

SENATE AMENDMENTS TO A-ENGROSSED HOUSE BILL 2870

By COMMITTEE ON LABOR AND BUSINESS

May 15

1 On page 1 of the printed A-engrossed bill, delete lines 5 through 26 and delete pages 2 through
2 7.

3 On page 8, delete lines 1 through 34 and insert:

4 “**SECTION 1.** ORS 279C.560 is amended to read:

5 “279C.560. (1)(a) [*Unless a contracting agency that reserves an amount as retainage under ORS*
6 *279C.570 (7) finds in writing that accepting a bond or instrument described in paragraph (a) or (b) of*
7 *this subsection poses an extraordinary risk that is not typically associated with the bond or instrument,*
8 *the*] **A contractor may submit and a contracting agency shall accept from a contractor** in lieu
9 of withholding moneys [*from payment shall accept from a contractor*] **for all or a portion of the**
10 **retainage required under a public contract:**

11 “[*(a)*] **(A)** Bonds, securities or other instruments of a character described in subsection (6) of this
12 section that are deposited as provided in subsection (4) of this section; or

13 “[*(b)*] **(B)** A surety bond deposited as provided in subsection (7) of this section.

14 “**(b) A surety bond that a contractor submits under this section must be executed by a**
15 **surety bonding company that is authorized to transact surety business in this state and may**
16 **not be a surety obligation of an individual.**

17 “(2) A contracting agency that holds moneys as retainage under ORS 279C.570 (7) shall:

18 “(a) Hold the moneys in a fund and pay the moneys to the contractor in accordance with ORS
19 279C.570; or

20 “(b) At the election of the contractor, pay the moneys to the contractor in accordance with
21 subsection (4) or (5) of this section and in a manner authorized by the Director of the Oregon De-
22 partment of Administrative Services.

23 “(3) If [*the*] **a** contracting agency incurs additional costs as a result of the **contractor’s** exercise
24 of an option described in subsection (1) or (5) of this section, the contracting agency may recover
25 the **additional** costs from the contractor by reducing the final payment. As work on the contract
26 progresses, the contracting agency shall, upon demand, inform the contractor of all accrued costs.

27 “(4) [*The*] **A** contractor may deposit bonds, securities or other instruments with [*the*] **a** con-
28 tracting agency or in a bank or [*trust company*] **other financial institution** for the contracting
29 agency to hold for the contracting agency’s benefit in lieu of moneys held as retainage. If [*the con-*
30 *tracting agency accepts*] **a contractor or subcontractor submits** bonds, securities or other instru-
31 ments [*deposited*] as provided in this subsection, the contracting agency shall reduce the moneys
32 held as retainage in an amount equal to the value of the bonds, securities and other instruments and
33 pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Interest or
34 earnings on the bonds, securities or other instruments shall accrue to the contractor.

35 “(5) If the contractor elects, the contracting agency shall deposit the retainage as accumulated

1 in an interest-bearing account in a bank[, *savings bank, trust company or savings association*] **or**
2 **other financial institution** for the benefit of the contracting agency. [*When*] **If** the contracting
3 agency is a state contracting agency, the account must be established through the State Treasurer.
4 Earnings on the account accrue to the contractor.

5 “(6) Bonds, securities and other instruments deposited or acquired in lieu of retainage, as per-
6 mitted by this section, must be of a character approved by the Director of the Oregon Department
7 of Administrative Services, including but not limited to:

8 “(a) Bills, certificates, notes or bonds of the United States.

9 “(b) Other obligations of the United States or agencies of the United States.

10 “(c) Obligations of a corporation wholly owned by the federal government.

11 “(d) Indebtedness of the Federal National Mortgage Association.

12 “(e) General obligation bonds of the State of Oregon or a political subdivision of the State of
13 Oregon.

