give preference to goods that are certified to be made from recycled materials if:

- (a) The recycled product is available;
- (b) The recycled product meets applicable standards;

- (c) The recycled product can be substituted for a comparable nonrecycled product; and
- (d) The recycled product's costs do not exceed the costs of nonrecycled products by more than five percent, or a higher percentage if a written determination is made by the contracting agency.

279C.505 Conditions concerning payment, contributions, liens, withholding, drug testing. (1) Every public improvement contract shall contain a condition that the contractor shall:

- (a) Make payment promptly, as due, to all persons supplying to the contractor labor or material for the performance of the work provided for in the contract.
 - (b) Pay all contributions or amounts due the Industrial Accident Fund from the contractor or subcontractor incurred in the performance of the contract.
 - (c) Not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished.
 - (d) Pay to the Department of Revenue all sums withheld from employees under ORS 316.167.
- (2) In addition to the conditions specified in subsection (1) of this section, every public improvement contract shall contain a condition that the contractor shall demonstrate that an employee drug testing program is in place.

279C.510 Demolition contracts to require material salvage; lawn and landscape maintenance contracts to require composting or mulching. (1) Every public improvement contract for demolition shall contain a condition requiring the contractor to salvage or recycle construction and demolition debris, if feasible and cost-effective.

(2) Every public improvement contract for lawn and landscape maintenance shall contain a condition requiring the contractor to compost or mulch yard waste material at an approved site, if feasible and cost-effective.

279C.515 Conditions concerning payment of claims by public officers, payment to persons furnishing labor or materials and complaints. (1) Every public improvement contract shall contain a clause or condition 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 in connection with the public improvement contract as the claim becomes due, the proper officer or officers representing the state or a county, school district, municipality, municipal corporation or subdivision thereof, as the case may be, may pay such claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due the contractor by reason of the contract.

(2) Every public improvement contract shall contain a clause or condition that, if the contractor or a first-tier subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public improvement contract within 30 days after receipt of payment from the contracting agency or a contractor, the contractor or first-tier subcontractor shall owe the person the amount due plus interest charges commencing at the end of the 10-day period that payment is due under ORS 279C.580 (4) and ending upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279C.580. The rate of interest charged to the contractor or first-tier subcontractor on the amount due shall equal three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date that is 30 days after the date when payment was received from the contracting agency or from the contractor, but the rate of interest may not exceed 30 percent. The amount of interest may not be waived.

(3) Every public improvement contract and every contract related to the public improvement contract shall contain a clause or condition that, if the contractor or a subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public improvement contract, the person may file a complaint with the Construction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS 279C.580.

(4) The payment of a claim in the manner authorized in this section does not relieve the contractor or the contractor's surety from obligation with respect to any unpaid claims.

279C.520 Condition concerning hours of labor. (1) Every public contract subject to this chapter must contain a condition that a person may not 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 when the public policy absolutely requires it, and in such cases, except in cases of contracts for personal services as defined in ORS 279C.100, the employee shall be paid at least time and a half pay:

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

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

(2) An employer must give notice in writing to employees who work on a public contract, 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.

(3) In the case of contracts for personal services as defined in ORS 279C.100, the contract shall contain a provision that the employee shall be paid at least time and a half for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime.

(4) In the case of a contract for services at a county fair or for other events authorized by a county fair board, the contract must contain a provision that employees must be paid at least time and a half for work in excess of 10 hours in any one day or 40 hours in any one week. An employer shall give notice in writing to employees who work on such a contract, 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 employees may be required to work.

(5)(a) Except as provided in subsection (4) of this section, contracts for services must contain a provision that requires that persons employed under the contracts shall receive at least time and a half pay for work performed on the legal holidays specified in a collective bargaining agreement or in ORS 279C.540 (1)(b)(B) to (G) and for all time worked in excess of 10 hours in any one day or in excess of 40 hours in any one week, whichever is greater.

