

Senate Bill 890

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 **as introduced**.

Requires contracting agency to include condition in public 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. Specifies actions that contractor must undertake. Provides exceptions to requirement for timely 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 279B.220, 279C.515 and 279C.580; and declaring an emergency.

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

5 **SECTION 1.** ORS 279B.220 is amended to read:

6 279B.220. [*Every public contract shall contain a condition that the contractor shall:*]

7 [*(1) Make payment promptly, as due, to all persons supplying to the contractor labor or material*
8 *for the performance of the work provided for in the contract.*]

9 [*(2) Pay all contributions or amounts due the Industrial Accident Fund from the contractor or*
10 *subcontractor incurred in the performance of the contract.*]

11 **(1)(a) A contracting agency in each public contract shall require, as a material covenant**
12 **enforceable as provided in subsection (3) of this section, that the contractor pay promptly,**
13 **as due for satisfactory performance, a subcontractor or other person that provides labor,**
14 **equipment, services or materials that the contractor uses to perform the work specified in**
15 **the public contract. Except as provided in paragraph (b) or (c) of this subsection, the con-**
16 **tractor shall pay the subcontractor or other person not later than 30 days after the sub-**
17 **contractor or other person submits a request for payment for the labor, equipment, services**
18 **or materials to the contractor.**

19 **(b) A contractor that has a good faith dispute with a subcontractor or other person**
20 **concerning the labor, equipment, services or materials the subcontractor or other person**
21 **provides may make a payment more than 30 days after receiving a request for payment from**
22 **the subcontractor or other person without becoming subject to the remedies provided in**
23 **subsection (3) of this section if the contractor:**

24 **(A) Notifies the subcontractor or other person and the contracting agency of the good**
25 **faith dispute in writing, describing the substance of the good faith dispute, specifying any**
26 **monetary amount at issue and outlining the conditions under which the contractor and the**
27 **subcontractor or other person can resolve the good faith dispute;**

28 **(B) Negotiates in good faith with the subcontractor or other person to resolve the good**
29 **faith dispute; and**

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

3 (c) If a contractor cannot pay for labor, equipment, services or materials as required
4 under paragraph (a) of this subsection because the contractor has not received a payment
5 due from the contracting agency under the terms of the public contract, the contractor may
6 make a payment more than 30 days after receiving a request for payment from the subcon-
7 tractor or other person, without becoming subject to the remedies provided in subsection (3)
8 of this section, if the contractor:

9 (A) Notifies the subcontractor or other person in writing and, in a separate communi-
10 cation, notifies the contracting agency that the reason for delaying payment is because the
11 contractor has not received a payment due from the contracting agency under the terms of
12 the public contract;

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

15 (C) Pays the subcontractor or other person not later than seven days after receiving
16 payment from the contracting agency.

17 (2) In addition to the requirements set forth in subsection (1) of this section, the con-
18 tracting agency shall provide in the public contract that the contractor:

19 (a) Shall pay contributions or amounts that the contractor or a subcontractor incurred
20 as an obligation to the Industrial Accident Fund while performing the public contract.

21 [(3)] (b) May not permit *[any]* a subcontractor or person that provided the contractor with
22 labor or materials to file or prosecute a lien or claim *[to be filed or prosecuted]* against the state
23 or a county, school district, municipality[,] or municipal corporation or a subdivision or agency
24 *[thereof, on account of any labor or material furnished]* of the state, county, school district,
25 municipality or municipal corporation.

26 [(4)] (c) Shall pay to the Department of Revenue all sums the contractor or subcontractor
27 withheld from employees under ORS 316.167.

28 (3)(a) A contracting agency that determines that a contractor has failed to make a pay-
29 ment as provided in subsection (1) of this section shall notify the contractor that the con-
30 tracting agency intends to pursue remedies under paragraph (b) of this subsection if the
31 contractor does not make the payment within 10 days after the date on which the contract-
32 ing agency issues the notice.

33 (b) If a contractor fails to make a payment in accordance with paragraph (a) of this
34 subsection, the contracting agency shall pursue one or more of the following remedies:

35 (A) Declare a breach of the public contract and bring an action against the contractor
36 for damages, specific performance or other equitable relief as the court may order.

37 (B) Debar the contractor under ORS 279B.130 (2)(d).

38 (4) A contracting agency in each public contract shall require, as a material covenant
39 enforceable as provided in subsection (3) of this section, that the contractor include in each
40 of the contractor's first-tier subcontracts provisions substantially similar to the provisions
41 set forth in subsection (1) of this section and shall require that each first-tier subcontractor
42 include substantially similar provisions in the first-tier subcontractor's subcontracts with
43 lower-tier subcontractors.

