

Requested by Senator BONHAM

**PROPOSED AMENDMENTS TO
A-ENGROSSED HOUSE BILL 2870**

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

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

4 “279C.560. (1)(a) [*Unless a contracting agency that reserves an amount as*
5 *retainage under ORS 279C.570 (7) finds in writing that accepting a bond or*
6 *instrument described in paragraph (a) or (b) of this subsection poses an ex-*
7 *traordinary risk that is not typically associated with the bond or instrument,*
8 *the]* **A contractor may submit and a contracting agency shall accept**
9 **from a contractor** in lieu of withholding moneys [*from payment shall accept*
10 *from a contractor]* **for all or a portion of the retainage required under a**
11 **public contract:**

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

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

17 **“(b) A surety bond that a contractor submits under this section**
18 **must be executed by a surety bonding company that is authorized to**
19 **transact surety business in this state and may not be a surety obli-**
20 **gation of an individual.**

21 “(2) A contracting agency that holds moneys as retainage under ORS

1 279C.570 (7) shall:

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

4 “(b) At the election of the contractor, pay the moneys to the contractor
5 in accordance with subsection (4) or (5) of this section and in a manner au-
6 thorized by the Director of the Oregon Department of Administrative Ser-
7 vices.

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

14 “(4) [*The*] **A** contractor may deposit bonds, securities or other instruments
15 with [*the*] **a** contracting agency or in a bank or [*trust company*] **other fi-**
16 **nancial institution** for the contracting agency to hold for the contracting
17 agency’s benefit in lieu of moneys held as retainage. If [*the contracting*
18 *agency accepts*] **a contractor or subcontractor submits** bonds, securities
19 or other instruments [*deposited*] as provided in this subsection, the con-
20 tracting agency shall reduce the moneys held as retainage in an amount
21 equal to the value of the bonds, securities and other instruments and pay the
22 amount of the reduction to the contractor in accordance with ORS 279C.570.
23 Interest or earnings on the bonds, securities or other instruments shall ac-
24 crue to the contractor.

25 “(5) If the contractor elects, the contracting agency shall deposit the
26 retainage as accumulated in an interest-bearing account in a bank[, *savings*
27 *bank, trust company or savings association*] **or other financial institution**
28 for the benefit of the contracting agency. [*When*] **If** the contracting agency
29 is a state contracting agency, the account must be established through the
30 State Treasurer. Earnings on the account accrue to the contractor.

1 “(6) Bonds, securities and other instruments deposited or acquired in lieu
2 of retainage, as permitted by this section, must be of a character approved
3 by the Director of the Oregon Department of Administrative Services, in-
4 cluding but not limited to:

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

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

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

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

10 “(e) General obligation bonds of the State of Oregon or a political subdi-
11 vision of the State of Oregon.

12 “(f) Irrevocable letters of credit issued by an insured institution, as de-
13 fined in ORS 706.008.

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

30 “(8)(a) **When a contracting agency accepts a surety bond in lieu of**

1 retainage from a contractor under this section, the contractor shall
2 accept surety bonds from subcontractors or suppliers from which the
3 contractor has withheld retainage. At any time before final payment
4 on a public improvement contract, a subcontractor may request the
5 contractor on the public improvement contract to submit a surety
6 bond to the contracting agency for the portion of the contractor's
7 retainage that pertains to the subcontractor. The surety bond must
8 meet the requirements set forth in subsection (1)(b) of this section. If
9 a contractor at the subcontractor's request obtains a surety bond un-
10 der this paragraph, the contractor may withhold from payments to the
11 subcontractor an amount equivalent to the portion of the surety bond
12 premium for which the subcontractor is responsible.

13 “(b) Within 30 days after a subcontractor's request under paragraph
14 (a) of this subsection, the contractor shall provide, and the contracting
15 agency shall accept, a surety bond that meets the requirements set
16 forth in subsection (1)(b) of this section unless:

17 “(A) The contracting agency finds good cause in writing for not
18 accepting the surety bond;

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

20 “(C) The subcontractor refuses to pay to the contractor the
21 subcontractor's portion of the surety bond premium or refuses to
22 provide the contractor with a surety bond that meets the requirements
23 of subsection (1)(b) of this section.

