



DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION

April 2, 2015

**SENT VIA US MAIL & EMAIL**

Paul Mather  
Highway Division Administrator  
Oregon Department of Transportation  
355 Capitol St. NE, MS-11  
Salem, Oregon 97301

Re: Modified Exemption from DOJ Legal Sufficiency Review and Approval for ODOT  
Highway Construction Contracts  
DOJ File No. 734110-GF0335-15

Dear Mr. Mather:

By letter to John Rosenberger dated March 12, 1998, Don Arnold approved a class exemption from the requirement for Attorney General legal sufficiency approval of Oregon Department of Transportation (ODOT) highway construction contracts. By letter to Mr. Rosenberger dated November 25, 2002, Mr. Arnold modified the exemption. By letter to Doug Tindall dated July 11, 2008, Stephanie Smythe (the then Attorney in Charge of the Business Transaction Section) also modified the exemption. This letter further modifies the exemption.

Approval of the original exemption was based on ODOT's use of "*Standard Specifications for Highway Construction 1996*", as well as a set of preexisting Supplemental Specifications and Special Provisions.

The 2002 modified exemption approved a set of ODOT/APWA Standard Specifications 2002, entitled "*Oregon Standard Specifications for Construction.*"

The 2008 modified exemption approved a set of ODOT Standard Specifications, 2008 version, entitled "*Oregon Standard Specifications for Construction.*"

As of the date of this letter, the following conditions apply to the class exemption for ODOT highway construction contracts and replace the conditions in our 2008 letter:

1. Scope. This class exemption applies to competitively bid public improvement contracts that are procured by the ODOT Highway Division and signed by the parties after the date of this letter. The scope of this exemption is contracts for horizontal, bridge and highway construction projects. This exemption does not apply to contracts exempted from competitive bidding under ORS 279C.335 and 279C.350, including Design-Build, CM/GC, A+B+C+D or any other contracts that require an exemption from competitive bidding. Contract Change Orders and

other amendatory documents for contracts that require an exemption from competitive bidding are also outside this exemption. This exemption also does not apply to contracts for the following types of work or projects: rail, bus, aviation, marine, ferry or ferry docks or approaches, or vertical construction-buildings, other than tool sheds, maintenance buildings, power sheds, bridge operation sheds, modular restrooms or modular rest area buildings, picnic tables including roof coverings, covered bicycle shelters and kiosks. In addition, this exemption does not apply to contracts that include providing software, software modification, customization, programming, configuration, installation or other software services.

In addition, this exemption applies to competitively bid public improvement contracts that included the 2015 version of ODOT's "Oregon Standard Specifications for Construction" that, before the date of this letter, were procured by the ODOT Highway Division and signed by the parties or were in other stages of procurement by the ODOT Highway Division, for which Sr. AAG Rob Gebhardt reviewed and authorized for advertisement the procurement documents, and reviewed and approved the contracts, as the case may be, depending upon the stage in the process for each such contract. These procurements and contracts are identified on a list agreed upon by ODOT's Sr. Specifications Engineer and Sr. AAG Rob Gebhardt. As of the date of this letter, these procurements and contracts are subject to the requirements and conditions of this exemption.

2. Specifications. Contracts under this class exemption must use the 2015 version of ODOT's "*Oregon Standard Specifications for Construction*" (Standard Specifications), which have been approved for legal sufficiency by Sr. AAG Rob Gebhardt (or they must use the 2008 version of the "*Oregon Standard Specifications for Construction*" and Special Provisions previously approved under the 2008 modified class exemption pending ODOT's full implementation of the 2015 version). Contracts under this class exemption shall otherwise include only the Standard Specifications and Special Provisions which modify the Standard Specifications that have been or are approved for legal sufficiency under or in relation to this exemption by the Attorney General through the Attorney in Charge of the Business Transaction Section or designee (DOJ Approval), as follows:

