

Enrolled
House Bill 2955

Sponsored by COMMITTEE ON BUSINESS AND LABOR

CHAPTER

AN ACT

Relating to retainage in connection with public improvement contracts; creating new provisions; and amending ORS 279C.560 and 701.435.

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

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

279C.560. *[(1) Moneys retained by a contracting agency under ORS 279C.570 (7) shall be:]*

(1) Unless a contracting agency that reserves an amount as retainage under ORS 279C.570 (7) finds in writing that accepting a bond or instrument described in paragraph (a) or (b) of this subsection poses an extraordinary risk that is not typically associated with the bond or instrument, the contracting agency in lieu of withholding moneys from payment shall accept from a contractor:

(a) Bonds, securities or other instruments of a character described in subsection (6) of this section that are deposited as provided in subsection (4) of this section; or

(b) A surety bond deposited as provided in subsection (7) of this section.

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

(a) [Retained] Hold the moneys in a fund [by the contracting agency and paid] and pay the moneys to the contractor in accordance with ORS 279C.570; or

(b) At the [option] election of the contractor, [paid] pay the moneys to the contractor in accordance with subsection [(3) or (4)] (4) or (5) of this section and in a manner authorized by the Director of the Oregon Department of Administrative Services.

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

[(3)] (4) The contractor may deposit bonds, [or] securities or other instruments with the contracting agency or in [any] a bank or trust company for the contracting agency to hold for the contracting agency's benefit [to be held] in lieu of [the cash] moneys held as retainage. [for the benefit of the contracting agency. In such event] If the contracting agency accepts bonds, securities or other instruments deposited as provided in this subsection, the contracting agency shall reduce the moneys held as retainage in an amount equal to the value of the bonds, [and] securities and other instruments and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Interest or earnings on the bonds, [or] securities or other instruments shall accrue to the contractor.

[(4)] (5) If the contractor elects, the **contracting agency shall deposit the** retainage as accumulated [*shall be deposited by the contracting agency*] in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the contracting agency. When the contracting agency is a state contracting agency, the account [*shall*] **must** be established through the State Treasurer. Earnings on the account [*shall*] accrue to the contractor.

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

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

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

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

(d) Indebtedness of the Federal National Mortgage Association.

(e) **General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.**

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

[(6)] (7) The contractor, with the approval of the contracting agency, may deposit a surety bond for all or any portion of the amount of funds retained, or to be retained, by the contracting agency in a form acceptable to the contracting agency. The bond and any proceeds **of the bond must** [*therefrom shall*] be made subject to all claims and liens and in the same manner and priority as set forth for retainage under ORS 279C.550 to 279C.570 and 279C.600 to 279C.625. The contracting agency shall reduce the **moneys the contracting agency holds as** retainage in an amount equal to the value of the bond and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Whenever a contracting agency accepts a surety bond from a contractor in lieu of retainage, the contractor shall accept like bonds from [*any*] a subcontractor or supplier from which the contractor has retainage. The contractor shall then reduce the **moneys the contractor holds as** retainage in an amount equal to the value of the bond and pay the amount of the reduction to the subcontractor or supplier.

SECTION 2. ORS 701.435 is amended to read:

701.435. (1) When a contractor on a public contract deposits bonds, [*or*] securities **or other instruments** under ORS 279C.560 [(3)] (4), if the subcontract price exceeds \$50,000 and constitutes more than 10 percent of the cost of the public contract, a subcontractor on the public contract may deposit bonds, [*or*] securities **or other instruments** with the contractor or in [*any*] a bank or trust company **for the contractor to hold for the contractor's benefit** [*to be held*] in lieu of [*cash*] **moneys held as** retainage [*for the benefit of the contractor*]. [*In such event*] **If the contractor accepts the bonds, securities or other instruments deposited as provided in this subsection,** the contractor shall reduce the **moneys held as** retainage in an amount equal to the value of the bonds, [*and*] securities **and other instruments** and pay the amount of the reduction to the subcontractor in accordance with ORS 701.420 and 701.430. Interest **or earnings** on [*such*] **the** bonds, [*or*] securities **or other instruments** shall accrue to the subcontractor.

(2) When a contractor on a public contract elects to have the public contracting agency deposit the accumulated retainage in an interest-bearing account under ORS 279C.560 [(4)] (5), the contractor, within 30 days following payment of the final amount due for construction of the public improvement, shall pay to each subcontractor who performed work on the construction the subcontractor's proportional share of the interest earnings that accrued to the contractor as a result of [*that*] **the** election. A subcontractor's share of the total amount of interest earnings under this subsection shall be determined by the proportion [*which*] **that** the amount of retainage withheld from the subcontractor bears to the amount of retainage withheld from the contractor and the length of time the retainage was withheld from the subcontractor. A share of the interest earnings shall be paid to a subcontractor under this subsection only when:

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

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

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

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

- (a) Bills, certificates, notes or bonds of the United States.
- (b) Other obligations of the United States or *[its]* agencies **of the United States**.
- (c) Obligations of *[any]* a corporation wholly owned by the federal government.
- (d) Indebtedness of the Federal National Mortgage Association.

(e) **General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.**

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

SECTION 3. The amendments to ORS 279C.560 and 701.435 by sections 1 and 2 of this 2009 Act apply to contracts first advertised or otherwise solicited or, if not advertised or solicited, first entered into on or after the effective date of this 2009 Act.

Passed by House May 6, 2009

Received by Governor:

Repassed by House June 4, 2009

.....M.,....., 2009

Approved:

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Chief Clerk of House

.....M.,....., 2009

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Speaker of House

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Governor

Passed by Senate June 2, 2009

Filed in Office of Secretary of State:

.....M.,....., 2009

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President of Senate

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Secretary of State