(b) An employer shall give notice in writing to employees who work on a contract for services, 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.

279C.525 Provisions concerning environmental and natural resources laws; remedies. (1) Solicitation documents for a public improvement contract shall make specific reference to federal, state and local agencies that have enacted ordinances, rules or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that affect the performance of the contract. If the successful bidder awarded the project is delayed or must undertake additional work by reason of existing ordinances, rules or regulations of agencies not cited in the public improvement contract or due to the enactment of new or the amendment of existing statutes, ordinances, rules or regulations relating to the prevention of environmental pollution and the preservation of natural resources occurring after the submission of the successful bid, the contracting agency may:

(a) Terminate the contract;

(b) Complete the work itself;

(c) Use nonagency forces already under contract with the contracting agency;

(d) Require that the underlying property owner be responsible for cleanup;

(e) Solicit bids for a new contractor to provide the necessary services under the competitive bid requirements of this chapter; or

(f) Issue the contractor a change order setting forth the additional work that must be undertaken.

(2) In addition to the obligation imposed under subsection (1) of this section to refer to federal, state and local agencies with ordinances, rules or regulations dealing with the prevention of environmental pollution and the preservation of natural resources, a solicitation document must also make specific reference to known conditions at the construction site that may require the successful bidder to comply with the ordinances, rules or regulations identified under subsection (1) of this section.

(3) If the successful bidder encounters a condition not referred to in the solicitation documents, not caused by the successful bidder and not discoverable by a reasonable prebid visual site inspection, and the condition requires compliance with the ordinances, rules or regulations referred to under subsection (1) of this section, the successful bidder shall immediately give notice of the condition to the contracting agency.

(4) Except in the case of an emergency and except as may otherwise be required by any environmental or natural resource ordinance, rule or regulation, the successful bidder may not commence work nor incur any additional job site costs in regard to the condition encountered and described in subsection (3) of this section without written direction from the contracting agency.

(5) Upon request by the contracting agency, the successful bidder shall estimate the emergency or regulatory compliance costs as well as the anticipated delay and costs resulting from the encountered condition. This cost estimate shall be promptly delivered to the contracting agency for resolution.

(6) Within a reasonable period of time following delivery of an estimate under subsection (5) of this section, the contracting agency may:

- (a) Terminate the contract;
- (b) Complete the work itself;
- (c) Use nonagency forces already under contract with the contracting agency;
- (d) Require that the underlying property owner be responsible for cleanup;
- (e) Solicit bids for a new contractor to provide the necessary services under the competitive bid requirements of this chapter; or
- (f) Issue the contractor a change order setting forth the additional work that must be undertaken.

(7)(a) If the contracting agency chooses to terminate the contract under subsection (1)(a) or (6)(a) of this section, the successful bidder shall be entitled to all costs and expenses incurred to the date of termination, including overhead and reasonable profits, on the percentage of the work completed. The contracting agency shall have access to the contractor's bid documents when making the contracting agency's determination of the additional compensation due to the contractor.

(b) If the contracting agency causes work to be done by another contractor under subsection (1)(c) or (e) or (6)(c) or (e) of this section, the initial contractor may not be held liable for actions or omissions of the other contractor.

(c) The change order under subsection (1)(f) or (6)(f) of this section shall include the appropriate extension of contract time and compensate the contractor for all additional costs, including overhead and reasonable profits, reasonably incurred as a result of complying with the applicable statutes, ordinances, rules or regulations. The contracting agency shall have access to the contractor's bid documents when making the contracting agency's determination of the additional compensation due to the contractor.

(8) Notwithstanding subsections (1) to (7) of this section, a contracting agency:

(a) May allocate all or a portion of the known environmental and natural resource risks to a contractor by listing such environmental and natural resource risks with specificity in the solicitation documents; and

(b) In a local improvement district, may allocate all or a portion of the known and unknown environmental and natural resource risks to a contractor by so stating in the solicitation documents.