14 “(f) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

15 “(7) [*The*] **A** contractor[, *with the approval of the contracting agency,*] may deposit a surety bond
16 for all or any portion of the amount of funds retained, or to be retained, by the contracting agency
17 in [*a form acceptable to the contracting agency*] **the form specified in ORS 701.435 (4)**. The **surety**
18 bond and any proceeds of the **surety** bond must be made subject to all claims and liens and in the
19 same manner and priority [*as set forth*] **specified** for retainage under ORS 279C.550 to 279C.570 and
20 279C.600 to 279C.625. The contracting agency shall reduce the moneys the contracting agency holds
21 as retainage in an amount equal to the value of the **surety** bond and pay the amount of the re-
22 duction to the contractor in accordance with ORS 279C.570. [*Whenever a contracting agency accepts*
23 *a surety bond from a contractor in lieu of retainage, the contractor shall accept like bonds from a*
24 *subcontractor or supplier from which the contractor has retainage. The contractor shall then reduce the*
25 *moneys the contractor holds as retainage in an amount equal to the value of the bond and pay the*
26 *amount of the reduction to the subcontractor or supplier.*]

27 “(8)(a) **When a contracting agency accepts a surety bond in lieu of retainage from a**
28 **contractor under this section, the contractor shall accept surety bonds from subcontractors**
29 **or suppliers from which the contractor has withheld retainage. At any time before final**
30 **payment on a public improvement contract, a subcontractor may request the contractor on**
31 **the public improvement contract to submit a surety bond to the contracting agency for the**
32 **portion of the contractor’s retainage that pertains to the subcontractor. The surety bond**
33 **must meet the requirements set forth in subsection (1)(b) of this section. If a contractor at**
34 **the subcontractor’s request obtains a surety bond under this paragraph, the contractor may**
35 **withhold from payments to the subcontractor an amount equivalent to the portion of the**
36 **surety bond premium for which the subcontractor is responsible.**

37 “(b) **Within 30 days after a subcontractor’s request under paragraph (a) of this sub-**
38 **section, the contractor shall provide, and the contracting agency shall accept, a surety bond**
39 **that meets the requirements set forth in subsection (1)(b) of this section unless:**

40 “(A) **The contracting agency finds good cause in writing for not accepting the surety**
41 **bond;**

42 “(B) **The surety bond is not commercially available; or**

43 “(C) **The subcontractor refuses to pay to the contractor the subcontractor’s portion of**
44 **the surety bond premium or refuses to provide the contractor with a surety bond that meets**
45 **the requirements of subsection (1)(b) of this section.**

1 “(c) A surety bond the contractor submits under this subsection, and any proceeds from
2 the surety bond, must be made subject to all claims and liens and in the same manner and
3 priority specified for retainage under ORS 279C.550 to 279C.570.

4 “(d) A contracting agency shall within 30 days after receiving a surety bond under this
5 subsection release to the contractor an amount the contracting agency holds as retainage
6 that is equivalent to the amount the contractor submitted as a surety bond.

7 “(e) A contractor must within 30 days after receiving a surety bond from a subcontractor
8 or supplier release to the subcontractor or supplier the amount the contractor holds as
9 retainage that is equivalent to the amount the subcontractor or supplier submitted as the
10 surety bond.

11 “(9) A surety bond under this section must be in substantially the form specified in ORS
12 701.435 (4).

13 “SECTION 2. ORS 279C.570 is amended to read:

14 “279C.570. (1) *[It is]* The policy of the State of Oregon is that all payments due on a public im-
15 provement contract and owed by a contracting agency *[shall]* **must** be paid promptly. No contract-
16 ing agency is exempt from the provisions of this section.

17 “(2) Contracting agencies shall make progress payments on the contract monthly as work
18 progresses on a public improvement contract. Payments shall be based upon estimates of work
19 completed that are approved by the contracting agency. A progress payment is not considered ac-
20 ceptance or approval of any work or waiver of any defects therein. The contracting agency shall
21 pay to the contractor interest on the progress payment, not including retainage, due the contractor.
22 The interest shall commence 30 days after receipt of the invoice from the contractor or 15 days after
23 the payment is approved by the contracting agency, whichever is the earlier date. The rate of in-
24 terest charged to the contracting agency on the amount due shall equal three times the discount
25 rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve dis-
26 trict that includes Oregon on the date that is 30 days after receipt of the invoice from the con-
27 tractor or 15 days after the payment is approved by the contracting agency, whichever is the earlier
28 date, but the rate of interest may not exceed 30 percent. *[If the contract price exceeds \$500,000, the*
29 *contracting agency shall place amounts deducted as retainage into an interest-bearing escrow account.*
30 *Interest on the retainage amount accrues from the date the payment request is approved until the date*
31 *the retainage is paid to the contractor to which it is due.]*

