

A-Engrossed
Senate Bill 890

Ordered by the Senate April 15
Including Senate Amendments dated April 15

Sponsored by COMMITTEE ON GENERAL GOVERNMENT, CONSUMER AND SMALL BUSINESS PROTECTION

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.

Creates procedure by which subcontractor can request payment of retainage withheld by contracting agency for work completed by subcontractor.

Requires contracting agency to include condition in public **improvement** contract under which contractor must pay subcontractors in timely fashion or *[risk action for damages or other relief from contracting agency or disqualification from future public contracts]* **be subject to cause of action by contracting agency for statutory remedies.** Specifies actions that contractor must undertake. Provides exceptions to requirement for timely payment.

Adds to statutory remedies for breach of public improvement contract revocation of bidding prequalification upon second failure to make required payment and specifies that disqualification from future public contracts is available only upon third failure to make required payment.

Becomes operative January 1, 2012.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to a contractor's relations with subcontractors under a public contract; creating new pro-
3 visions; amending ORS 279C.515, 279C.570 and 279C.580; and declaring an emergency.

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

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

6 279C.515. (1) Every public improvement contract *[shall]* **must** contain a clause or condition that,
7 if the contractor fails, neglects or refuses to *[make prompt payment of any]* **pay promptly a person's**
8 claim for labor or services *[furnished]* **that the person provides** to the contractor or a subcon-
9 tractor *[by any person]* in connection with the public improvement contract as the claim becomes
10 due, the proper officer *[or officers representing]* **that represents** the state or a county, school dis-
11 trict, municipality[,] **or** municipal corporation or a subdivision *[thereof, as the case may be,]* **of the**
12 **state, county, school district, municipality or municipal corporation** may pay *[such]* **the**
13 **amount of the** claim to the person *[furnishing]* **that provides** the labor or services and charge the
14 amount of the payment against funds due or to become due the contractor by reason of the contract.

15 (2) Every public improvement contract *[shall]* **must** contain a clause or condition that, if the
16 contractor or a first-tier subcontractor fails, neglects or refuses to *[make payment to]* **pay** a person
17 furnishing labor or materials in connection with the public improvement contract within 30 days
18 after *[receipt of]* **receiving** payment from the contracting agency or a contractor, the contractor or
19 first-tier subcontractor *[shall owe]* **owes** the person the amount due plus interest charges *[com-*
20 *mencing]* **that begin** at the end of the 10-day period *[that]* **within which** payment is due under ORS
21 279C.580 *[(4)]* **(1)** and *[ending]* **that end** upon final payment, unless payment is subject to a good
22 faith dispute as defined in ORS 279C.580. The rate of interest charged to the contractor or first-tier

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 subcontractor on the amount due *[shall equal]* **is** three times the discount rate on 90-day commercial
 2 paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon
 3 on the date that is 30 days after the date *[when]* **on which the contractor or first-tier subcon-**
 4 **tractor received** payment *[was received]* from the contracting agency or from the contractor, but
 5 the rate of interest may not exceed 30 percent. The amount of interest may not be waived.

6 (3) Every public improvement contract and every contract related to the public improvement
 7 contract *[shall]* **must** contain a clause or condition that, if the contractor or a subcontractor fails,
 8 neglects or refuses to make payment to a person *[furnishing]* **that provides** labor or materials in
 9 connection with the public improvement contract, the person may file a complaint with the Con-
 10 struction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS
 11 279C.580.

12 (4) *[The payment of]* **Paying** a claim in the manner authorized in this section does not relieve
 13 the contractor or the contractor's surety from obligation with respect to *[any]* **an** unpaid *[claims]*
 14 **claim.**

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

16 279C.570. (1) *[It is]* The policy of the State of Oregon **is** that **a contracting agency shall pay**
 17 **promptly** all payments **that the contracting agency owes and that are** due on a public im-
 18 provement contract *[and owed by a contracting agency shall be paid promptly. No]. All* contracting
 19 *[agency is exempt from]* **agencies are subject to** the provisions of this section.

