House Bill 4034

Introduced and printed pursuant to House Rule 12.00. Presession filed (at the request of House Interim Committee on Business and Labor)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Changes applicable rate of interest for contractor's failure to make timely payment in accordance with public improvement contract to nine percent per annum.

Requires public improvement contract to obligate contractor to provide first-tier subcontractor with standard form for claiming payment and to use same form and regular administrative procedures to process payments during entire term of public improvement contract. Permits contractor to change form or administrative procedure if contractor notifies subcontractor of new or changed form or procedure and includes in notice new or changed form or description of new or changed procedure.

Becomes operative 91 days after effective date of Act.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to prompt progress payments on public improvement contracts; creating new provisions; amending ORS 279C.515 and 279C.580; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 279C.515 is amended to read:

279C.515. (1) Every public improvement contract [*shall*] **must** contain a clause or condition that, if the contractor fails, neglects or refuses to [*make prompt payment of any*] **pay promptly a person's** claim for labor or services [*furnished*] **that the person provides** 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*] **that represents** the state or a county, school district, municipality[,] **or** municipal corporation or **a** subdivision [*thereof, as the case may be,*] **of the state, county, school district, municipality or municipal corporation** may pay [*such*] **the amount of the** claim to the person [*furnishing*] **that provides** 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*] **must** contain a clause or condition that, if the contractor or a first-tier subcontractor fails, neglects or refuses to [*make payment to*] **pay** a person [*furnishing*] **that provides** labor or materials in connection with the public improvement contract within 30 days after [*receipt of*] **receiving** payment from the contracting agency or a contractor, the contractor or first-tier subcontractor [*shall owe*] **owes** the person the amount due plus interest charges [*commencing*] **that begin** at the end of the 10-day period [*that*] **within which** payment is due under ORS 279C.580 (4) and [*ending*] **that end** 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.*] **on the amount due is nine**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

percent per annum. The amount of interest may not be waived.

(3) Every public improvement contract and every contract related to the public improvement contract [*shall*] **must** contain a clause or condition that, if the contractor or a subcontractor fails, neglects or refuses to [*make payment to*] **pay** a person [*furnishing*] **that provides** 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*] **Paying** 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*] **an** unpaid [*claims*] **claim**.

SECTION 2. ORS 279C.580 is amended to read:

279C.580. (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*] **must** include a clause that requires the contractor to include in each subcontract for property or services [*entered*] **the contractor enters** into [*by the contractor and*] **with** 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*] **the** subcontract within 10 days out of [*such*] amounts [*as are paid*] **the contracting agency pays** to the contractor [*by the contracting agency*] under the **public improvement** contract[*; and*]**.**

(b) A clause that requires the contractor to provide a first-tier subcontractor with a standard form that the first-tier subcontractor may use as an application for payment or as another method by which the subcontractor may claim a payment due from the contractor.

(c) A clause that requires the contractor, except as otherwise provided in this paragraph, to use the same form and regular administrative procedures for processing payments during the entire term of the subcontract. A contractor may change the form or the regular administrative procedures the contractor uses for processing payments if the contractor:

(A) Notifies the subcontractor in writing at least 45 days before the date on which the contractor makes the change; and

(B) Includes with the written notice a copy of the new or changed form or a description of the new or changed procedure.

[*(b)*] **(d)** An interest penalty clause that obligates the contractor, if [*payment is not made*] **the contractor does not pay the first-tier subcontractor** within 30 days after [*receipt of*] **receiving** 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*] **the contractor does not make** in accordance with the payment clause included in the subcontract under paragraph (a) of this subsection. A con-

tractor or first-tier subcontractor [*may not be*] **is not** 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*] **Applies to** the period [*beginning*] **that begins** on the day after the required payment date and [*ending*] **that ends** on the date on which [*payment of*] the amount due is [*made*] **paid**; and

(B) **Is** computed at the rate specified in ORS 279C.515 (2).

(4) [*The*] **A public improvement** contract [*awarded by*] **that** the contracting agency **awards** shall [*require*] **obligate** the contractor [*to include*]**,** in each of the contractor's subcontracts, [*for the purpose of performance of such contract condition, a provision requiring*] **to require** the first-tier subcontractor to include a payment clause and an interest penalty clause [*conforming*] **that conforms** 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*] **the first-tier subcontractors'** 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*] **do not** 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 **agree upon**, 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*] **that conforms** 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 **issues** 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*] **applying** to a contracting agency for payment under a **public improvement** contract but before [*making a payment to*] **paying** a subcontractor for the subcontractor's performance covered by [*such*] **the** application, a contractor discovers that all or a portion of the payment otherwise due the subcontractor is subject to withholding from the subcon-

tractor 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*] **after** ascertaining the cause [*giving rise to a*] **for the** withholding, but [*prior to*] **before** the due date for [*subcontractor*] payment **to the subcontractor**;

(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 **to the subcontractor** 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*] **for the payment** 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*] **the** 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*] **on which the** 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*] **receiving** 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*] **paying** a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor a written notice asserting a deficiency in [*such*] **the** first-tier subcontractor's performance under the **public improvement** contract for which the contractor may be ultimately liable and the contractor determines that all or a portion of future payments otherwise due [*such*] **the** 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*] **that conforms** to the standards of subsection (8) of this section as soon as practicable [*upon*] **after** making [*such*] **the** 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*] **receiving** satisfactory written [*notification*] **notice** 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*] **the** first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to [*such*] **the** first-tier subcontractor computed at the rate specified in ORS 279C.570.

(8) A written notice of any withholding [*shall*] **must** be issued to a subcontractor, with a copy

to the contracting agency [*of any such notice issued by a contractor, specifying*]**, that specifies**:

(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 **must take** 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 **a contractor's** late payment or nonpayment [*by a contractor*] or **a subcontractor's** 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*] **a** late payment interest penalty. A cost reimbursement claim may not include any amount for reimbursement of [*such*] **a** late payment interest penalty.

SECTION 3. The amendments to ORS 279C.515 and 279C.580 by sections 1 and 2 of this 2012 Act apply to a public improvement contract that a contracting agency first advertises or otherwise solicits on or after the operative date specified in section 4 of this 2012 Act or, if the contracting agency does not advertise or solicit the public improvement contract, to a public improvement contract that the contracting agency enters into on or after the operative date specified in section 4 of this 2012 Act.

SECTION 4. (1) The amendments to ORS 279C.515 and 279C.580 by sections 1 and 2 of this 2012 Act become operative 91 days after the effective date of this 2012 Act.

(2) The Director of the Oregon Department of Administrative Services, the Attorney General or a contracting agency that adopts rules under ORS 279A.065 may take any action before the operative date specified in subsection (1) of this section that is necessary to enable the director, the Attorney General or the contracting agency to exercise, on and after the operative date specified in subsection (1) of this section, all of the duties, functions and powers conferred on the director, the Attorney General or the contracting agency by the amendments to ORS 279C.515 and 279C.580 by sections 1 and 2 of this 2012 Act.

SECTION 5. This 2012 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2012 Act takes effect on its passage.