32 “(3) Interest shall be paid automatically when payments become overdue. The contracting
33 agency shall document, calculate and pay any interest due when payment is made on the principal.
34 Interest payments shall accompany payment of net due on public improvement contracts. The con-
35 tracting agency may not require the contractor to petition, invoice, bill or wait additional days to
36 receive interest due.

37 “(4) *[When]* **If** an invoice is filled out incorrectly, *[when]* **if** there is any defect or impropriety
38 in any submitted invoice or *[when]* **if** there is a good faith dispute, the contracting agency shall so
39 notify the contractor within 15 days stating the reason or reasons the invoice is defective or im-
40 proper or the reasons for the dispute. A defective or improper invoice, if corrected by the contractor
41 within seven days of being notified by the contracting agency, may not cause a payment to be made
42 later than specified in this section unless interest is also paid.

43 “(5) If requested in writing by a first-tier subcontractor, the contractor, within 10 days after
44 receiving the request, shall send to the first-tier subcontractor a copy of that portion of any invoice,
45 request for payment submitted to the contracting agency or pay document provided by the con-

1 tracting agency to the contractor specifically related to any labor or materials supplied by the
2 first-tier subcontractor.

3 “(6) Payment of interest may be postponed when payment on the principal is delayed because
4 of disagreement between the contracting agency and the contractor. Whenever a contractor brings
5 formal administrative or judicial action to collect interest due under this section, the prevailing
6 party is entitled to costs and reasonable attorney fees.

7 “(7) A contracting agency may reserve as retainage from any progress payment on a public im-
8 provement contract an amount not to exceed five percent of the payment. As work progresses, a
9 contracting agency may reduce the amount of the retainage and the contracting agency may elimi-
10 nate retainage on any remaining monthly contract payments after 50 percent of the work under the
11 contract is completed if, in the contracting agency’s opinion, such work is progressing satisfactorily.
12 Elimination or reduction of retainage shall be allowed only upon written application by the con-
13 tractor, and the application shall include written approval of the contractor’s surety. However, when
14 the contract work is 97.5 percent completed the contracting agency may, at the contracting agency’s
15 discretion and without application by the contractor, reduce the retained amount to 100 percent of
16 the value of the contract work remaining to be done. Upon receipt of a written application by the
17 contractor, the contracting agency shall respond in writing within a reasonable time.

18 “(8) The retainage held by a contracting agency [*shall*] **must** be included in and paid to the
19 contractor as part of the final payment of the contract price. The contracting agency shall pay to
20 the contractor interest at the rate of 1.5 percent per month on the final payment due the contractor,
21 interest to commence 30 days after the work under the contract has been completed and accepted
22 and to run until the date when the final payment is tendered to the contractor. The contractor shall
23 notify the contracting agency in writing when the contractor considers the work complete and the
24 contracting agency shall, within 15 days after receiving the written notice, either accept the work
25 or notify the contractor of work yet to be performed on the contract. If the contracting agency does
26 not, within the time allowed, notify the contractor of work yet to be performed to fulfill contractual
27 obligations, the interest provided by this subsection shall commence to run 30 days after the end
28 of the 15-day period.

29 “(9)(a) The contracting agency shall pay, upon settlement or judgment in favor of the contractor
30 regarding any dispute as to the compensation due a contractor for work performed under the terms
31 of a public improvement contract, the amount due plus interest at the rate of two times the discount
32 rate, but not to exceed 30 percent, on 90-day commercial paper in effect at the Federal Reserve Bank
33 in the Federal Reserve district that includes Oregon on the date of the settlement or judgment, and
34 accruing from the later of:

35 “(A) The due date of any progress payment received under the contract for the period in which
36 such work was performed; or

37 “(B) Thirty days after the date on which the claim for the payment under dispute was presented
38 to the contracting agency by the contractor in writing or in accordance with applicable provisions
39 of the contract.

