

# Senate Bill 986

Sponsored by Senator SHIELDS; Senator BOQUIST (at the request of National Association of Minority Contractors, National Electrical Contractors Association, Oregon State Building Trades Council, Associated Builders and Contractors and Independent Electrical Contractors)

## 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 contractor to include clauses in public improvement contract with first-tier subcontractor under which contractor provides first-tier subcontractor with form first-tier subcontractor may use as invoice or other method to claim payment due from contractor, contractor uses same form and regular administrative procedures during term of subcontract unless contractor notifies first-tier subcontractor of change 45 days in advance, and contractor may not delay payment due first-tier subcontractor because of changes in form or regular administrative procedures.

Provides that contracting agency shall revoke contractor's prequalification if contractor fails to take or refrain from taking action required by clauses in public improvement contract and shall disqualify contractor from public contracts if contractor fails to take or refrain from taking action for second time.

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 and 279C.580; and declaring an emergency.

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

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

6 279C.580. (1) A contractor may not request payment from the contracting agency of any amount  
7 withheld or retained in accordance with subsection (5) of this section until such time as the con-  
8 tractor has determined and certified to the contracting agency that the subcontractor has deter-  
9 mined and certified to the contracting agency that the subcontractor is entitled to the payment of  
10 such amount.

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

16 (3)(a) Each public improvement contract awarded by a contracting agency shall [*include a clause*  
17 *that requires*] **require** the contractor to include in each subcontract for property or services entered  
18 into by the contractor and a first-tier subcontractor, including a material supplier, for the purpose  
19 of performing a construction contract:

20 [(a)] **(A)** A payment clause that obligates the contractor to pay the first-tier subcontractor for  
21 satisfactory performance under its subcontract within 10 days out of such amounts as are paid to  
22 the contractor by the contracting agency under the contract[; *and*].

23 **(B)** A clause that requires the contractor to provide the first-tier subcontractor with a  
24 standard form that the first-tier subcontractor may use as an invoice or other method with  
25 which to claim a payment due from the contractor.

**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) A clause that requires the contractor, except as otherwise provided in this subpara-  
2 graph, to use the same form and regular administrative procedures for processing payments  
3 during the entire term of the subcontract. A contractor may change the form or the regular  
4 administrative procedures the contractor uses for processing payments if the contractor  
5 notifies the first-tier subcontractor at least 45 days before the date on which the contractor  
6 makes the change.

7 (D) A clause that states that the contractor may not use changes in a form or other  
8 method by which a first-tier subcontractor may claim a payment due, or changes in the  
9 contractor's regular administrative procedures, as a basis for delaying, withholding or de-  
10 denying a payment that is due.

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

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

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

22 (b) A contracting agency that determines that a contractor has failed to take or refrain  
23 from taking an action that a clause described in paragraph (a) of this subsection requires the  
24 contractor to take or refrain from taking, the contracting agency shall notify the contractor  
25 that the contracting agency intends to pursue one or more of the remedies set forth in  
26 paragraph (c) of this subsection if the contractor does not take or refrain from taking the  
27 action. The notice must specify the nature of the failure, the action the contractor must  
28 take or refrain from taking and a date by which the contractor must take or refrain from  
29 taking the action.

30 (c) If a contractor fails to take or refrain from taking the action by the date specified in  
31 a notice described in paragraph (b) of this subsection, the contracting agency shall:

32 (A) Revoke a contractor's prequalification under ORS 279C.430 (4).

33 (B) Disqualify the contractor under ORS 279C.440 (2)(d) if the contractor for the second  
34 time fails to take or refrain from taking an action required by a clause described in para-  
35 graph (a) of this subsection.

36 (d) For purposes of this subsection, if a contractor did not fail to take or refrain from  
37 taking an action required by a clause described in paragraph (a) of this subsection for a pe-  
38 riod of five years before the date on which the contractor failed to take or refrain from  
39 taking an action required by a clause described in paragraph (a) of this subsection, a con-  
40 tracting agency shall treat the contractor's failure as the contractor's first such failure.

