

House Bill 2619

Sponsored by Representative SCHAUFLER (Presession filed.)

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**.

Permits contracting agency to consider bidder's record of relations with subcontractors in evaluating bidder's responsibility for purposes of awarding public contract.

Permits contracting agency or Construction Contractors Board to disqualify person from consideration for award of contracting agency's contracts if person violates provisions of law regulating conduct between contractor and subcontractor.

Requires contractor to provide and use specific form and administrative procedures for processing payments due to subcontractors and prohibits contractor from delaying, withholding or denying payment on basis of change in form or administrative procedures.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to obligations between contractors on public contracts; creating new provisions; amending
3 ORS 279C.375, 279C.440 and 279C.580; and declaring an emergency.

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

5 **SECTION 1.** ORS 279C.375 is amended to read:

6 279C.375. (1) After a contracting agency has opened bids and determined that the contracting
7 agency will award a public improvement contract, the contracting agency shall award the contract
8 to the lowest responsible bidder.

9 (2) At least seven days before awarding a public improvement contract, unless the contracting
10 agency determines that seven days is impractical under rules adopted under ORS 279A.065, the
11 contracting agency shall issue to each bidder or post, electronically or otherwise, a notice of the
12 contracting agency's intent to award a contract. This subsection does not apply to a contract to
13 which competitive bidding does not apply under ORS 279C.335 (1)(c) or (d). The notice and the
14 manner in which the **contracting agency posts or issues the** notice [*is posted or issued*] must
15 conform to rules adopted under ORS 279A.065.

16 (3) In determining the lowest responsible bidder, a contracting agency shall do all of the fol-
17 lowing:

18 (a) Check the list created by the Construction Contractors Board under ORS 701.227 for bidders
19 who are not qualified to hold a public improvement contract.

20 (b) Determine whether the bidder is responsible. A responsible bidder must demonstrate to the
21 contracting agency that the bidder:

22 (A) Has available the appropriate financial, material, equipment, facility and personnel resources
23 and expertise, or has the ability to obtain the resources and expertise, necessary to meet all con-
24 tractual responsibilities.

25 (B) Holds current licenses that businesses or service professionals operating in this state must
26 hold in order to undertake or perform the work specified in the contract.

27 (C) Is covered by liability insurance and other insurance in amounts the contracting agency

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.

1 requires in the solicitation documents.

2 (D) Qualifies as a carrier-insured employer or a self-insured employer under ORS 656.407 or has
3 elected coverage under ORS 656.128.

4 (E) Has made the disclosure required under ORS 279C.370.

5 (F) Completed previous contracts of a similar nature with a satisfactory record of performance.
6 For purposes of this subparagraph, a satisfactory record of performance means that to the extent
7 that the costs associated with and time available to perform a previous contract remained within
8 the bidder's control, the bidder stayed within the time and budget allotted for the procurement and
9 otherwise performed the contract in a satisfactory manner. The contracting agency shall document
10 the bidder's record of performance if the contracting agency finds under this subparagraph that the
11 bidder is not responsible.

12 (G) Has a satisfactory record of integrity. The contracting agency in evaluating the bidder's
13 record of integrity may consider, among other things, whether the bidder has previous criminal
14 convictions for offenses related to obtaining or attempting to obtain a contract or subcontract or in
15 connection with the bidder's performance of a contract or subcontract **and whether the bidder in**
16 **previous public contracts complied with the provisions of ORS 279C.580 and otherwise had a**
17 **satisfactory record of relations with the bidder's previous subcontractors.** The contracting
18 agency shall document the bidder's record of integrity if the contracting agency finds under this
19 subparagraph that the bidder is not responsible.

20 (H) Is legally qualified to contract with the contracting agency.

21 (I) Supplied all necessary information in connection with the inquiry concerning responsibility.
22 If a bidder fails to promptly supply information concerning responsibility that the contracting
23 agency requests, the contracting agency shall determine the bidder's responsibility based on avail-
24 able information, or may find that the bidder is not responsible.

25 (c) Document the contracting agency's compliance with the requirements of paragraphs (a) and
26 (b) of this subsection in substantially the following form:

27 _____

28
29 RESPONSIBILITY DETERMINATION FORM

30
31 Project Name: _____

32 Bid Number: _____

33 Business Entity Name: _____

34 CCB License Number: _____

35 Form Submitted By (Contracting Agency): _____

36 Form Submitted By (Contracting Agency Representative's Name): _____

37 Title: _____

38 Date: _____

39 (The contracting agency must submit this form with attachments, if any, to the Construction
40 Contractors Board within 30 days after the date of contract award.)