- a. The 2015 version of the Standard Specifications is one volume and is comprised of the Part 00100 General Conditions and the Parts 00200 through 03000 Technical Specifications.
- b. Other than the fill-in-the-blank portions of the Part 00100 General Conditions of the Standard Specifications, ODOT and its contractors and consultants may not add to, delete from or otherwise modify the Part 00100 General Conditions, or approved Special Provisions for the Part 00100 General Conditions, without first obtaining DOJ Approval. (References in this letter to "approved Special Provisions" means Special Provisions approved by DOJ.)
- c. As of the date of this letter, Sr. AAG Rob Gebhardt has provided DOJ review, and where necessary, DOJ Approval of the updated Bid Booklet, Special Provisions Booklet, Contract Booklet, related contract documents (including but not limited to the contract form, bonds, certificates, federal provisions and required disclosures), for the versions

that reside on the ODOT eBids website used for paper-based bidding and for the versions that reside on the BidExpress website used for electronic bidding, and accompanying or related approved Special Provisions used to implement, or modify when applicable, the 2015 Standard Specifications, and the foregoing updated versions must be used with the 2015 Standard Specifications. ODOT may not implement modifications to the foregoing documents without first obtaining DOJ review and, where necessary, DOJ Approval.

d. In order to maintain an accurate record of approved Standard Specifications and Special Provisions, ODOT shall submit numbered requests for DOJ Approval consistent with numbering and tracking systems to be mutually established by DOJ and ODOT staff, and shall provide DOJ with confirmed sets of approved Standard Specifications and approved Special Provisions in standard loose-leaf notebook or electronic forms upon request.

e. For purposes of this exemption, the Part 00200 through 03000 Technical Specifications of the Standard Specifications are excluded from legal sufficiency review pursuant to OAR 137-045-0015(5)(c). However, ODOT may not add any general legal requirements to the Part 00200 through 03000 Standard Specifications or approved Special Provisions for the Part 00200 through 03000 Standard Specifications or other parts of the contract (including warranties, surety bonds, liquidated damages, penalties, bonuses, incentives, disincentives or general legal requirements of the type addressed in or that are inconsistent with or in conflict with the Part 00100 General Conditions of the Standard Specifications or approved Special Provisions for the Part 00100 General Conditions of the Standard Specifications) without first obtaining DOJ Approval. In addition, the measurement and payment Standard Specifications and Special Provisions are not excluded from DOJ review, however, the Attorney in Charge of the Business Transactions Section or designee may agree to guidelines for allowable changes to the measurement and payment Standard Specifications and Special Provisions.

f. Special prequalification documentation for contracts within this exemption must be reviewed by the Attorney in Charge of the Business Transactions Section or designee before they are advertised or posted.

g. If a contract is otherwise within this exemption, but ODOT proposes modifications for which advance DOJ Approval is required under items 2.b., c. or e. above, the contract will be considered to be within this exemption once those modifications have received the required advance DOJ Approval (together with any other documents, Standard Specifications, Special Provisions or other provisions the reviewing DOJ attorney elects to review).

h. Designees for purposes of DOJ Approval and DOJ reviews referenced in this letter are: Sr. AAG Rob Gebhardt and Sr. AAG Blake Underwood.

3. Statutes and Rules. Contracts under this exemption must be awarded by competitive bidding, under the requirements of ORS Chapter 279C, to the responsible bidder submitting the lowest responsive bid. ODOT must follow all applicable public contracting rules, including

ORS Chapter 279C (as may be amended), and administrative rules adopted by ODOT under ORS 279A.065 in lieu of the *Attorney General's Model Public Contract Rules*. Those ODOT rules are at OAR Chapter 731, Division 5 (Public Contract Rules) and Division 7 (Public Improvement Contracts). ODOT must also follow its rules in Chapter 734, Division 10, including those regarding prequalification and contractor evaluation. In the event these statutes or rules are amended in a manner that requires revision of the approved Part 00100 General Conditions of the Standard Specifications or approved Special Provisions for the Part 00100 General Conditions of the Standard Specifications, ODOT must obtain DOJ Approval of such revisions before use. ODOT must also comply with all applicable federal requirements.