41 (4) The contract awarded by the contracting agency shall require the contractor to include in  
42 each of the contractor's subcontracts, for the purpose of performance of such contract condition, a  
43 provision requiring the first-tier subcontractor to include [a payment clause and an interest penalty  
44 clause] **clauses** conforming to the standards of subsection (3) of this section in each of the first-tier  
45 subcontractor's subcontracts and to require each of the first-tier subcontractor's subcontractors to

1 include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

2 (5)(a) The clauses required by subsections (3) and (4) of this section are not intended to impair  
3 the right of a contractor or a subcontractor at any tier to negotiate, and to include in the subcon-  
4 tract, provisions that:

5 (A) Permit the contractor or a subcontractor to retain, in the event of a good faith dispute, an  
6 amount not to exceed 150 percent of the amount in dispute from the amount due a subcontractor  
7 under the subcontract without incurring any obligation to pay a late payment interest penalty, in  
8 accordance with terms and conditions agreed to by the parties to the subcontract, giving such re-  
9 cognition as the parties consider appropriate to the ability of a subcontractor to furnish a perform-  
10 ance bond and a payment bond;

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

14 (C) Permit such withholdings without incurring any obligation to pay a late payment interest  
15 penalty if:

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

18 (ii) A copy of any notice issued by a contractor under sub-subparagraph (i) of this subparagraph  
19 has been furnished to the contracting agency.

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

21 (A) Unsatisfactory job progress.

22 (B) Defective work not remedied.

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

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

25 (E) Damage to the prime contractor or subcontractor.

26 (F) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the  
27 subcontract sum.

28 (6) If, after making application to a contracting agency for payment under a contract but before  
29 making a payment to a subcontractor for the subcontractor's performance covered by such applica-  
30 tion, a contractor discovers that all or a portion of the payment otherwise due the subcontractor is  
31 subject to withholding from the subcontractor in accordance with the subcontract agreement, the  
32 contractor shall:

33 (a) Furnish to the subcontractor a notice conforming to the standards of subsection (8) of this  
34 section as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior  
35 to the due date for subcontractor payment;

36 (b) Furnish to the contracting agency, as soon as practicable, a copy of the notice furnished to  
37 the subcontractor under paragraph (a) of this subsection;

38 (c) Reduce the subcontractor's progress payment by an amount not to exceed the amount spec-  
39 ified in the notice of withholding furnished under paragraph (a) of this subsection;

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

42 (e) Make such payment within:

43 (A) Seven days after correction of the identified subcontract performance deficiency unless the  
44 funds therefor must be recovered from the contracting agency because of a reduction under para-  
45 graph (f)(A) of this subsection; or

1 (B) Seven days after the contractor recovers such funds from the contracting agency;  
 2 (f) Notify the contracting agency upon:  
 3 (A) Reduction of the amount of any subsequent certified application for payment; or  
 4 (B) Payment to the subcontractor of any withheld amounts of a progress payment, specifying:  
 5 (i) The amounts of the progress payments withheld under paragraph (a) of this subsection; and  
 6 (ii) The dates that such withholding began and ended; and  
 7 (g) Be obligated to pay to the contracting agency an amount equal to interest on the withheld  
 8 payments computed in the manner provided in ORS 279C.570 from the 11th day after receipt of the  
 9 withheld amounts from the contracting agency until:  
 10 (A) The day the identified subcontractor performance deficiency is corrected; or  
 11 (B) The date that any subsequent payment is reduced under paragraph (f)(A) of this subsection.  
 12 (7)(a) If a contractor, after making payment to a first-tier subcontractor, receives from a supplier  
 13 or subcontractor of the first-tier subcontractor a written notice asserting a deficiency in such first-  
 14 tier subcontractor's performance under the contract for which the contractor may be ultimately li-  
 15 able and the contractor determines that all or a portion of future payments otherwise due such  
 16 first-tier subcontractor is subject to withholding in accordance with the subcontract agreement, the  
 17 contractor may, without incurring an obligation to pay a late payment interest penalty under sub-  
 18 section (6)(e) of this section:  
 19 (A) Furnish to the first-tier subcontractor a notice conforming to the standards of subsection (8)  
 20 of this section as soon as practicable upon making such determination; and  
 21 (B) Withhold from the first-tier subcontractor's next available progress payment or payments an  
 22 amount not to exceed the amount specified in the notice of withholding furnished under subpara-  
 23 graph (A) of this paragraph.  
 24 (b) As soon as practicable, but not later than 10 days after receipt of satisfactory written no-  
 25 tification that the identified subcontract performance deficiency has been corrected, the contractor  
 26 shall pay the amount withheld under paragraph (a)(B) of this subsection to such first-tier subcon-  
 27 tractor, or shall incur an obligation to pay a late payment interest penalty to such first-tier sub-  
 28 contractor computed at the rate specified in ORS 279C.570.  
 29 (8) A written notice of any withholding shall be issued to a subcontractor, with a copy to the  
 30 contracting agency of any such notice issued by a contractor, specifying:  
 31 (a) The amount to be withheld;  
 32 (b) The specified causes for the withholding under the terms of the subcontract; and  
 33 (c) The remedial actions to be taken by the subcontractor in order to receive payment of the  
 34 amounts withheld.  
 35 (9) Except as provided in subsection (2) of this section, this section does not limit or impair any  
 36 contractual, administrative or judicial remedies otherwise available to a contractor or a subcon-  
 37 tractor in the event of a dispute involving late payment or nonpayment by a contractor or deficient  
 38 performance or nonperformance by a subcontractor.  
 39 (10) A contractor's obligation to pay a late payment interest penalty to a subcontractor under  
 40 the clause included in a subcontract under subsection (3) or (4) of this section is not intended to be  
 41 an obligation of the contracting agency. A contract modification may not be made for the purpose  
 42 of providing reimbursement of such late payment interest penalty. A cost reimbursement claim may  
 43 not include any amount for reimbursement of such late payment interest penalty.  
 44 **SECTION 2.** ORS 279C.515 is amended to read:  
 45 279C.515. (1) Every public improvement contract shall contain a clause or condition that, if the