40 “(b) Interest shall be added to and not made a part of the settlement or judgment.

41 “**SECTION 3.** ORS 701.420 is amended to read:

42 “701.420. (1) Partial payment is allowed and may be made on contracts for construction and
43 home improvement. An owner, contractor or subcontractor may withhold as retainage an amount
44 equal to not more than five percent of the contract price of the work completed. Partial payment
45 allowed under this subsection is not acceptance or approval of some of the work or a waiver of

1 defects in the work.

2 “[*(2)(a)*] **(2)** The owner, contractor or subcontractor shall pay interest at the rate of one percent
3 per month on the final payment due the contractor or subcontractor. The interest shall commence
4 30 days after the contractor or subcontractor has completed and the owner has accepted the work
5 under the contract for construction for which the final payment is due. The interest shall run until
6 the date when final payment is tendered to the contractor or subcontractor. When the contractor
7 or subcontractor considers the work that the contractor or subcontractor is contracted to perform
8 to be complete, the contractor or subcontractor shall notify the party to whom the contractor or
9 subcontractor is responsible for performing the construction work under the contract. The party
10 shall, within 15 days after receiving the notice, either accept the work or notify the contractor or
11 subcontractor of work yet to be performed under the contract. If the party does not accept the work
12 or does not notify the contractor or subcontractor of work yet to be performed within the time al-
13 lowed, the interest required under this subsection shall commence 30 days after the end of the
14 15-day period.

15 “[*(b)* *If the contract price exceeds \$500,000, the owner, contractor or subcontractor shall place*
16 *amounts withheld as retainage into an interest-bearing escrow account. Interest on the retainage*
17 *amount accrues from the date the payment request is approved until the date the retainage is paid to*
18 *the contractor or subcontractor to which it is due.*]

19 “**(3)** When a contractor pays a subcontractor in full, including the amount the contractor with-
20 held as retainage, the owner with whom the contractor has the contract shall pay the contractor,
21 out of the amount that the owner withheld from the contractor as retainage, a sum equal to the
22 amount of retainage that the contractor paid the subcontractor. The contractor shall notify the
23 owner when the contractor pays a subcontractor in full under this section and the owner shall,
24 within 15 days after receiving the notice, pay the contractor the amount due the contractor under
25 this subsection. Interest on the amount due the contractor at the rate of one percent per month shall
26 commence 30 days after the owner receives notice of full payment to the subcontractor.

27 “**SECTION 4.** ORS 701.435 is amended to read:

28 “701.435. [*(1)* *When a contractor on a public contract deposits bonds, securities or other instru-*
29 *ments under ORS 279C.560 (4), if the subcontract price exceeds \$50,000 and constitutes more than 10*
30 *percent of the cost of the public contract, a subcontractor on the public contract may deposit bonds,*
31 *securities or other instruments with the contractor or in a bank or trust company for the contractor to*
32 *hold for the contractor’s benefit in lieu of moneys held as retainage. If the contractor accepts the bonds,*
33 *securities or other instruments deposited as provided in this subsection, the contractor shall reduce the*
34 *moneys held as retainage in an amount equal to the value of the bonds, securities and other instruments*
35 *and pay the amount of the reduction to the subcontractor in accordance with ORS 701.420 and 701.430.*
36 *Interest or earnings on the bonds, securities or other instruments shall accrue to the subcontractor.*]

37 “**(1)(a)** **A contractor that performs work on a large commercial structure or under a**
38 **public improvement contract may submit to the project owner and any lender a surety bond**
39 **for all or any portion of the retainage required for the large commercial structure or under**
40 **the public improvement contract.**