20 (2) **A** contracting *[agencies]* **agency** shall make progress payments on *[the]* **a public improve-**
 21 **ment** contract monthly as work progresses on *[a public improvement contract. Payments shall be*
 22 *based]* **the contract. The contracting agency shall base the amount of each payment** upon es-
 23 timates of work completed that *[are approved by]* the contracting agency **approves.** A progress
 24 payment is not *[considered]* acceptance or approval of *[any]* work or **a** waiver of any defects
 25 *[therein]* **in the work.** The contracting agency shall pay to the contractor interest on the progress
 26 payment, not including retainage, due the contractor. The interest shall commence 30 days after
 27 *[receipt of]* **the contracting agency receives** the invoice from the contractor or 15 days after the
 28 *[payment is approved by the contracting agency,]* **contracting agency approves the payment,**
 29 whichever is the earlier date. The rate of interest *[charged to]* the contracting agency **shall pay** on
 30 the amount due *[shall equal]* **equals** three times the discount rate on 90-day commercial paper in
 31 effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date
 32 that is 30 days after *[receipt of]* **the contracting agency receives** the invoice from the contractor
 33 or 15 days after the *[payment is approved by the contracting agency,]* **contracting agency approves**
 34 **the payment,** whichever is the earlier date, but the rate of interest may not exceed 30 percent.

35 (3) **The contracting agency shall pay** interest *[shall be paid]* automatically when payments
 36 become overdue. The contracting agency shall document, calculate and pay *[any]* interest due when
 37 *[payment is made on]* **the contracting agency pays** the principal. Interest payments shall accom-
 38 pany payment of net due on public improvement contracts. The contracting agency may not require
 39 the contractor to petition **for,** invoice **for,** bill **for** or wait additional days to receive interest due.

40 (4) *[When an invoice is filled out incorrectly, when there is any]* **If a contractor fills out an**
 41 **invoice incorrectly, if a** defect or impropriety **exists** in *[any submitted]* **an** invoice **that the con-**
 42 **tractor submits** or *[when]* **if** there is a good faith dispute, the contracting agency shall *[so]* notify
 43 the contractor **of the error, defect, impropriety or dispute** within 15 days, stating the reason or
 44 reasons the invoice is **incorrect,** defective or improper or the reasons for the dispute. *[A defective*
 45 *or improper invoice, if corrected by]* **If** the contractor **corrects a defective or improper invoice**

1 within seven days *[of being notified by]* **after** the contracting agency **notifies the contractor of the**
 2 **defect or impropriety, the contracting agency** may not *[cause]* **make** a payment *[to be made]* later
 3 than specified in this section unless **the contracting agency also pays** interest *[is also paid]*.

4 (5) If *[requested in writing by]* a first-tier subcontractor¹, *the contractor, within 10 days after re-*
 5 *ceiving the request, shall send to the first-tier subcontractor a copy of that portion of any* **requests a**
 6 **copy of an** invoice, a request for payment **that the contractor** submitted to the contracting agency
 7 or a pay document *[provided by]* the contracting agency **provided** to the contractor **that is** specif-
 8 ically related to any labor or materials *[supplied by]* the first-tier subcontractor **supplied, the con-**
 9 **tractor within 10 days after receiving the request shall send a copy of the portion of the**
 10 **invoice, request for payment or pay document that relates to the first-tier subcontractor's**
 11 **provision of labor or materials.**

12 (6) *[Payment of interest may be postponed when payment on]* **A contracting agency may post-**
 13 **pone paying interest if the contracting agency delays paying** the principal *[is delayed]* because
 14 of a disagreement between the contracting agency and the contractor. *[Whenever]* **If** a contractor
 15 brings formal administrative or judicial action to collect interest due under this section, the pre-
 16 vailing party is entitled to costs and reasonable attorney fees.