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

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

1 **amount the contractor submitted as a surety bond.**

2 **“(e) A contractor must within 30 days after receiving a surety bond**
3 **from a subcontractor or supplier release to the subcontractor or sup-**
4 **plier the amount the contractor holds as retainage that is equivalent**
5 **to the amount the subcontractor or supplier submitted as the surety**
6 **bond.**

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

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

10 **“279C.570. (1) [It is] The policy of the State of Oregon is that all payments**
11 **due on a public improvement contract and owed by a contracting agency**
12 **[shall] must be paid promptly. No contracting agency is exempt from the**
13 **provisions of this section.**

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

1 *on the retainage amount accrues from the date the payment request is approved*
2 *until the date the retainage is paid to the contractor to which it is due.]*

3 “(3) Interest shall be paid automatically when payments become overdue.
4 The contracting agency shall document, calculate and pay any interest due
5 when payment is made on the principal. Interest payments shall accompany
6 payment of net due on public improvement contracts. The contracting agency
7 may not require the contractor to petition, invoice, bill or wait additional
8 days to receive interest due.

9 “(4) [*When*] **If** an invoice is filled out incorrectly, [*when*] **if** there is any
10 defect or impropriety in any submitted invoice or [*when*] **if** there is a good
11 faith dispute, the contracting agency shall so notify the contractor within
12 15 days stating the reason or reasons the invoice is defective or improper
13 or the reasons for the dispute. A defective or improper invoice, if corrected
14 by the contractor within seven days of being notified by the contracting
15 agency, may not cause a payment to be made later than specified in this
16 section unless interest is also paid.

17 “(5) If requested in writing by a first-tier subcontractor, the contractor,
18 within 10 days after receiving the request, shall send to the first-tier sub-
19 contractor a copy of that portion of any invoice, request for payment sub-
20 mitted to the contracting agency or pay document provided by the
21 contracting agency to the contractor specifically related to any labor or
22 materials supplied by the first-tier subcontractor.

23 “(6) Payment of interest may be postponed when payment on the principal
24 is delayed because of disagreement between the contracting agency and the
25 contractor. Whenever a contractor brings formal administrative or judicial
26 action to collect interest due under this section, the prevailing party is en-
27 titled to costs and reasonable attorney fees.

28 “(7) A contracting agency may reserve as retainage from any progress
29 payment on a public improvement contract an amount not to exceed five
30 percent of the payment. As work progresses, a contracting agency may re-

1 duce the amount of the retainage and the contracting agency may eliminate
2 retainage on any remaining monthly contract payments after 50 percent of
3 the work under the contract is completed if, in the contracting agency's
4 opinion, such work is progressing satisfactorily. Elimination or reduction of
5 retainage shall be allowed only upon written application by the contractor,
6 and the application shall include written approval of the contractor's surety.
7 However, when the contract work is 97.5 percent completed the contracting
8 agency may, at the contracting agency's discretion and without application
9 by the contractor, reduce the retained amount to 100 percent of the value
10 of the contract work remaining to be done. Upon receipt of a written appli-
11 cation by the contractor, the contracting agency shall respond in writing
12 within a reasonable time.

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

27 “(9)(a) The contracting agency shall pay, upon settlement or judgment in
28 favor of the contractor regarding any dispute as to the compensation due a
29 contractor for work performed under the terms of a public improvement
30 contract, the amount due plus interest at the rate of two times the discount

1 rate, but not to exceed 30 percent, on 90-day commercial paper in effect at
2 the Federal Reserve Bank in the Federal Reserve district that includes
3 Oregon on the date of the settlement or judgment, and accruing from the
4 later of:

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

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

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

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

13 “701.420. (1) Partial payment is allowed and may be made on contracts for
14 construction and home improvement. An owner, contractor or subcontractor
15 may withhold as retainage an amount equal to not more than five percent
16 of the contract price of the work completed. Partial payment allowed under
17 this subsection is not acceptance or approval of some of the work or a waiver
18 of defects in the work.

19 “[~~(2)(a)~~] **(2)** The owner, contractor or subcontractor shall pay interest at
20 the rate of one percent per month on the final payment due the contractor
21 or subcontractor. The interest shall commence 30 days after the contractor
22 or subcontractor has completed and the owner has accepted the work under
23 the contract for construction for which the final payment is due. The interest
24 shall run until the date when final payment is tendered to the contractor or
25 subcontractor. When the contractor or subcontractor considers the work that
26 the contractor or subcontractor is contracted to perform to be complete, the
27 contractor or subcontractor shall notify the party to whom the contractor
28 or subcontractor is responsible for performing the construction work under
29 the contract. The party shall, within 15 days after receiving the notice, ei-
30 ther accept the work or notify the contractor or subcontractor of work yet

1 to be performed under the contract. If the party does not accept the work
2 or does not notify the contractor or subcontractor of work yet to be per-
3 formed within the time allowed, the interest required under this subsection
4 shall commence 30 days after the end of the 15-day period.