41 “**(b)** **When an owner accepts a surety bond in lieu of retainage from a contractor under**
42 **this section, the contractor shall accept surety bonds from subcontractors or suppliers from**
43 **which the contractor has withheld retainage. At any time before final payment for work on**
44 **a large commercial structure or under a public improvement contract, a subcontractor may**
45 **request the contractor on the large commercial structure or under the public improvement**

1 contract to submit a surety bond to the project owner and lender for the portion of the
2 contractor's retainage that pertains to the subcontractor. The surety bond must be from a
3 surety bonding company that is authorized to transact business this state and may not be a
4 surety obligation of an individual. The surety bond must be in substantially the form speci-
5 fied in subsection (4) of this section. If a contractor at the subcontractor's request obtains
6 a surety bond under this paragraph, the contractor may withhold from payments to the
7 subcontractor an amount equivalent to the portion of the surety bond premium for which
8 the subcontractor is responsible.

9 "(c) Within 30 days after a subcontractor's request under paragraph (b) of this sub-
10 section, the contractor shall provide and the owner and lender shall accept a surety bond
11 that meets the requirements set forth in this subsection unless:

12 "(A) The surety bond is not commercially available; or

13 "(B) The subcontractor refuses to pay to the contractor the subcontractor's portion of
14 the surety bond premium or refuses to provide the contractor with a surety bond that meets
15 the requirements of this subsection.

16 "(d) A surety bond the contractor submits under this subsection, and any proceeds from
17 the surety bond, are subject to all claims and liens and in the same manner and priority
18 specified for retainage under this section and ORS 279C.550 to 279C.570, 701.410, 701.420,
19 701.430 and 701.440.

20 "(e) An owner and any lender shall within 30 days after receiving a surety bond under
21 this subsection release to the contractor an amount the owner or lender holds as retainage
22 that is equivalent to the amount the contractor submitted as a surety bond.

23 "(f) The contractor must within 30 days after receiving a surety bond from a subcon-
24 tractor or supplier reduce the amount the contractor holds as retainage in an amount
25 equivalent to the amount the subcontractor or supplier submitted as a surety bond and shall
26 pay the amount of the reduction to the subcontractor or supplier in accordance with ORS
27 701.420 and 701.430.

28 "(2) [*When a contractor on a public contract elects to have the public contracting agency deposit*
29 *the accumulated retainage in an interest-bearing account under ORS 279C.560 (5),*] **If a contractor**
30 **or a subcontractor performing work on a large commercial structure or under a public im-**
31 **provement contract does not deposit a surety bond in lieu of retainage, the contractor may**
32 **elect to have the project owner or contracting agency deposit accumulated retainage in an**
33 **interest-bearing account with a bank or other financial institution or pay interest on the**
34 **accumulated retainage at the rate of two percent plus the discount rate on 90-day commer-**
35 **cial paper that is in effect at the Federal Reserve Bank in the Federal Reserve district that**
36 **includes this state on the date that the retainage is paid. Subject to subsection (3) of this**
37 **section, if the contractor elects to have accumulated retainage pay interest, the contractor,**
38 **within 30 days following payment of the final amount due for construction of the project or public**
39 **improvement, shall pay to each subcontractor [who] that performed work on the construction the**
40 **subcontractor's proportional share of the interest earnings that accrued to the contractor as a result**
41 **of the election. A subcontractor's share of the total amount of interest earnings under this sub-**
42 **section [shall] must be determined by the proportion that the amount of retainage withheld from**
43 **the subcontractor bears to the amount of retainage withheld from the contractor and the length of**
44 **time the retainage was withheld from the subcontractor. A share of the interest earnings shall be**
45 **paid to a subcontractor under this subsection only when:**

1 “(a) Retainage is withheld from the subcontractor for more than 60 days after the day on which
2 the first partial payment was due the subcontractor under the terms of the subcontract; and

3 “(b) The amount of interest earnings due the subcontractor exceeds \$100.

4 “(3) If [*the*] a contractor incurs additional costs as a result of the exercise of an option described
5 in subsection (1) or (2) of this section, the contractor may recover the **additional** costs from the
6 subcontractor by reducing the final payment. As work on the subcontract progresses, the contractor
7 shall, upon demand, inform the subcontractor of all accrued additional costs.