41 The contracting agency has (check all of the following):

- 42 [] Checked the list created by the
43 Construction Contractors Board
44 under ORS 701.227 for bidders who
45 are not qualified to hold a public

- 1 improvement contract.
- 2 Determined whether the bidder has
- 3 met the standards of responsibility.
- 4 In so doing, the contracting agency
- 5 has found that the bidder
- 6 demonstrated that the bidder:
 - 7 Has available the appropriate
 - 8 financial, material, equipment,
 - 9 facility and personnel resources
 - 10 and expertise, or the ability to
 - 11 obtain the resources and
 - 12 expertise, necessary to meet
 - 13 all contractual responsibilities.
 - 14 Holds current licenses that
 - 15 businesses or service professionals
 - 16 operating in this state must hold
 - 17 in order to undertake or perform
 - 18 the work specified in the contract.
 - 19 Is covered by liability insurance
 - 20 and other insurance in amounts
 - 21 required in the solicitation
 - 22 documents.
 - 23 Qualifies as a carrier-insured
 - 24 employer or a self-insured
 - 25 employer under ORS 656.407 or has
 - 26 elected coverage under ORS 656.128.
 - 27 Has disclosed the bidder's first-
 - 28 tier subcontractors in accordance
 - 29 with ORS 279C.370.
 - 30 Has a satisfactory record of
 - 31 performance.
 - 32 Has a satisfactory record of
 - 33 integrity.
 - 34 Is legally qualified to contract
 - 35 with the contracting agency.
 - 36 Has supplied all necessary
 - 37 information in connection with
 - 38 the inquiry concerning
 - 39 responsibility.
- 40 Determined the bidder to be
- 41 (check one of the following):
 - 42 Responsible under ORS 279C.375
 - 43 (3)(a) and (b).
 - 44 Not responsible under
 - 45 ORS 279C.375 (3)(a) and (b).

1 (Attach documentation if the contracting agency finds the bidder not to be responsible.)
 2
 3

4 (d) Submit the form described in paragraph (c) of this subsection, with any attachments, to the
 5 Construction Contractors Board within 30 days after the date the contracting agency awards the
 6 contract.

7 (4) The successful bidder shall:

8 (a) Promptly execute a formal contract; and

9 (b) Execute and deliver to the contracting agency a performance bond and a payment bond when
 10 required under ORS 279C.380.

11 (5) *[Based on competitive bids,]* A contracting agency, **on the basis of competitive bids**, may
 12 award a public improvement contract or may award multiple public improvement contracts when
 13 specified in the invitation to bid.

14 (6) A contracting agency may not exclude a commercial contractor from competing for a public
 15 contract on the basis that the license issued by the Construction Contractors Board is endorsed as
 16 a level 1 or level 2 license. As used in this section, “commercial contractor” has the meaning given
 17 that term in ORS 701.005.

18 **SECTION 2.** ORS 279C.440 is amended to read:

19 279C.440. (1)(a) A contracting agency may disqualify a person from consideration for award of
 20 the contracting agency’s contracts for the reasons listed in subsection (2) of this section after pro-
 21 viding the person with notice and a reasonable opportunity to be heard.

22 (b) In lieu of the disqualification process described in paragraph (a) of this subsection, a con-
 23 tracting agency contracting for a public improvement may petition the Construction Contractors
 24 Board to disqualify a person from consideration for award of the contracting agency’s public im-
 25 provement contracts for the reasons listed in subsection (2) of this section. The Construction Con-
 26 tractors Board shall provide the person with notice and a reasonable opportunity to be heard.

27 (c) A contracting agency or the Construction Contractors Board may not disqualify a person
 28 under this section for a period of more than three years.

29 (2) A person may be disqualified from consideration for award of a contracting agency’s con-
 30 tracts for any of the following reasons:

31 (a) The person *[has been]* **was** convicted of a criminal offense as an incident in obtaining or at-
 32 tempting to obtain a public or private contract or subcontract, or in the performance of such con-
 33 tract or subcontract.

34 (b) The person *[has been]* **was** convicted under state or federal statutes of embezzlement, theft,
 35 forgery, bribery, falsification or destruction of records, receiving stolen property or any other of-
 36 fense indicating a lack of business integrity or business honesty that currently, seriously and di-
 37 rectly affects the person’s responsibility as a contractor.

38 (c) The person *[has been]* **was** convicted under state or federal antitrust statutes.