279C.530 Condition concerning payment for medical care and providing workers' compensation. (1)

Every public improvement contract shall contain a condition that the contractor shall promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of the contractor, of all sums that the contractor agrees to pay for the services and all moneys and sums that the contractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services.

(2) Every public contract subject to this chapter shall contain a clause or condition that all subject employers working under the contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126.

279C.555 Withholding of retainage. The withholding of retainage by a contractor or subcontractor on public improvement contracts shall be in accordance with ORS 701.420 and 701.430 except when the charter of the contracting agency contains provisions requiring retainage by the contracting agency of more than five percent of the contract price of the work completed.

279C.560 Form of retainage. (1) Moneys retained by a contracting agency under ORS 279C.570 (7) shall be:

(a) Retained in a fund by the contracting agency and paid to the contractor in accordance with ORS 279C.570; or

(b) At the option of the contractor, paid to the contractor in accordance with subsection (3) or (4) of this section and in a manner authorized by the Director of the Oregon Department of Administrative Services.

(2) If the contracting agency incurs additional costs as a result of the exercise of the options described in subsection (1) of this section, the contracting agency may recover such costs from the contractor by reduction of the final payment. As work on the contract progresses, the contracting agency shall, upon demand, inform the contractor of all accrued costs.

(3) The contractor may deposit bonds or securities with the contracting agency or in any bank or trust company to be held in lieu of the cash retainage for the benefit of the contracting agency. In such event the contracting agency shall reduce the retainage in an amount equal to the value of the bonds and securities and pay the amount of the

reduction to the contractor in accordance with ORS 279C.570. Interest on the bonds or securities shall accrue to the contractor.

(4) If the contractor elects, the retainage as accumulated shall be deposited by the contracting agency in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the contracting agency. When the contracting agency is a state contracting agency, the account shall be established through the State Treasurer. Earnings on the account shall accrue to the contractor.

(5) Bonds and securities deposited or acquired in lieu of retainage, as permitted by this section, shall be of a character approved by the Director of the Oregon Department of Administrative Services, including but not limited to:

- (a) Bills, certificates, notes or bonds of the United States.
- (b) Other obligations of the United States or its agencies.
- (c) Obligations of any corporation wholly owned by the federal government.
- (d) Indebtedness of the Federal National Mortgage Association.

(6) The contractor, with the approval of the contracting agency, may deposit a surety bond for all or any portion of the amount of funds retained, or to be retained, by the contracting agency in a form acceptable to the contracting agency. The bond and any proceeds therefrom shall be made subject to all claims and liens and in the same manner and priority as set forth for retainage under ORS 279C.550 to 279C.570 and 279C.600 to 279C.625. The contracting agency shall reduce the retainage in an amount equal to the value of the bond and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Whenever a contracting agency accepts a surety bond from a contractor in lieu of retainage, the contractor shall accept like bonds from any subcontractor or supplier from which the contractor has retainage. The contractor shall then reduce the retainage in an amount equal to the value of the bond and pay the amount of the reduction to the subcontractor or supplier.

279C.580 Contractor's relations with subcontractors. (1) A contractor may not request payment from the contracting agency of any amount withheld or retained in accordance with subsection (5) of this section until such time as the contractor has determined and certified to the contracting agency that the subcontractor has determined and certified to the contracting agency that the subcontractor is entitled to the payment of such amount.

(2) A dispute between a contractor and first-tier subcontractor relating to the amount or entitlement of a first-tier subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract under subsection (3) or (4) of this section does not constitute a dispute to which the contracting agency is a party. The contracting agency may not be included as a party in any administrative or judicial proceeding involving such a dispute.