17 (7) A contracting agency may reserve as retainage from any progress payment on a public im-
 18 provement contract an amount not to exceed five percent of the payment. As work progresses, a
 19 contracting agency may reduce the amount of the retainage and the contracting agency may elimi-
 20 nate retainage on any remaining monthly contract payments after 50 percent of the work under the
 21 contract is completed if, in the contracting agency's opinion, *[such]* **the** work is progressing satis-
 22 factorily. *[Elimination or reduction of retainage shall be allowed only upon written application by the*
 23 *contractor, and the application shall include written approval of the contractor's surety.]* **The con-**
 24 **tracting agency may not eliminate or reduce retainage unless the contractor applies in**
 25 **writing for the elimination or reduction with the written approval of the contractor's surety.**
 26 However, when the contract work is 97.5 percent completed the contracting agency *[may]*, at the
 27 contracting agency's discretion and without **the contractor's** application *[by the contractor]*, **may**
 28 reduce the retained amount to 100 percent of the value of the contract work remaining. *[to be done.*
 29 *Upon receipt of a written application by the contractor,]* The contracting agency shall respond in
 30 writing within a reasonable time **after receiving a written application from the contractor.**

31 (8) *[The retainage held by a contracting agency shall be included in and paid to the contractor as*
 32 *part of the final payment of the contract price. The contracting agency]* **A contracting agency shall**
 33 **pay to the contractor as part of the payment of the final contract price the retainage that**
 34 **the contracting agency holds. If, 30 days after the contractor completes work under the**
 35 **public improvement contract and the contracting agency accepts the work, the contracting**
 36 **agency has not paid the final payment due the contractor, the contracting agency** shall pay
 37 to the contractor interest at the rate of 1.5 percent per month on the final payment due *[the con-*
 38 *tractor, interest to commence 30 days after the work under the contract has been completed and ac-*
 39 *cepted and to].* **The interest shall continue to** run until the date when the **contracting agency**
 40 **tenders the** final payment *[is tendered]* to the contractor. The contractor shall notify the contract-
 41 ing agency in writing when the contractor considers the work complete and the contracting agency
 42 shall, within 15 days after receiving the written notice, either accept the work or notify the con-
 43 tractor of work yet to be performed on the contract. If the contracting agency does not, within the
 44 time allowed, notify the contractor of work yet to be performed to fulfill contractual obligations, the
 45 interest provided by this subsection shall commence to run 30 days after the end of the 15-day pe-

1 rioid.

2 (9)(a) If a first-tier subcontractor completes the first-tier subcontractor's work under the
 3 public improvement contract, the first-tier subcontractor may request that the contractor
 4 apply as provided in subsection (7) of this section to the contracting agency to eliminate
 5 retainage on amounts the contracting agency must pay under the terms of the public im-
 6 provement contract for the work that the first-tier subcontractor performed.
 7 Notwithstanding the contracting agency's reservation of retainage from progress payments
 8 to the contractor under subsection (7) of this section and the requirement under subsection
 9 (8) of this section for the contractor to complete and the contracting agency to accept the
 10 contractor's other work under the public improvement contract, and except as provided in
 11 paragraph (b) of this subsection, the contracting agency not later than 60 days after receiv-
 12 ing an application described in this paragraph shall eliminate and pay to the contractor for
 13 the first-tier subcontractor's benefit any retainage the contracting agency holds on amounts
 14 due for work the first-tier subcontractor performed under the public improvement contract.

15 (b) The requirement under paragraph (a) of this subsection for the contracting agency
 16 to eliminate and pay retainage the contracting agency holds within 60 days after receiving
 17 an application does not apply if the contracting agency in good faith disputes that the first-
 18 tier subcontractor has completed work under the public improvement contract.