39 (d) The person *[has committed a violation of]* **violated** a contract provision that *[is regarded by]*
 40 the contracting agency or the Construction Contractors Board *[to be]* **regards as** so serious as to
 41 justify disqualification. A violation may include but is not limited to a failure to perform the terms
 42 of a contract, *[or]* an unsatisfactory performance in accordance with the terms of the contract **or**
 43 **knowingly and repeatedly failing to pay the person’s subcontractors in accordance with the**
 44 **terms of a subcontract.** However, a failure to perform or an unsatisfactory performance caused
 45 by acts beyond the control of the contractor may not be considered to be a basis for disqualification.

1 (e) The person does not carry workers' compensation or unemployment insurance as required
 2 by statute.

3 **(f) The person violated the provisions of ORS 279C.580.**

4 (3) A contracting agency or the Construction Contractors Board shall issue a written decision
 5 to disqualify a person under this section. The decision shall:

6 (a) State the reasons for the action taken; and

7 (b) Inform the disqualified person of the appeal right of the person under:

8 (A) ORS 279C.445 and 279C.450 if the decision to disqualify was issued by a contracting agency;

9 or

10 (B) ORS chapter 183 if the decision to disqualify was issued by the Construction Contractors
 11 Board.

12 (4) A copy of the decision issued under subsection (3) of this section must be mailed or otherwise
 13 furnished immediately to the disqualified person.

14 **SECTION 3.** ORS 279C.580 is amended to read:

15 279C.580. (1) A contractor may not request payment from *[the]* a contracting agency of any
 16 amount withheld or retained in accordance with subsection (5) of this section until *[such time as]*
 17 the contractor has determined and certified to the contracting agency that the subcontractor has
 18 determined and certified to the contracting agency that the subcontractor is entitled to the payment
 19 of *[such]* **the** amount.

20 (2) A dispute between a contractor and a first-tier subcontractor relating to *[the amount or*
 21 *entitlement of a first-tier subcontractor to a payment or a late payment interest penalty under]* a clause
 22 included in the subcontract under subsection (3) or (4) of this section does not constitute a dispute
 23 to which the contracting agency is a party. The contracting agency may not be included as a party
 24 in *[any]* **an** administrative or judicial proceeding involving *[such a]* **the** dispute.

25 (3) *[Each public improvement contract awarded by]* A contracting agency shall include *[a clause]*
 26 **in each public improvement contract the contracting agency awards a clause** that requires the
 27 contractor to include in each subcontract for property or services **that the contractor enters into**
 28 **with** *[entered into by the contractor and]* a first-tier subcontractor, including a material supplier, for
 29 the purpose of performing a construction contract:

30 (a) A payment clause that obligates the contractor to pay the first-tier subcontractor for satis-
 31 factory performance under *[its]* **the** subcontract within 10 days out of *[such]* amounts *[as are paid*
 32 *to]* **that the contracting agency pays to** the contractor *[by the contracting agency]* under the con-
 33 tract; *[and]*

34 **(b) A clause under which the contractor:**

35 **(A) Must provide the first-tier subcontractor with a standard form the first-tier subcon-**
 36 **tractor may use as an invoice or other method with which to claim a payment due from the**
 37 **contractor;**

38 **(B) Must use the same form and regular administrative procedures for processing pay-**
 39 **ments during the entire term of the subcontract; and**

40 **(C) May not use changes in the form or the contractor's administrative procedures as a**
 41 **basis for delaying, withholding or denying a payment that is due; and**

42 *[(b)]* (c) An interest penalty clause that obligates the contractor, if **the contractor does not**
 43 **pay the first-tier subcontractor** *[payment is not made]* within 30 days after *[receipt of]* **the con-**
 44 **tractor receives** payment from the contracting agency, to pay to the first-tier subcontractor an
 45 interest penalty on amounts due *[in the case of]* **for** each payment *[not made]* **the contractor does**

1 **not make** in accordance with the payment clause included in the subcontract under paragraph (a)
 2 of this subsection. A contractor or first-tier subcontractor [*may not be*] **is not** obligated to pay an
 3 interest penalty if the only reason that the contractor or first-tier subcontractor did not make pay-
 4 ment when payment was due is that the contractor or first-tier subcontractor did not receive pay-
 5 ment from the contracting agency or contractor when payment was due. The interest penalty [*shall*
 6 *be*] **is:**

7 (A) For the period beginning on the day after the required payment date and ending on the date
 8 on which payment of the amount due is made; and

9 (B) Computed at the rate specified in ORS 279C.515 (2).