(3) Each public improvement contract awarded by a contracting agency shall include a clause that requires the contractor to include in each subcontract for property or services entered into by the contractor and a first-tier subcontractor, including a material supplier, for the purpose of performing a construction contract:

(a) A payment clause that obligates the contractor to pay the first-tier subcontractor for satisfactory performance under its subcontract within 10 days out of such amounts as are paid to the contractor by the contracting agency under the contract; and

(b) An interest penalty clause that obligates the contractor, if payment is not made within 30 days after receipt of payment from the contracting agency, to pay to the first-tier subcontractor an interest penalty on amounts due in the case of each payment not made in accordance with the payment clause included in the subcontract under paragraph (a) of this subsection. A contractor or first-tier subcontractor may not be obligated to pay an interest penalty if the only reason that the contractor or first-tier subcontractor did not make payment when payment was due is that the contractor or first-tier subcontractor did not receive payment from the contracting agency or contractor when payment was due. The interest penalty shall be:

(A) For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

(B) Computed at the rate specified in ORS 279C.515 (2).

(4) The contract awarded by the contracting agency shall require the contractor to include in each of the contractor's subcontracts, for the purpose of performance of such contract condition, a provision requiring the first-tier subcontractor to include a payment clause and an interest penalty clause conforming to the standards of subsection (3) of this section in each of the first-tier subcontractor's subcontracts and to require each of the first-tier subcontractor's subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

(5)(a) The clauses required by subsections (3) and (4) of this section are not intended to impair the right of a contractor or a subcontractor at any tier to negotiate, and to include in the subcontract, provisions that:

(A) Permit the contractor or a subcontractor to retain, in the event of a good faith dispute, an amount not to exceed 150 percent of the amount in dispute from the amount due a subcontractor under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties consider appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(B) Permit the contractor or subcontractor to make a determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

(C) Permit such withholdings without incurring any obligation to pay a late payment interest penalty if:

(i) A notice conforming to the standards of subsection (8) of this section has been previously furnished to the subcontractor; and

(ii) A copy of any notice issued by a contractor under sub-subparagraph (i) of this subparagraph has been furnished to the contracting agency.

(b) As used in this subsection, "good faith dispute" means a documented dispute concerning:

(A) Unsatisfactory job progress.

(B) Defective work not remedied.

(C) Third-party claims filed or reasonable evidence that claims will be filed.

(D) Failure to make timely payments for labor, equipment and materials.

(E) Damage to the prime contractor or subcontractor.

(F) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.

(6) If, after making application to a contracting agency for payment under a contract but before making a payment to a subcontractor for the subcontractor's performance covered by such application, a contractor discovers that all or a portion of the payment otherwise due the subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, the contractor shall:

(a) Furnish to the subcontractor a notice conforming to the standards of subsection (8) of this section as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for subcontractor payment;

(b) Furnish to the contracting agency, as soon as practicable, a copy of the notice furnished to the subcontractor under paragraph (a) of this subsection;

(c) Reduce the subcontractor's progress payment by an amount not to exceed the amount specified in the notice of withholding furnished under paragraph (a) of this subsection;

(d) Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency;

(e) Make such payment within:

(A) Seven days after correction of the identified subcontract performance deficiency unless the funds therefor must be recovered from the contracting agency because of a reduction under paragraph (f)(A) of this subsection; or

(B) Seven days after the contractor recovers such funds from the contracting agency;

(f) Notify the contracting agency upon:

(A) Reduction of the amount of any subsequent certified application for payment; or

(B) Payment to the subcontractor of any withheld amounts of a progress payment, specifying:

(i) The amounts of the progress payments withheld under paragraph (a) of this subsection; and

(ii) The dates that such withholding began and ended; and

(g) Be obligated to pay to the contracting agency an amount equal to interest on the withheld payments computed in the manner provided in ORS 279C.570 from the 11th day after receipt of the withheld amounts from the contracting agency until:

(A) The day the identified subcontractor performance deficiency is corrected; or

(B) The date that any subsequent payment is reduced under paragraph (f)(A) of this subsection.