4. Legislative Sessions. Following each state legislative session, ODOT must submit to DOJ for DOJ Approval, through the Attorney-in-Charge of the Business Transaction Section, or designee, any changes to the Part 00100 General Conditions of the Standard Specifications or approved Special Provisions for the Part 00100 General Conditions of the Standard Specifications proposed in response to new state laws. ODOT must allow adequate time for review and comment, typically at least 30 days before new laws take effect (absent an emergency clause or other earlier effective date for new legislation). ODOT must obtain DOJ Approval of such changes prior to their use. Prior to their use, ODOT must also obtain DOJ Approval for changes proposed in response to requirements of federal law or FHWA or other applicable federal authorities.

5. Addenda to Procurement Documents. Addenda to procurement documents for contracts to be awarded under this exemption are also exempt, but only to the same extent and on the same conditions as the contract terms included in the original procurement documents. Therefore, ODOT may not by addenda make modifications of the type described in items 2.b., c. and e. above without first obtaining DOJ Approval.

6. Change Orders. Change orders to contracts awarded under this exemption are also exempt, but only to the same extent and on the same conditions as the original contract. Therefore, ODOT may not by change order (or by other amendatory documents) make modifications of the type described in items 2.b., c. and e. above without first obtaining DOJ Approval. In addition, to be exempt, change orders and other amendatory documents must also be within the general scope of the procurement and must be implemented in accordance with the change provisions of the Standard Specifications.

7. Procurement and Contract Review Process. ODOT has somewhat modified its procedure for review of procurement and contract documents for individual contracts. Previously, all documentation was fully reviewed and approved by ODOT centrally in Salem. The current procedure for ODOT's central Office of Project Letting (OPL), when it receives documentation from a Region office, is to review the procurement and sample contract documentation against a detailed checklist of predetermined factors, which were discussed with DOJ as part of ODOT's request for this exemption letter, to determine whether the conditions of this exemption have been met, whether FHWA requirements have been met and whether there are any fatal flaws or defects in the documentation. Necessary corrections and modifications are then communicated to and made by or through the Region office. Modifications of the Standard Specifications and

approved Special Provisions are still subject to the review and approval of the centralized OPL, under the supervision of the OPL Manager and by or under the guidance of the Sr. Specifications Engineer, before they are used, for the initial procurement and sample contract documents and for all addenda thereto. Responsibility for compliance with the conditions and requirements of this exemption lies with ODOT as a whole, but the primary responsibility for compliance before contract award lies centrally with OPL, under the supervision of the OPL Manager and guidance of the Sr. Specifications Engineer, who are DOJ's primary contact points for this exemption. OPL produces a Quality Assurance report for each procurement and provides the report to the relevant Region office. ODOT will make copies of such reports available to DOJ upon request. Modifications of the Standard Specifications and approved Special Provisions after contract award are subject to review by the Construction Administration Engineer or designee, including all change orders and other amendatory documents.

8. Performance Reviews. ODOT must make procurement and contract records available to DOJ upon request for periodic review of systems, processes or individual procurements or contracts, at such times and locations as DOJ may reasonably request.

9. Advance Review of Particular Contracts. The Attorney-in-Charge of the Business Transactions Section or designee may require review and legal sufficiency approval of particular ODOT public improvement contracts, whether or not those contracts would otherwise be exempt under this exemption, before they become bidding on the State, and before any services or work are performed under those contracts.

10. Modification or Revocation of Exemption. This exemption may be modified or revoked at any time by the Attorney-in-Charge of the Business Transactions Section upon a determination by DOJ that modification or revocation of the exemption is legally required or is otherwise in the best interest of the State. Such modification or revocation will be made by written notice to ODOT.

Subject to the above conditions and requirements, I hereby further modify the class exemption for ODOT highway construction contracts as stated in this letter.

Please feel free to contact me with any questions or comments regarding this exemption.

Sincerely,



Mark A. Williams  
Attorney-in-Charge  
Business Transactions Section

MAW:llz/DM5918487v3  
cc: Brenda Marcus, ODOT  
Dan Anderson, ODOT  
Steve Cooley, ODOT  
Rob Gebhardt, DOJ  
Blake Underwood, DOJ