19 (c) The contracting agency's payment of retainage under this subsection to the contrac-
 20 tor on the first-tier subcontractor's behalf does not affect the contractor's right to withhold
 21 amounts as provided in ORS 279C.580.

22 [(9)(a)] (10)(a) The contracting agency shall pay, upon settlement or judgment in favor of [the]
 23 a contractor [regarding any] in a dispute as to the compensation due [a] the contractor for work
 24 performed under the terms of a public improvement contract, the amount due plus interest at the
 25 rate of two times the discount rate, but not to exceed 30 percent, on 90-day commercial paper in
 26 effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date
 27 of the settlement or judgment, and accruing from the later of:

28 (A) The due date of any progress payment received under the contract for the period in which
 29 [such] the work was performed; or

30 (B) Thirty days after the date on which the contractor presented the claim for the payment
 31 that is under dispute [was presented] to the contracting agency [by the contractor] in writing or in
 32 accordance with applicable provisions of the contract.

33 (b) Interest [shall] must be added to and not made a part of the settlement or judgment.

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

35 279C.580. [(1) A contractor may not request payment from the contracting agency of any amount
 36 withheld or retained in accordance with subsection (5) of this section until such time as the contractor
 37 has determined and certified to the contracting agency that the subcontractor has determined and cer-
 38 tified to the contracting agency that the subcontractor is entitled to the payment of such amount.]

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

44 [(3) Each public improvement contract awarded by a contracting agency shall include a clause that
 45 requires the contractor to include in each subcontract for property or services entered into by the con-

1 *tractor and a first-tier subcontractor, including a material supplier, for the purpose of performing a*
2 *construction contract:]*

3 *[(a) A payment clause that obligates the contractor to pay the first-tier subcontractor for satisfac-*
4 *tory performance under its subcontract within 10 days out of such amounts as are paid to the con-*
5 *tractor by the contracting agency under the contract; and]*

6 *[(b) An interest penalty clause that obligates the contractor, if payment is not made within 30 days*
7 *after receipt of payment from the contracting agency, to pay to the first-tier subcontractor an interest*
8 *penalty on amounts due in the case of each payment not made in accordance with the payment clause*
9 *included in the subcontract under paragraph (a) of this subsection. A contractor or first-tier subcon-*
10 *tractor may not be obligated to pay an interest penalty if the only reason that the contractor or first-tier*
11 *subcontractor did not make payment when payment was due is that the contractor or first-tier subcon-*
12 *tractor did not receive payment from the contracting agency or contractor when payment was due. The*
13 *interest penalty shall be:]*

14 *[(A) For the period beginning on the day after the required payment date and ending on the date*
15 *on which payment of the amount due is made; and]*

16 *[(B) Computed at the rate specified in ORS 279C.515 (2).]*

17 *[(4) The contract awarded by the contracting agency shall require the contractor to include in each*
18 *of the contractor's subcontracts, for the purpose of performance of such contract condition, a provision*
19 *requiring the first-tier subcontractor to include a payment clause and an interest penalty clause con-*
20 *forming to the standards of subsection (3) of this section in each of the first-tier subcontractor's sub-*
21 *contracts and to require each of the first-tier subcontractor's subcontractors to include such clauses in*
22 *their subcontracts with each lower-tier subcontractor or supplier.]*

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

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

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

35 *[(C) Permit such withholdings without incurring any obligation to pay a late payment interest*
36 *penalty if:]*

37 *[(i) A notice conforming to the standards of subsection (8) of this section has been previously fur-*
38 *nished to the subcontractor; and]*

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

41 *[(b) As used in this subsection, "good faith dispute" means a documented dispute concerning:]*

42 *[(A) Unsatisfactory job progress.]*

43 *[(B) Defective work not remedied.]*

44 *[(C) Third-party claims filed or reasonable evidence that claims will be filed.]*

45 *[(D) Failure to make timely payments for labor, equipment and materials.]*

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

2 *[(F) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the*
3 *subcontract sum.]*