(7)(a) If a contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor a written notice asserting a deficiency in such first-tier subcontractor's performance under the contract for which the contractor may be ultimately liable and the contractor determines that all or a portion of future payments otherwise due such first-tier subcontractor is subject to withholding in accordance with the subcontract agreement, the contractor may, without incurring an obligation to pay a late payment interest penalty under subsection (6)(e) of this section:

(A) Furnish to the first-tier subcontractor a notice conforming to the standards of subsection (8) of this section as soon as practicable upon making such determination; and

(B) Withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under subparagraph (A) of this paragraph.

(b) As soon as practicable, but not later than 10 days after receipt of satisfactory written notification that the identified subcontract performance deficiency has been corrected, the contractor shall pay the amount withheld under paragraph (a)(B) of this subsection to such first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed at the rate specified in ORS 279C.570.

(8) A written notice of any withholding shall be issued to a subcontractor, with a copy to the contracting agency of any such notice issued by a contractor, specifying:

(a) The amount to be withheld;

(b) The specified causes for the withholding under the terms of the subcontract; and

(c) The remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

(9) Except as provided in subsection (2) of this section, this section does not limit or impair any contractual, administrative or judicial remedies otherwise available to a contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by a contractor or deficient performance or nonperformance by a subcontractor.

(10) A contractor's obligation to pay a late payment interest penalty to a subcontractor under the clause included in a subcontract under subsection (3) or (4) of this section is not intended to be an obligation of the contracting agency. A contract modification may not be made for the purpose of providing reimbursement of such late payment interest penalty. A cost reimbursement claim may not include any amount for reimbursement of such late payment interest penalty.

279C.585 Authority to substitute undisclosed first-tier subcontractor; circumstances; rules. A contractor whose bid is accepted may substitute a first-tier subcontractor that was not disclosed under ORS 279C.370 by submitting the name of the new subcontractor and the reason for the substitution in writing to the contracting agency. A contractor may substitute a first-tier subcontractor under this section in the following circumstances:

(1) When the subcontractor disclosed under ORS 279C.370 fails or refuses to execute a written contract after having had a reasonable opportunity to do so after the written contract, which must be reasonably based upon the general terms, conditions, plans and specifications for the public improvement project or the terms of the subcontractor's written bid, is presented to the subcontractor by the contractor.

(2) When the disclosed subcontractor becomes bankrupt or insolvent.

(3) When the disclosed subcontractor fails or refuses to perform the subcontract.

(4) When the disclosed subcontractor fails or refuses to meet the bond requirements of the contractor that had been identified prior to the bid submittal.

(5) When the contractor demonstrates to the contracting agency that the subcontractor was disclosed as the result of an inadvertent clerical error.

(6) When the disclosed subcontractor does not hold a license from the Construction Contractors Board and is required to be licensed by the board.

(7) When the contractor determines that the work performed by the disclosed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications or that the subcontractor is substantially delaying or disrupting the progress of the work.

(8) When the disclosed subcontractor is ineligible to work on a public improvement contract under applicable statutory provisions.

(9) When the substitution is for good cause. The Construction Contractors Board shall define "good cause" by rule. "Good cause" includes but is not limited to the financial instability of a subcontractor. The definition of "good cause" must reflect the least-cost policy for public improvements established in ORS 279C.305.

(10) When the substitution is reasonably based on the contract alternates chosen by the contracting agency.

279C.830 Provisions concerning prevailing rate of wage in specifications, contracts and subcontracts; applicability of prevailing wage; fee; bond. (1)(a) Except as provided in paragraph (d) of this subsection, the specifications for every contract for public works shall 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. 3141 et seq.) that may be paid to workers in each trade or occupation required for the public works employed in the performance of the contract either by the contractor or subcontractor or other person doing or contracting to do the

whole or any part of the work contemplated by the contract. When the prevailing rates of wage 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.

(b) If a public agency is required under paragraph (a) of this subsection to include the state and federal prevailing rates of wage in the specifications, 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)(c).

