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VIA E-MAIL

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RE: AGC/HB 2415 Memo

Dear John, Dee and Kirsten:

Please consider this discussion as you weigh options regarding HB 2415.

It likely makes some sense to share our background and perspective as construction attorneys. Our firm likely has the largest construction practice in the Northwest, and we have an integrated client base of real estate and construction professionals. We present clients at all levels in the construction food chain: lenders, owners and developers, general contractors, subcontractors, and design professionals. Our practice also has our team working issues from both sides. We routinely address issues involving prompt pay, both the private act as well as the public act. While that activity has been robust, there is little appellate treatment of the prompt pay law, this likely because issues involving prompt pay are resolved without full trials and appeals on the merits.

We understand that HB 2415 was triggered in large part because several industry representatives have continued to express concern that the Prompt Pay laws are not curing systemic payment issues, most particularly those related to retention. While we acknowledge that issues around payment have continued to be (and will continue to be indefinitely) a source of many construction disputes, it is not due to application of the Prompt Pay law. The law works. In fact, whether our office is prosecuting or defending Prompt Pay issues, we have found application of the law relatively simple, and resolution of issues typically clear cut. I have not had a Prompt Pay issue get fully tried to the Court or a private arbitrator. The issues get resolved. If there were issues that plagued the Prompt Pay law, the disputes would not get resolved, and there would be appellate treatment of the issues which required clarification from the Court.

HB 2415 is designed to provide additional measures for contractors and subcontractors to secure timely payment for work performed. The revised proposal seems to balance better some of the concerns raised, but could be better if adjusted as follows:

(1) Measure to Require Escrow Deposits on Retainage on Contracts Exceeding $250,000:

This proposal in practice sounds simple enough—if requested by the payor, retention on contracts exceeding $250,000 could be placed in an independent escrow account. We see two issues with this proposal.

First, retention at its most fundamental issue is “insurance” for timely and full completion of performance. The money theoretically should be available if the payor defaults, and the money is needed to hire cover and ensure the contract is completed. Requiring the money to be tied in a separate fund defeats this most fundamental objective.

Second, administered “trust” accounts through an escrow process is time consuming and can be expensive.

As an accommodation, if this proposal is deemed necessary to cure a perceived issue, it might be better to increase the minimum dollar level, to say $1,000,000. This would reduce the occasions to those projects with significant dollar value, and allow the parties to consider other security vehicles to ensure timely and full performance.

(2) Measure to Include Interest on the Escrow Deposit:

We understand that one proposal has the interest rate at a statutory rate of 9 percent (and we have heard as great at 18 percent). If interest is going to accrue, it should track the law for prompt payment on progress payments under the Public Contracting Code, ORS 279C.570(2). Under this section, interest equals 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 of the contract execution). This would provide a reasonable rate of return but not create an imbalance between what the money can logically accrue if put in a secure account and a potential windfall.

The bottom line---years ago the retainage laws were changed to make them more fair. A compromise was reached. Industry recognized that allowing for retention values exceeding five percent created unfairness. Industry also recognized that preserving the industry practice of retention (later determined to be five percent) was the best tool to ensure full and timely performance. At some point, impairing this hold back option will so compromise the incentive that industry will need to employ other tools. These include bonds and guarantees. And at least with the former, adding bonding requirements at the sub and sub sub level will add cost and expense to all work. And requiring guarantees could significantly impair the qualified list of subs available. Few private projects today require performance bonds at the sub and sub sub level, this for very important reasons---these programs are expensive, and the retention tools have worked in large part to strike a balance between performance and payment.

We do not feel it is necessary to retrench further from long-standing industry practice. It is our impression that the previous changes are working, and there is sufficient "bite" in the Prompt Pay law if folks choose to enforce their rights.

As always, I am happy to discuss this further.

Very truly yours,

/s/ Darien S. Loiselle

Darien S. Loiselle

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Enclosure