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

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

12 *[(b) Furnish to the contracting agency, as soon as practicable, a copy of the notice furnished to the*
13 *subcontractor under paragraph (a) of this subsection;]*

14 *[(c) Reduce the subcontractor's progress payment by an amount not to exceed the amount specified*
15 *in the notice of withholding furnished under paragraph (a) of this subsection;]*

16 *[(d) Pay the subcontractor as soon as practicable after the correction of the identified subcontract*
17 *performance deficiency;]*

18 *[(e) Make such payment within:]*

19 *[(A) Seven days after correction of the identified subcontract performance deficiency unless the*
20 *funds therefor must be recovered from the contracting agency because of a reduction under paragraph*
21 *(f)(A) of this subsection; or]*

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

23 *[(f) Notify the contracting agency upon:]*

24 *[(A) Reduction of the amount of any subsequent certified application for payment; or]*

25 *[(B) Payment to the subcontractor of any withheld amounts of a progress payment, specifying:]*

26 *[(i) The amounts of the progress payments withheld under paragraph (a) of this subsection; and]*

27 *[(ii) The dates that such withholding began and ended; and]*

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

31 *[(A) The day the identified subcontractor performance deficiency is corrected; or]*

32 *[(B) The date that any subsequent payment is reduced under paragraph (f)(A) of this subsection.]*

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

40 *[(A) Furnish to the first-tier subcontractor a notice conforming to the standards of subsection (8)*
41 *of this section as soon as practicable upon making such determination; 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 under subparagraph*
44 *(A) of this paragraph.]*

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

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

5 *[(8) A written notice of any withholding shall be issued to a subcontractor, with a copy to the*
6 *contracting agency of any such notice issued by a contractor, specifying:]*

7 *[(a) The amount to be withheld;]*

8 *[(b) The specified causes for the withholding under the terms of the subcontract; and]*

9 *[(c) The remedial actions to be taken by the subcontractor in order to receive payment of the*
10 *amounts withheld.]*

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

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

20 **(1)(a) A contracting agency in each public improvement contract shall require, as a ma-**
21 **terial covenant enforceable as provided in subsection (9) of this section, that the contractor:**

22 **(A) Pay promptly, as due for satisfactory performance, a first-tier subcontractor that**
23 **provides labor, equipment, services or materials that the contractor uses to perform the**
24 **work specified in the public improvement contract. Except as provided in paragraph (b) or**
25 **(c) of this subsection, the contractor shall pay the subcontractor not later than 10 days after**
26 **the subcontractor submits a request for payment for the labor, equipment, services or ma-**
27 **terials to the contractor.**

28 **(B) Pay interest on amounts described in subparagraph (A) of this paragraph that the**
29 **contractor does not pay within 30 days after receiving a payment from the contracting**
30 **agency. The contractor shall pay interest at the rate and for the period specified in ORS**
31 **279C.515.**

32 **(C) Provide the first-tier subcontractor with a standard form that the first-tier subcon-**
33 **tractor may use as an invoice or other method with which to claim a payment due from the**
34 **contractor.**

35 **(D) Except as otherwise provided in this subparagraph, use the same form and regular**
36 **administrative procedures for processing payments during the entire term of the subcon-**
37 **tract. A contractor may change the form or the regular administrative procedures the con-**
38 **tractor uses for processing payments if the contractor notifies the subcontractor at least 45**
39 **days before the date on which the contractor makes the change.**

40 **(E) Not use changes in a form or other method by which a subcontractor may claim a**
41 **payment due, or in the contractor's administrative procedures, as a basis for delaying,**
42 **withholding or denying a payment that is due.**

43 **(b) A contractor that has a good faith dispute with a subcontractor concerning the labor,**
44 **equipment, services or materials the subcontractor provides may make a payment more than**
45 **10 days after receiving a request for payment from the subcontractor, without paying inter-**

1 est as provided in paragraph (a)(B) of this subsection and without becoming subject to the
2 remedies provided in subsection (9) of this section, if the contractor:

3 (A) Notifies the subcontractor and the contracting agency of the good faith dispute in
4 writing, describing the substance of the good faith dispute, specifying any monetary amount
5 at issue and outlining the conditions under which the contractor and the subcontractor or
6 other person can resolve the good faith dispute;

7 (B) Negotiates in good faith with the subcontractor or other person to resolve the good
8 faith dispute; and

9 (C) Pays the subcontractor or other person not later than seven days after resolving the
10 good faith dispute.