(c) Every contract and subcontract shall contain a provision that the workers shall be paid not less than the specified minimum hourly rate of wage in accordance with ORS 279C.838 and 279C.840.

(d) A public works project described in ORS 279C.800 (6)(a)(B) or (C) 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.

(2) The specifications for every contract for public works between a public agency and a contractor shall contain a provision stating that a fee is required to be paid to the Commissioner of the Bureau of Labor and Industries as provided in ORS 279C.825 (1). The contract shall contain a provision that the fee shall be paid to the commissioner under the administrative rule of the commissioner.

(3) The specifications for every contract for public works shall contain a provision 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 under ORS 279C.836 (4), (7), (8) or (9). Every contract awarded by a contracting agency shall contain a provision requiring the contractor:

(a) To have a public works bond filed with the Construction Contractors Board before starting work on the project, unless exempt under ORS 279C.836 (4), (7), (8) or (9).

(b) 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 under ORS 279C.836 (4), (7), (8) or (9).

279C.838 Applicability of state and federal rates of wage; determination of site of project; determination of applicability of wage to transportation workers; waiver. When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.):

(1) 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 at least the state prevailing rate of wage as determined under ORS 279C.815;

(2) The Commissioner of the Bureau of Labor and Industries shall determine the site of the project in a manner consistent with the term “site of the work” as that term is used in federal law and in regulations adopted or guidelines issued in accordance with the Davis-Bacon Act;

(3) The commissioner shall determine in a manner that is consistent with federal law and regulations adopted or guidelines issued in accordance with the Davis-Bacon Act whether workers transporting materials and supplies to and from the site of the project are subject to the Davis-Bacon Act and are entitled to be paid the prevailing rate of wage;

(4) Except as provided in subsection (1) of this section, the commissioner, in consultation with the advisory committee appointed under ORS 279C.820, may administer and enforce ORS 279C.800 to 279C.870 in a manner that is consistent with federal law and regulations adopted or guidelines issued in accordance with the Davis-Bacon Act. The commissioner may provide a waiver from a requirement set forth in ORS 279C.800 to 279C.870 if necessary to achieve consistency with the Davis-Bacon Act and to further the purposes of ORS 279C.805; and

(5) ORS 279C.800 to 279C.870 do not apply to workers enrolled in skill training programs that are certified by the United States Secretary of Transportation under the Federal-Aid Highway Act (23 U.S.C. 113(c)).

279C.840 Payment of prevailing rate of wage; posting of rates and fringe benefit plan provisions. (1) The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour’s work in the same trade or occupation in the locality where the labor is performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash, by the making of contributions of a type referred to in ORS 279C.800 (1)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS

279C.800 (1)(b), or any combination thereof, where the aggregate of any such payments, contributions and costs is not less than the prevailing rate of wage.

(2) After a contract for public works is executed with any contractor or work is commenced upon any public works, the amount of the prevailing rate of wage is not subject to attack in any legal proceeding by any contractor or subcontractor in connection with that contract.

(3) It is not a defense in any legal proceeding that the prevailing rate of wage is less than the amount required to be in the specifications of a contract for public works, or that there was an agreement between the employee and the employer to work at less than the wage rates required to be paid under this section.

(4) Every contractor or subcontractor engaged on a project for which there is a contract for a public works shall keep the prevailing rates of wage for that project posted in a conspicuous and accessible place in or about the project. The Commissioner of the Bureau of Labor and Industries shall furnish without charge copies of the prevailing rates of wage to contractors and subcontractors.

(5) Every contractor or subcontractor engaged on a project for which there is a contract for a public works to which the prevailing wage requirements apply that also provides or contributes to a health and welfare plan or a pension plan, or both, for the contractor or subcontractor's employees on the project shall post a notice describing the plan in a conspicuous and accessible place in or about the project. The notice preferably shall be posted in the same place as the notice required under subsection (4) of this section. In addition to the description of the plan, the notice shall contain information on how and where to make claims and where to obtain further information.