10 (4) [*The contract awarded by*] The contracting agency shall require **in a contract with a con-**
 11 **tractor that** the contractor [*to include in each of the contractor's subcontracts, for the purpose of*
 12 *performance of such contract condition, a provision requiring*] **in turn require in each subcontract**
 13 **with a first-tier subcontractor that:**

14 (a) The first-tier subcontractor [*to*] include [*a payment clause and an interest penalty clause con-*
 15 *forming*] **clauses that conform** to the standards of subsection (3) of this section in each of the
 16 first-tier subcontractor's subcontracts; and

17 (b) [*to require each of*] **That** the first-tier subcontractor's subcontractors [*to*] include [*such*]
 18 clauses **that conform to the standards of subsection (3) of this section** in [*their*] subcontracts
 19 with [*each*] lower-tier [*subcontractor or supplier*] **subcontractors or suppliers.**

20 (5)(a) The clauses required by subsections (3) and (4) of this section [*are not intended to*] **do not**
 21 impair the right of a contractor or a subcontractor at any tier to negotiate, and to include in the
 22 subcontract, provisions that **permit the contractor or the subcontractor to:**

23 (A) [*Permit the contractor or a subcontractor to*] Retain, in the event of a good faith dispute, an
 24 amount not to exceed 150 percent of the amount in dispute from the amount due a subcontractor
 25 under the subcontract without incurring [*any*] **an** obligation to pay a late payment interest penalty,
 26 in accordance with terms and conditions **in the subcontract to which the parties** agreed, [*to by*
 27 *the parties to the subcontract, giving such recognition as the parties consider appropriate to the ability*
 28 *of a subcontractor*] **recognizing as the parties consider appropriate the subcontractor's ability**
 29 to furnish a performance bond and a payment bond;

30 (B) [*Permit the contractor or subcontractor to make a determination*] **Determine** that part or all
 31 of the subcontractor's [*request for*] payment may be withheld in accordance with the subcontract
 32 [*agreement*]; and

33 (C) [*Permit such withholdings*] **Withhold the amount described in this paragraph** without in-
 34 curring [*any*] **an** obligation to pay a late payment interest penalty if:

35 (i) A notice conforming to the standards of subsection (8) of this section has been previously
 36 furnished to the subcontractor; and

37 (ii) A copy of any notice [*issued by*] **that** a contractor **issues** under sub-subparagraph (i) of this
 38 subparagraph has been furnished to the contracting agency.

39 (b) As used in this subsection, "good faith dispute" means a documented dispute concerning:

40 (A) Unsatisfactory job progress.

41 (B) Defective work not remedied.

42 (C) Third-party claims filed or reasonable evidence that claims will be filed.

43 (D) Failure to make timely payments for labor, equipment and materials.

44 (E) Damage to the [*prime*] contractor or a subcontractor.

45 (F) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the

1 subcontract *[sum]* **price**.

2 (6) If, after *[making application]* **applying** to a contracting agency for payment under a contract
 3 but before *[making a payment to]* **paying** a subcontractor for the subcontractor's performance cov-
 4 ered by *[such]* **the** application, a contractor discovers that all or a portion of the payment otherwise
 5 due the subcontractor is subject to withholding from the subcontractor in accordance with the
 6 subcontract *[agreement]*, the contractor shall:

7 (a) *[Furnish to]* **Give** the subcontractor a notice *[conforming]* **that conforms** to the standards
 8 of subsection (8) of this section as soon as practicable upon ascertaining the cause giving rise to a
 9 withholding, but *[prior to]* **before** the due date for subcontractor payment;

10 (b) *[Furnish to]* **Give** the contracting agency, as soon as practicable, a copy of the notice *[fur-*
 11 *nished]* **the contractor gave** to the subcontractor under paragraph (a) of this subsection;

12 (c) Reduce the subcontractor's progress payment by an amount not to exceed the amount spec-
 13 ified in the notice of withholding *[furnished]* **given** under paragraph (a) of this subsection;

14 (d) Pay the subcontractor as soon as practicable after the correction of the identified subcon-
 15 tract performance deficiency;

16 (e) Make *[such]* **the** payment **described in paragraph (d) of this subsection** within:

17 (A) Seven days after correction of the identified subcontract performance deficiency unless **the**
 18 **contractor must recover** the funds *[therefor must be recovered]* **necessary to pay the subcon-**
 19 **tractor** from the contracting agency because of a reduction under paragraph (f)(A) of this sub-
 20 section; or

21 (B) Seven days after the contractor recovers *[such]* **the** funds from the contracting agency;

22 (f) Notify the contracting agency upon:

23 (A) Reduction of the amount of any subsequent certified application for payment; or

24 (B) Payment to the subcontractor of any withheld amounts of a progress payment, specifying:

25 (i) The amounts of the progress payments withheld under paragraph (a) of this subsection; and

26 (ii) The dates that such withholding began and ended; and

27 (g) Be obligated to pay to the contracting agency an amount equal to interest on the withheld
 28 payments computed in the manner provided in ORS 279C.570 from the 11th day after receipt of the
 29 withheld amounts from the contracting agency until:

30 (A) The day the identified subcontractor performance deficiency is corrected; or

31 (B) The date that any subsequent payment is reduced under paragraph (f)(A) of this subsection.