5 *“(b) If the contract price exceeds \$500,000, the owner, contractor or sub-
6 contractor shall place amounts withheld as retainage into an interest-bearing
7 escrow account. Interest on the retainage amount accrues from the date the
8 payment request is approved until the date the retainage is paid to the con-
9 tractor or subcontractor to which it is due.]”*

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

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

22 *“701.435. [(1) When a contractor on a public contract deposits bonds, secu-
23 rities or other instruments under ORS 279C.560 (4), if the subcontract price
24 exceeds \$50,000 and constitutes more than 10 percent of the cost of the public
25 contract, a subcontractor on the public contract may deposit bonds, securities
26 or other instruments with the contractor or in a bank or trust company for the
27 contractor to hold for the contractor’s benefit in lieu of moneys held as
28 retainage. If the contractor accepts the bonds, securities or other instruments
29 deposited as provided in this subsection, the contractor shall reduce the moneys
30 held as retainage in an amount equal to the value of the bonds, securities and*

1 *other instruments and pay the amount of the reduction to the subcontractor in*
2 *accordance with ORS 701.420 and 701.430. Interest or earnings on the bonds,*
3 *securities or other instruments shall accrue to the subcontractor.]*

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

9 **“(b) When an owner accepts a surety bond in lieu of retainage from**
10 **a contractor under this section, the contractor shall accept surety**
11 **bonds from subcontractors or suppliers from which the contractor has**
12 **withheld retainage. At any time before final payment for work on a**
13 **large commercial structure or under a public improvement contract,**
14 **a subcontractor may request the contractor on the large commercial**
15 **structure or under the public improvement contract to submit a surety**
16 **bond to the project owner and lender for the portion of the**
17 **contractor’s retainage that pertains to the subcontractor. The surety**
18 **bond must be from a surety bonding company that is authorized to**
19 **transact business this state and may not be a surety obligation of an**
20 **individual. The surety bond must be in substantially the form speci-**
21 **fied in subsection (4) of this section. If a contractor at the**
22 **subcontractor’s request obtains a surety bond under this paragraph,**
23 **the contractor may withhold from payments to the subcontractor an**
24 **amount equivalent to the portion of the surety bond premium for**
25 **which the subcontractor is responsible.**

26 **“(c) Within 30 days after a subcontractor’s request under paragraph**
27 **(b) of this subsection, the contractor shall provide and the owner and**
28 **lender shall accept a surety bond that meets the requirements set**
29 **forth in this subsection unless:**

30 **“(A) The surety bond is not commercially available; or**

1 **“(B) The subcontractor refuses to pay to the contractor the**
2 **subcontractor’s portion of the surety bond premium or refuses to**
3 **provide the contractor with a surety bond that meets the requirements**
4 **of this subsection.**

5 **“(d) A surety bond the contractor submits under this subsection,**
6 **and any proceeds from the surety bond, are subject to all claims and**
7 **liens and in the same manner and priority specified for retainage un-**
8 **der this section and ORS 279C.550 to 279C.570, 701.410, 701.420, 701.430**
9 **and 701.440.**

10 **“(e) An owner and any lender shall within 30 days after receiving**
11 **a surety bond under this subsection release to the contractor an**
12 **amount the owner or lender holds as retainage that is equivalent to**
13 **the amount the contractor submitted as a surety bond.**

14 **“(f) The contractor must within 30 days after receiving a surety**
15 **bond from a subcontractor or supplier reduce the amount the con-**
16 **tractor holds as retainage in an amount equivalent to the amount the**
17 **subcontractor or supplier submitted as a surety bond and shall pay the**
18 **amount of the reduction to the subcontractor or supplier in accord-**
19 **ance with ORS 701.420 and 701.430.**

20 **“(2) [When a contractor on a public contract elects to have the public con-**
21 **tracting agency deposit the accumulated retainage in an interest-bearing ac-**
22 **count under ORS 279C.560 (5),] If a contractor or a subcontractor**
23 **performing work on a large commercial structure or under a public**
24 **improvement contract does not deposit a surety bond in lieu of**
25 **retainage, the contractor may elect to have the project owner or con-**
26 **tracting agency deposit accumulated retainage in an interest-bearing**
27 **account with a bank or other financial institution or pay interest on**
28 **the accumulated retainage at the rate of two percent plus the discount**
29 **rate on 90-day commercial paper that is in effect at the Federal Re-**
30 **serve Bank in the Federal Reserve district that includes this state on**