44 (5)(a) As used in this section, a "good faith dispute" means a dispute concerning one or
45 more of the issues specified in paragraph (b) of this subsection in which at least one of the

1 **parties to the dispute documents the issue, with appropriate examples, in writing when, or**
 2 **within a reasonable time after, the issue arises and specifies reasons for the dispute.**

3 **(b) Issues that may be the subject of a good faith dispute under subsection (1) of this**
 4 **section are:**

5 **(A) Unsatisfactory job progress;**

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

7 **(C) A claim filed by a third party or reasonable evidence that indicates that a third party**
 8 **will file a claim;**

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

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

12 **(F) Reasonable evidence that indicates that the subcontract cannot be completed for the**
 13 **unpaid balance of the subcontract price.**

14 **SECTION 2.** ORS 279C.515 is amended to read:

15 279C.515. (1) Every public improvement contract *[shall]* **must** contain a clause or condition that,
 16 if the contractor fails, neglects or refuses to *[make prompt payment of any]* **pay promptly a person's**
 17 claim for labor or services *[furnished]* **that the person provides** to the contractor or a subcon-
 18 tractor *[by any person]* in connection with the public improvement contract as the claim becomes
 19 due, the proper officer *[or officers representing]* **that represents** the state or a county, school dis-
 20 trict, municipality[,] **or** municipal corporation or a subdivision *[thereof, as the case may be,]* **of the**
 21 **state, county, school district, municipality or municipal corporation** may pay *[such]* **the**
 22 **amount of the** claim to the person *[furnishing]* **that provides** the labor or services and charge the
 23 amount of the payment against funds due or to become due the contractor by reason of the contract.

24 (2) Every public improvement contract *[shall]* **must** contain a clause or condition that, if the
 25 contractor or a first-tier subcontractor fails, neglects or refuses to *[make payment to]* **pay** a person
 26 furnishing labor or materials in connection with the public improvement contract within 30 days
 27 after *[receipt of]* **receiving** payment from the contracting agency or a contractor, the contractor or
 28 first-tier subcontractor *[shall owe]* **owes** the person the amount due plus interest charges *[com-*
 29 *mencing]* **that begin** at the end of the 10-day period *[that]* **within which** payment is due under ORS
 30 279C.580 *[(4)]* **(1)** and *[ending]* **that end** upon final payment, unless payment is subject to a good
 31 faith dispute as defined in ORS 279C.580. The rate of interest charged to the contractor or first-tier
 32 subcontractor on the amount due *[shall equal]* **is** three times the discount rate on 90-day commercial
 33 paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon
 34 on the date that is 30 days after the date *[when]* **on which the contractor or first-tier subcon-**
 35 **tractor received** payment *[was received]* from the contracting agency or from the contractor, but
 36 the rate of interest may not exceed 30 percent. The amount of interest may not be waived.

37 (3) Every public improvement contract and every contract related to the public improvement
 38 contract *[shall]* **must** contain a clause or condition that, if the contractor or a subcontractor fails,
 39 neglects or refuses to make payment to a person *[furnishing]* **that provides** labor or materials in
 40 connection with the public improvement contract, the person may file a complaint with the Con-
 41 struction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS
 42 279C.580.

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

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

2 279C.580. [(1) A contractor may not request payment from the contracting agency of any amount
3 withheld or retained in accordance with subsection (5) of this section until such time as the contractor
4 has determined and certified to the contracting agency that the subcontractor has determined and cer-
5 tified to the contracting agency that the subcontractor is entitled to the payment of such amount.]

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

11 [(3) Each public improvement contract awarded by a contracting agency shall include a clause that
12 requires the contractor to include in each subcontract for property or services entered into by the con-
13 tractor and a first-tier subcontractor, including a material supplier, for the purpose of performing a
14 construction contract:]

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

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

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

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

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

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

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

44 [(B) Permit the contractor or subcontractor to make a determination that part or all of the
45 subcontractor's request for payment may be withheld in accordance with the subcontract agreement;

1 and]

2 [(C) Permit such withholdings without incurring any obligation to pay a late payment interest

3 penalty if:]

4 [(i) A notice conforming to the standards of subsection (8) of this section has been previously fur-

5 nished to the subcontractor; and]

6 [(ii) A copy of any notice issued by a contractor under sub-subparagraph (i) of this subparagraph

7 has been furnished to the contracting agency.]

8 [(b) As used in this subsection, “good faith dispute” means a documented dispute concerning:]

9 [(A) Unsatisfactory job progress.]

10 [(B) Defective work not remedied.]

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

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

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

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

15 subcontract sum.]

16 [(6) If, after making application to a contracting agency for payment under a contract but before

17 making a payment to a subcontractor for the subcontractor’s performance covered by such application,

18 a contractor discovers that all or a portion of the payment otherwise due the subcontractor is subject

19 to withholding from the subcontractor in accordance with the subcontract agreement, the contractor

20 shall:]

21 [(a) Furnish to the subcontractor a notice conforming to the standards of subsection (8) of this

22 section as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the

23 due date for subcontractor payment;]

24 [(b) Furnish to the contracting agency, as soon as practicable, a copy of the notice furnished to the

25 subcontractor under paragraph (a) of this subsection;]

26 [(c) Reduce the subcontractor’s progress payment by an amount not to exceed the amount specified

27 in the notice of withholding furnished under paragraph (a) of this subsection;]

28 [(d) Pay the subcontractor as soon as practicable after the correction of the identified subcontract

29 performance deficiency;]

30 [(e) Make such payment within:]