32 (7)(a) If a contractor, after *[making payment to]* **paying** a first-tier subcontractor, receives from
 33 a supplier or subcontractor of the first-tier subcontractor a written notice asserting a deficiency in
 34 *[such]* **the** first-tier subcontractor's performance under the contract for which the contractor may
 35 be ultimately liable and the contractor determines that all or a portion of future payments otherwise
 36 due *[such]* **the** first-tier subcontractor is subject to withholding in accordance with the subcontract
 37 *[agreement]*, the contractor may, without incurring an obligation to pay a late payment interest
 38 penalty under subsection (6)(e) of this section:

39 (A) *[Furnish to]* **Give** the first-tier subcontractor a notice *[conforming]* **that conforms** to the
 40 standards of subsection (8) of this section as soon as practicable upon making *[such]* **the** determi-
 41 nation; and

42 (B) Withhold from the first-tier subcontractor's next available progress payment or payments an
 43 amount not to exceed the amount specified in the notice of withholding *[furnished]* **given** under
 44 subparagraph (A) of this paragraph.

45 (b) As soon as practicable, but not later than 10 days after *[receipt of]* **receiving** satisfactory

1 written notification that the identified subcontract performance deficiency has been corrected, the
 2 contractor shall pay the amount withheld under paragraph (a)(B) of this subsection to *[such]* **the**
 3 first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to
 4 *[such]* **the** first-tier subcontractor computed at the rate specified in ORS 279C.570.

5 (8) **The contractor shall give** a written notice of any withholding *[shall be issued]* to a sub-
 6 contractor, with a copy to the contracting agency *[of any such notice issued by a contractor]*, speci-
 7 fying:

8 (a) The amount to be withheld;

9 (b) The specified causes for the withholding under the terms of the subcontract; and

10 (c) The remedial actions *[to be taken by]* the subcontractor **must take** in order to receive pay-
 11 ment of the amounts withheld.

12 (9) Except as provided in subsection (2) of this section, this section does not limit or impair any
 13 contractual, administrative or judicial remedies otherwise available to a contractor or a subcon-
 14 tractor in the event of a dispute involving late payment or nonpayment by a contractor or deficient
 15 performance or nonperformance by a subcontractor.

16 (10) A contractor's obligation to pay a late payment interest penalty to a subcontractor under
 17 the clause *[included in a subcontract under]* **described in** subsection (3) or (4) of this section is not
 18 *[intended to be]* an obligation of the contracting agency. A contract modification may not be made
 19 for the purpose of providing reimbursement of *[such]* a late payment interest penalty. A cost re-
 20 imbursement claim may not include *[any]* an amount for reimbursement of *[such]* a late payment
 21 interest penalty.

22 **SECTION 4. The amendments to ORS 279C.375, 279C.440 and 279C.580 by sections 1 to 3**
 23 **of this 2011 Act apply to contracts that a contracting agency first advertises or otherwise**
 24 **solicits on or after the operative date specified in section 5 of this 2011 Act or, if the con-**
 25 **tracting agency does not advertise or solicit the contract, to contracts that the contracting**
 26 **agency first enters into on or after the operative date specified in section 5 of this 2011 Act.**

27 **SECTION 5. (1) The amendments to ORS 279C.375, 279C.440 and 279C.580 by sections 1 to**
 28 **3 of this 2011 Act become operative on January 1, 2012.**

29 **(2) The Director of the Oregon Department of Administrative Services, the Attorney**
 30 **General or a contracting agency that adopts rules under ORS 279A.065 may take any action**
 31 **before the operative date specified in subsection (1) of this section that is necessary to enable**
 32 **the director, the Attorney General or the contracting agency to exercise, on and after the**
 33 **operative date specified in subsection (1) of this section, all of the duties, functions and**
 34 **powers conferred on the director, the Attorney General or the contracting agency by the**
 35 **amendments to ORS 279C.375, 279C.440 and 279C.580 by sections 1 to 3 of this 2011 Act.**

36 **SECTION 6. This 2011 Act being necessary for the immediate preservation of the public**
 37 **peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect**
 38 **on its passage.**

39