1 contractor fails, neglects or refuses to make prompt payment of any claim for labor or services  
 2 furnished to the contractor or a subcontractor by any person in connection with the public im-  
 3 provement contract as the claim becomes due, the proper officer or officers representing the state  
 4 or a county, school district, municipality, municipal corporation or subdivision thereof, as the case  
 5 may be, may pay such claim to the person furnishing the labor or services and charge the amount  
 6 of the payment against funds due or to become due the contractor by reason of the contract.

7 (2) Every public improvement contract shall contain a clause or condition that, if the contractor  
 8 or a first-tier subcontractor fails, neglects or refuses to make payment to a person furnishing labor  
 9 or materials in connection with the public improvement contract within 30 days after receipt of  
 10 payment from the contracting agency or a contractor, the contractor or first-tier subcontractor shall  
 11 owe the person the amount due plus interest charges commencing at the end of the 10-day period  
 12 that payment is due under ORS 279C.580 [(4)] (3) and ending upon final payment, unless payment is  
 13 subject to a good faith dispute as defined in ORS 279C.580. The rate of interest charged to the  
 14 contractor or first-tier subcontractor on the amount due shall equal three times the discount rate  
 15 on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district  
 16 that includes Oregon on the date that is 30 days after the date when payment was received from the  
 17 contracting agency or from the contractor, but the rate of interest may not exceed 30 percent. The  
 18 amount of interest may not be waived.

19 (3) Every public improvement contract and every contract related to the public improvement  
 20 contract shall contain a clause or condition that, if the contractor or a subcontractor fails, neglects  
 21 or refuses to make payment to a person furnishing labor or materials in connection with the public  
 22 improvement contract, the person may file a complaint with the Construction Contractors Board,  
 23 unless payment is subject to a good faith dispute as defined in ORS 279C.580.

24 (4) The payment of a claim in the manner authorized in this section does not relieve the con-  
 25 tractor or the contractor's surety from obligation with respect to any unpaid claims.

26 **SECTION 3. The amendments to ORS 279C.515 and 279C.580 by sections 1 and 2 of this**  
 27 **2011 Act apply to a contract that a contracting agency first advertises or otherwise solicits**  
 28 **on or after the operative date specified in section 3 of this 2011 Act or, if the contracting**  
 29 **agency does not advertise or solicit the contract, to a contract that the contracting agency**  
 30 **enters into on or after the operative date specified in section 3 of this 2011 Act.**

31 **SECTION 4. (1) The amendments to ORS 279C.515 and 279C.580 by sections 1 and 2 of this**  
 32 **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 and 279C.580 by sections 1 and 2 of this 2011 Act.**

40 **SECTION 5. 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.**