31 [(A) Seven days after correction of the identified subcontract performance deficiency unless the

32 funds therefor must be recovered from the contracting agency because of a reduction under paragraph

33 (f)(A) of this subsection; or]

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

35 [(f) Notify the contracting agency upon:]

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

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

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

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

40 [(g) Be obligated to pay to the contracting agency an amount equal to interest on the withheld

41 payments computed in the manner provided in ORS 279C.570 from the 11th day after receipt of the

42 withheld amounts from the contracting agency until:]

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

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

45 [(7)(a) If a contractor, after making payment to a first-tier subcontractor, receives from a supplier

1 or subcontractor of the first-tier subcontractor a written notice asserting a deficiency in such first-tier
 2 subcontractor's performance under the contract for which the contractor may be ultimately liable and
 3 the contractor determines that all or a portion of future payments otherwise due such first-tier subcon-
 4 tractor is subject to withholding in accordance with the subcontract agreement, the contractor may,
 5 without incurring an obligation to pay a late payment interest penalty under subsection (6)(e) of this
 6 section:]

7 [(A) Furnish to the first-tier subcontractor a notice conforming to the standards of subsection (8)
 8 of this section as soon as practicable upon making such determination; and]

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

12 [(b) As soon as practicable, but not later than 10 days after receipt of satisfactory written notifi-
 13 cation that the identified subcontract performance deficiency has been corrected, the contractor shall
 14 pay the amount withheld under paragraph (a)(B) of this subsection to such first-tier subcontractor, or
 15 shall incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed
 16 at the rate specified in ORS 279C.570.]

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

19 [(a) The amount to be withheld;]

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

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

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

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

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

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

40 **(B) Pay interest on amounts described in subparagraph (A) of this paragraph that the**
 41 **contractor does not pay within 30 days after receiving a payment from the contracting**
 42 **agency. The contractor shall pay interest at the rate and for the period specified in ORS**
 43 **279C.515.**

44 **(b) A contractor that has a good faith dispute with a subcontractor concerning the labor,**
 45 **equipment, services or materials the subcontractor provides may make a payment more than**

1 10 days after receiving a request for payment from the subcontractor, without paying inter-
2 est as provided in paragraph (a)(B) of this subsection and without becoming subject to the
3 remedies provided in subsection (9) of this section, if the contractor:

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

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

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

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

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

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

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

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

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

36 (A) Withhold, without incurring an obligation to pay interest as provided in subsection
37 (1)(a)(B) of this section and without becoming subject to the remedies set forth in subsection
38 (9) of this section, not more than 150 percent of the amount at issue in a good faith dispute
39 from the amount due the contractor or subcontractor under the terms of the subcontract;
40 and

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

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

1 and payment bond.

2 (c) A contractor or subcontractor that exercises a right granted by a provision described
3 in paragraph (a) of this subsection may do so only if the contractor or subcontractor:

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

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

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

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

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

19 (B) Reduce the next payment due the subcontractor by not more than the amount that
20 is permitted under the terms of the subcontract;

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

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

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

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

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

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

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

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

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

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

1 (A) Notifies the first-tier subcontractor and the contracting agency in accordance with
2 subsection (3)(c) of this section before the date on which the next payment is due the first-
3 tier subcontractor under the terms of the subcontract; and

4 (B) Reduces the next payment due the first-tier subcontractor by not more than the
5 amount that is permitted under the terms of the subcontract.

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

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

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

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

28 (8) A contracting agency may not:

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

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

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

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

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

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

4 (B) Disqualify the contractor under ORS 279C.440 (2)(d).

5 (10)(a) As used in this section, a “good faith dispute” means a dispute concerning one or
6 more of the issues specified in paragraph (b) of this subsection in which at least one of the
7 parties to the dispute documents the issue, with appropriate examples, in writing when, or
8 within a reasonable time after, the issue arises and specifies reasons for the dispute.

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

10 (A) Unsatisfactory job progress;

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

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

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

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

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

19 **SECTION 4.** The amendments to ORS 279B.220, 279C.515 and 279C.580 by sections 1 to 3
20 of this 2011 Act apply to a contract that a contracting agency first advertises or otherwise
21 solicits on or after the operative date specified in section 5 of this 2011 Act or, if the con-
22 tracting agency does not advertise or solicit the contract, to a contract that the contracting
23 agency enters into on or after the operative date specified in section 5 of this 2011 Act.

24 **SECTION 5.** (1) The amendments to ORS 279B.220, 279C.515 and 279C.580 by sections 1 to
25 3 of this 2011 Act become operative on January 1, 2012.

26 (2) The Director of the Oregon Department of Administrative Services, the Attorney
27 General or a contracting agency that adopts rules under ORS 279A.065 may take any action
28 before the operative date specified in subsection (1) of this section that is necessary to enable
29 the director, the Attorney General or the contracting agency to exercise, on and after the
30 operative date specified in subsection (1) of this section, all of the duties, functions and
31 powers conferred on the director, the Attorney General or the contracting agency by the
32 amendments to ORS 279B.220, 279C.515 and 279C.580 by sections 1 to 3 of this 2011 Act.

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

36