1 **the date that the retainage is paid. Subject to subsection (3) of this**
2 **section, if the contractor elects to have accumulated retainage pay**
3 **interest,** the contractor, within 30 days following payment of the final
4 amount due for construction of the **project or** public improvement, shall pay
5 to each subcontractor [*who*] **that** performed work on the construction the
6 subcontractor's proportional share of the interest earnings that accrued to
7 the contractor as a result of the election. A subcontractor's share of the total
8 amount of interest earnings under this subsection [*shall*] **must** be determined
9 by the proportion that the amount of retainage withheld from the subcon-
10 tractor bears to the amount of retainage withheld from the contractor and
11 the length of time the retainage was withheld from the subcontractor. A
12 share of the interest earnings shall be paid to a subcontractor under this
13 subsection only when:

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

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

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

23 “[*(4) Bonds, securities and other instruments deposited or acquired in lieu*
24 *of retainage, as permitted by this section, must be of a character approved by*
25 *the Director of the Oregon Department of Administrative Services, including*
26 *but not limited to:*]

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

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

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

1 *government.]*

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

3 *“[(e) General obligation bonds of the State of Oregon or a political subdi-*
4 *vision of the State of Oregon.]*

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

7 **“(4) A surety bond under this section and ORS 279C.560 must be in**
8 **substantially the following form:**

9 “ _____

10 **RETAINAGE SURETY BOND**

11
12 **KNOW ALL BY THESE PRESENTS: That _____, a**
13 **_____ authorized to do business in the State of Oregon, as**
14 **Principal, and _____, a corporation organized and existing**
15 **under the laws of the State of _____ and authorized to**
16 **transact the business of surety in the State of Oregon, as Surety, are**
17 **jointly and severally held and bound to _____ (“Obligee”)**
18 **and _____ (“Owner”), and their lenders, heirs, executors,**
19 **administrators, successors and assigns in the penal sum of**
20 **\$_____, plus _____ % (not more than five percent) of any**
21 **increases in the contract amount that may occur because of change**
22 **orders or increases in the quantities of or that addition of any new**
23 **item of work.**

24
25 **WHEREAS the Principal has executed a contract**
26 **for _____ with the Obligee; and**

27
28 **WHEREAS Oregon law allows the Obligee to withhold from the**
29 **Principal the sum of five percent from moneys the Principal earns on**
30 **estimates during the progress of the work (“Earned Retained**

1 Funds”); and

2

3 WHEREAS the Principal has requested that the Obligee or Owner
4 accept a surety bond in lieu of Earned Retained Funds as allowed un-
5 der ORS 279C.560 or 701.435;

6

7 NOW, THEREFORE, this obligation is such that the Surety and the
8 Surety’s successors and assigns are held and bound to Obligee, Owner
9 and any lender, and to all beneficiaries for the sum set forth in the
10 first paragraph of this retainage surety bond. This surety bond and
11 any proceeds from this surety bond are subject to all claims and liens
12 by the Obligee against the Principal in the same manner and priority
13 as specified for retainage under ORS 279C.550 to 279C.570, 701.410,
14 701.420, 701.430, 701.435 and 701.440, as applicable. The condition of this
15 obligation is such that if the Principal satisfies all payment obligations
16 to any Obligee that may lawfully claim against project sums due to the
17 Principal and indemnify and hold the Obligee harmless from any and
18 all loss, costs and damages that the Obligee may sustain by release
19 of the retainage to the Principal or Surety, this obligation is null and
20 void if the Obligee notifies the Surety that the Obligee released the
21 obligation. The obligation otherwise remains in full force and effect.

22

23 IT IS HEREBY DECLARED AND AGREED that the Surety is liable
24 under this obligation in the same manner and to the same extent as
25 is Principal. The Surety will not be discharged or released from li-
26 ability for any act, omission or defense of any kind or nature that
27 would not also discharge the Principal.

28

29 IT IS HEREBY FURTHER DECLARED AND AGREED that this
30 obligation is binding upon and inures to the benefit of the Principal,

1 **the Surety, the Obligee, the Owner, the lender and the beneficiaries**
2 **of this obligation and their respective heirs, executors, administrators,**
3 **successors and assigns.**

4

5 **SIGNED AND SEALED this _____ day of _____, 20____**

6

7 **Principal _____ Surety _____**

8 **Name _____ Name _____**

9 **Title _____ Title _____**

10 **Address _____ Address _____**

11 **City/State/Zip _____ City/State/Zip _____**

12 **Phone _____ Phone _____**

13 “ _____ ”.

14 On page 8, delete lines 1 through 34.

15 _____