(6)(a) Except as provided in paragraph (c) of this subsection, no person other than the contractor or subcontractor may pay or contribute any portion of the prevailing rate of wage paid by the contractor or subcontractor to workers employed in the performance of a public works contract.

(b) For the purpose of this subsection, the prevailing rate of wage is the prevailing rate of wage specified in the contract.

(c) This subsection is not intended to prohibit payments to a worker who is enrolled in any government-subsidized training or retraining program.

(7) A person may not take any action that circumvents the payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee's regular rate of pay on any project not subject to ORS 279C.800 to 279C.870 in a manner that has the effect of offsetting the prevailing rate of wage on a public works project.

279C.845 Certified statements regarding payment of prevailing rates of wage; retainage. (1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:

(a) The hourly rate of wage paid each worker whom the contractor or the subcontractor has employed upon the public works; and

(b) That no worker employed upon the public works has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract.

(2) The certified statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read the certified statement and knows the contents thereof and that the same is true to the contractor or subcontractor's knowledge.

(3) The certified statements shall set out accurately and completely the payroll records for the prior week, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.

(4) The contractor or subcontractor shall deliver or mail each certified statement required by subsection (1) of this section to the public agency. Certified statements for each week during which the contractor or subcontractor employs a worker upon the public works shall be submitted once a month, by the fifth business day of the following month. Information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 to 279C.870.

(5) Each contractor or subcontractor shall preserve the certified statements for a period of three years from the date of completion of the contract.

(6) Certified statements received by a public agency are public records subject to the provisions of ORS 192.410 to 192.505.

(7) Notwithstanding ORS 279C.555 or 279C.570 (7), if a contractor is required to file certified statements under this section, the public agency shall retain 25 percent of any amount earned by the contractor on the public works

until the contractor has filed with the public agency certified statements as required by this section. The public agency shall pay the contractor the amount retained under this subsection within 14 days after the contractor files the certified statements as required by this section, regardless of whether a subcontractor has failed to file certified statements as required by this section. The public agency is not required to verify the truth of the contents of certified statements filed by the contractor under this section.

(8) Notwithstanding ORS 279C.555, the contractor shall retain 25 percent of any amount earned by a first-tier subcontractor on a public works until the subcontractor has filed with the public agency certified statements as required by this section. The contractor shall verify that the first-tier subcontractor has filed the certified statements before the contractor may pay the subcontractor any amount retained under this subsection. The contractor shall pay the first-tier subcontractor the amount retained under this subsection within 14 days after the subcontractor files the certified statements as required by this section. Neither the public agency nor the contractor is required to verify the truth of the contents of certified statements filed by a first-tier subcontractor under this section.

279C.855 Liability for violations. (1) Any contractor or subcontractor or contractor's or subcontractor's surety that violates the provisions of ORS 279C.840 is liable to the workers affected in the amount of their unpaid minimum wages, including all fringe benefits, and in an additional amount equal to the unpaid wages as liquidated damages.

(2) Actions to enforce liability to workers under subsection (1) of this section may be brought as actions on contractors' bonds as provided for in ORS 279C.610.

(3) If a public agency fails to include a provision that the contractor and any subcontractor shall comply with ORS 279C.840 in the advertisement for bids, the request for bids, the contract specifications, the accepted bid or elsewhere in the contract documents, the liability of the public agency for unpaid minimum wages, as described in subsection (1) of this section, is joint and several with any contractor or subcontractor that had notice of the requirement to comply with ORS 279C.840.

(4) 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.

(5) The Commissioner of the Bureau of Labor and Industries may enforce the provisions of subsections (3) and (4) of this section by a civil action under ORS 279C.850 (4), by a civil action on an assigned wage claim under ORS 652.330, or by an administrative proceeding on an assigned wage claim under ORS 652.332.