11 (c) If a contractor cannot pay for labor, equipment, services or materials as required
12 under paragraph (a) of this subsection because the contractor has not received a payment
13 due from the contracting agency under the terms of the public improvement contract, the
14 contractor may make a payment more than 10 days after receiving a request for payment
15 from the subcontractor, without paying interest as provided in paragraph (a)(B) of this sub-
16 section and without becoming subject to the remedies provided in subsection (9) of this sec-
17 tion, if the contractor:

18 (A) Notifies the subcontractor in writing and, in a separate communication, notifies the
19 contracting agency that the reason for delaying payment is because the contractor has not
20 received a payment due from the contracting agency under the terms of the public im-
21 provement contract;

22 (B) Requests in the communication to the contracting agency payment for the specific
23 amount due under the terms of the public improvement contract; and

24 (C) Pays the subcontractor not later than seven days after receiving payment from the
25 contracting agency.

26 (2) A contracting agency in each public improvement contract shall require, as a material
27 covenant enforceable as provided in subsection (9) of this section, that the contractor include
28 in each of the contractor's first-tier subcontracts provisions substantially similar to the
29 provisions set forth in subsection (1) of this section and shall require that each first-tier
30 subcontractor include substantially similar provisions in the first-tier subcontractor's sub-
31 contracts with lower-tier subcontractors.

32 (3)(a) Subject to paragraphs (b) and (c) of this subsection, a contractor or a subcontractor
33 at any tier may include provisions in a subcontract that permit the contractor or sub-
34 contractor to:

35 (A) Withhold, without incurring an obligation to pay interest as provided in subsection
36 (1)(a)(B) of this section and without becoming subject to the remedies set forth in subsection
37 (9) of this section, not more than the amount at issue in a good faith dispute from the
38 amount due the contractor or subcontractor under the terms of the subcontract; and

39 (B) Determine that the withholding described in subparagraph (A) of this paragraph is
40 an appropriate action to take in connection with a particular good faith dispute.

41 (b) A contractor or subcontractor that includes a provision described in paragraph (a)
42 of this subsection may do so only after negotiating with the subcontractor in good faith and
43 giving appropriate consideration to the subcontractor's ability to furnish a performance bond
44 and payment bond.

45 (c) A contractor or subcontractor that exercises a right granted by a provision described

1 in paragraph (a) of this subsection may do so only if the contractor or subcontractor:

2 (A) Notifies the subcontractor and the contracting agency of the good faith dispute, de-
3 scribes the substance of the good faith dispute, specifies any monetary amount at issue and
4 outlines the conditions under which the contractor and the subcontractor can resolve the
5 good faith dispute;

6 (B) Negotiates in good faith with the subcontractor to resolve the good faith dispute; and

7 (C) Pays the subcontractor as provided in subsection (4)(a)(C) of this section.