8 “[*(4) Bonds, securities and other instruments deposited or acquired in lieu of retainage, as per-*
9 *mitted by this section, must be of a character approved by the Director of the Oregon Department of*
10 *Administrative Services, including but not limited to:*]

11 “[*(a) Bills, certificates, notes or bonds of the United States.*]

12 “[*(b) Other obligations of the United States or agencies of the United States.*]

13 “[*(c) Obligations of a corporation wholly owned by the federal government.*]

14 “[*(d) Indebtedness of the Federal National Mortgage Association.*]

15 “[*(e) General obligation bonds of the State of Oregon or a political subdivision of the State of*
16 *Oregon.*]

17 “[*(f) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.*]

18 “(4) A surety bond under this section and ORS 279C.560 must be in substantially the fol-
19 lowing form:

20 “

21
22 **RETAINAGE SURETY BOND**

23
24 **KNOW ALL BY THESE PRESENTS: That _____, a _____**
25 **authorized to do business in the State of Oregon, as Principal, and _____, a**
26 **corporation organized and existing under the laws of the State of _____ and**
27 **authorized to transact the business of surety in the State of Oregon, as Surety, are jointly**
28 **and severally held and bound to _____ (“Obligee”)**
29 **and _____ (“Owner”), and their lenders, heirs, executors, administrators,**
30 **successors and assigns in the penal sum of \$_____, plus _____ % (not**
31 **more than five percent) of any increases in the contract amount that may occur because of**
32 **change orders or increases in the quantities of or that addition of any new item of work.**

33
34 **WHEREAS the Principal has executed a contract for _____ with the**
35 **Obligee; and**

36
37 **WHEREAS Oregon law allows the Obligee to withhold from the Principal a sum equiv-**
38 **alent to _____ % (not more than five percent) from moneys the Principal earns on es-**
39 **timates or progress payments during the progress of the work (“Earned Retained Funds”);**
40 **and**

41
42 **WHEREAS the Principal has requested that the Obligee or Owner accept a surety bond**
43 **in lieu of Earned Retained Funds as allowed under ORS 279C.560 or 701.435;**

44
45 **NOW, THEREFORE, this obligation is such that the Surety and the Surety’s successors**

1 and assigns are held and bound to Obligee, Owner and any lender, and to all beneficiaries for
2 the sum set forth in the first paragraph of this retainage surety bond. This surety bond and
3 any proceeds from this surety bond are subject to all claims and liens by the Obligee against
4 the Principal in the same manner and priority as specified for retainage under ORS 279C.550
5 to 279C.570, 701.410, 701.420, 701.430, 701.435 and 701.440, as applicable. The condition of this
6 obligation is such that if the Principal satisfies all payment obligations to any Obligee that
7 may lawfully claim against project sums due to the Principal and indemnify and hold the
8 Obligee harmless from any and all loss, costs and damages that the Obligee may sustain by
9 release of the retainage to the Principal or Surety, this obligation is null and void if the
10 Obligee notifies the Surety that the Obligee released the obligation. The obligation otherwise
11 remains in full force and effect.

12
13 IT IS HEREBY DECLARED AND AGREED that the Surety is liable under this obligation
14 in the same manner and to the same extent as is Principal. The Surety will not be discharged
15 or released from liability for any act, omission or defense of any kind or nature that would
16 not also discharge the Principal.

17
18 IT IS HEREBY FURTHER DECLARED AND AGREED that this obligation is binding
19 upon and inures to the benefit of the Principal, the Surety, the Obligee, the Owner, the
20 lender and the beneficiaries of this obligation and their respective heirs, executors, admin-
21 istrators, successors and assigns.

22
23 SIGNED AND SEALED this _____ day of _____, 20____
24
25 Principal _____ Surety _____
26 Name _____ Name _____
27 Title _____ Title _____
28 Address _____ Address _____
29 City/State/Zip _____ City/State/Zip _____
30 Phone _____ Phone _____
31 “ _____ ”.

32
33 _____