8 (4)(a) If a contractor requests payment from a contracting agency for work that a sub-
9 contractor performed under a subcontract but before the contractor pays the subcontractor
10 for the work the contractor determines that a condition exists under which the contractor
11 may withhold payment from the subcontractor under a term of the subcontract included in
12 accordance with subsection (3) of this section, the contractor shall take the following
13 actions:

14 (A) Notify the subcontractor and the contracting agency in accordance with subsection
15 (3)(c) of this section before the date on which the next payment is due the subcontractor
16 under the terms of the subcontract;

17 (B) Reduce the next payment due the subcontractor by not more than the amount that
18 is in dispute;

19 (C) Pay the subcontractor within seven days after the later of the dates on which:

20 (i) The contractor and subcontractor resolve the dispute; or

21 (ii) The contractor receives a payment from the contracting agency if the contracting
22 agency elects to withhold the payment the contractor requested until the contractor has
23 resolved the dispute; and

24 (D) Notify the contracting agency when the contractor:

25 (i) Reduces the amount of the contractor's request for the next payment due the con-
26 tractor under the terms of the public improvement contract; or

27 (ii) Pays the subcontractor an amount the contractor withheld under this paragraph,
28 specifying the amount the contractor withheld and the dates on which the withholding began
29 and ended.

30 (b) A contractor that withholds an amount under paragraph (a) of this subsection is ob-
31 ligated to pay to the contracting agency interest at the rate specified in ORS 279C.570 for the
32 period that begins on the 11th day after the contractor receives a payment from the con-
33 tracting agency and ends on the date on which:

34 (A) The contractor and subcontractor resolve the dispute; or

35 (B) The contractor provides a notification under paragraph (a)(D)(i) of this subsection.

36 (5)(a) If after paying a first-tier subcontractor a contractor receives a notice from a
37 lower-tier subcontractor of a deficiency in the first-tier subcontractor's performance for
38 which the contractor may become liable and the contractor determines that a condition ex-
39 ists under which the contractor may withhold payment from the first-tier subcontractor
40 under a term of the subcontract included in accordance with subsection (3) of this section,
41 the contractor may do so without paying interest under subsection (1)(a)(B) or (4)(b) of this
42 section and without becoming subject to the remedies provided in subsection (9) of this sec-
43 tion if the contractor:

44 (A) Notifies the first-tier subcontractor and the contracting agency in accordance with
45 subsection (3)(c) of this section before the date on which the next payment is due the first-

1 tier subcontractor under the terms of the subcontract; and

2 (B) Reduces the next payment due the first-tier subcontractor by not more than the
3 amount that is in dispute.

4 (b) The contractor shall pay the first-tier subcontractor not later than 10 days after the
5 contractor receives a written notification that states that the first-tier contractor has cor-
6 rected the deficiency that was the subject of the notification under paragraph (a) of this
7 subsection. A contractor that does not pay a first-tier subcontractor within the time speci-
8 fied in this paragraph shall pay interest on the unpaid amount at the interest rate specified
9 in ORS 279C.570 (2) for a period that begins on the date on which the payment was due under
10 this paragraph and that ends when the contractor makes the payment.

11 (6)(a) Except as provided in paragraph (b) of this subsection, a dispute concerning an is-
12 sue set forth in subsection (10) of this section between a contractor to which a contracting
13 agency has awarded a public improvement contract and a subcontractor is not a dispute to
14 which the contracting agency is a party. A party to the dispute may not join or include the
15 contracting agency in an administrative or judicial proceeding concerned with the dispute.

16 (b) Paragraph (a) of this subsection does not affect the contracting agency's ability to
17 seek a remedy under subsection (9) of this section for a breach or other failure for which this
18 section allows a remedy. The contracting agency, on the contracting agency's initiative and
19 at the contracting agency's sole discretion, may petition a court or administrative body to
20 join or intervene in a proceeding concerning a dispute described in paragraph (a) of this
21 subsection.

22 (7) Except as provided in subsection (6) of this section, this section does not limit or
23 impair a contractual, administrative or judicial remedy that a contractor or subcontractor
24 otherwise has for a dispute concerning a contractor's delay or failure to pay a subcontractor
25 or a subcontractor's deficient performance or failure to perform.

26 (8) A contracting agency may not:

27 (a) Pay interest to a subcontractor that a contractor is obligated to pay under subsection
28 (1)(a)(B) of this section;

29 (b) Reimburse a contractor for interest that the contractor paid to a subcontractor un-
30 der subsection (1)(a)(B) of this section; or

31 (c) Modify or amend a public improvement contract so as to enable the contracting
32 agency to make a payment described in paragraph (a) or (b) of this subsection.

33 (9)(a) A contracting agency that determines that a contractor has breached a term of a
34 public improvement contract or has taken or failed to take an action for which this section
35 provides a remedy shall notify the contractor that the contracting agency intends to pursue
36 one or more of the remedies set forth in paragraph (b) of this subsection if the contractor
37 does not cure the breach or take or refrain from taking the action that is the subject of the
38 contracting agency's notice. The notice must specify the nature of the breach or failure, the
39 action the contractor must take or refrain from taking and a date by which the contractor
40 must take or refrain from taking the action.

41 (b) If a contractor fails to take or refrain from taking the action by the date specified in
42 a notice described in paragraph (a) of this subsection, the contracting agency shall pursue
43 one or more of the following remedies, as appropriate:

44 (A) Declare a breach of the public improvement contract and bring an action against the
45 contractor for damages, specific performance or other equitable relief as the court may or-

1 der.

2 (B) Revoke the contractor's prequalification under ORS 279C.430 (4), if the contractor
3 fails to make a payment in accordance with paragraph (a) of this subsection for a second
4 time.

5 (C) Disqualify the contractor under ORS 279C.440 (2)(d) if the contractor fails to make a
6 payment in accordance with paragraph (a) of this subsection for a third time.

7 (c) For purposes of this subsection, if a contractor has made payments as provided in
8 subsection (1) of this section for a period of five years before the date on which the con-
9 tractor fails to make a payment as provided in subsection (1) of this section, a contracting
10 agency shall treat the contractor's failure to make the payment as the contractor's first
11 such failure.

12 (10)(a) As used in this section, a "good faith dispute" means a dispute concerning one or
13 more of the issues specified in paragraph (b) of this subsection in which at least one of the
14 parties to the dispute documents the issue, with appropriate examples, in writing when, or
15 within 10 days after, the issue arises and specifies reasons for the dispute.

16 (b) Issues that may be the subject of a good faith dispute under this section are:

17 (A) Unsatisfactory job progress;

18 (B) Defective work that the party does not remedy;

19 (C) A claim filed by a third party or reasonable evidence that indicates that a third party
20 will file a claim;

21 (D) A party's failure to make timely payments for labor, equipment, services or materials
22 that the party received from a third party;

23 (E) Damage to a party that results from the other party's action; or

24 (F) Reasonable evidence that indicates that the subcontract cannot be completed for the
25 unpaid balance of the subcontract price.

26 SECTION 4. The amendments to ORS 279C.515, 279C.570 and 279C.580 by sections 1 to 3
27 of this 2011 Act apply to a contract that a contracting agency first advertises or otherwise
28 solicits on or after the operative date specified in section 5 of this 2011 Act or, if the con-
29 tracting agency does not advertise or solicit the contract, to a contract that the contracting
30 agency enters into on or after the operative date specified in section 5 of this 2011 Act.

31 SECTION 5. (1) The amendments to ORS 279C.515, 279C.570 and 279C.580 by sections 1 to
32 3 of this 2011 Act become operative on January 1, 2012.

33 (2) The Director of the Oregon Department of Administrative Services, the Attorney
34 General or a contracting agency that adopts rules under ORS 279A.065 may take any action
35 before the operative date specified in subsection (1) of this section that is necessary to enable
36 the director, the Attorney General or the contracting agency to exercise, on and after the
37 operative date specified in subsection (1) of this section, all of the duties, functions and
38 powers conferred on the director, the Attorney General or the contracting agency by the
39 amendments to ORS 279C.515, 279C.570 and 279C.580 by sections 1 to 3 of this 2011 Act.

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