

Senate Bill 405

Sponsored by Senator SHIELDS (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Limits retainage amount for contractor and subcontractor work on construction contracts and public improvement projects.

A BILL FOR AN ACT

1
2 Relating to payment amounts withheld as retainage; creating new provisions; and amending ORS
3 279C.555, 279C.845, 701.420 and 701.430.

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

5 **SECTION 1.** ORS 279C.555 is amended to read:

6 279C.555. (1) **The Legislative Assembly finds and declares that preventing undue financial**
7 **burdens on contractors, subcontractors and suppliers caused by excessive retainage on public**
8 **improvement projects is important to the maintenance of a viable construction industry in**
9 **this state and is therefore a matter of state concern. Notwithstanding any contrary provision**
10 **in the charter of a contracting agency, a contracting agency may not withhold as retainage**
11 **more than five percent of the contract price of work completed.**

12 (2) The withholding of retainage by a contractor or subcontractor on public improvement con-
13 tracts shall be in accordance with ORS 701.420 and 701.430. [*except when the charter of the con-*
14 *tracting agency contains provisions requiring retainage by the contracting agency of more than five*
15 *percent of the contract price of the work completed.*]

16 **SECTION 2.** ORS 279C.845 is amended to read:

17 279C.845. (1) The contractor or the contractor's surety and every subcontractor or the
18 subcontractor's surety shall file certified statements with the public agency in writing, on a form
19 prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:

20 (a) The hourly rate of wage paid each worker whom the contractor or the subcontractor has
21 employed upon the public works; and

22 (b) That no worker employed upon the public works has been paid less than the prevailing rate
23 of wage or less than the minimum hourly rate of wage specified in the contract.

24 (2) The certified statement shall be verified by the oath of the contractor or the contractor's
25 surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read
26 the certified statement, that the contractor or subcontractor knows the contents of the certified
27 statement and that to the contractor or subcontractor's knowledge the certified statement is true.

28 (3) The certified statements shall set out accurately and completely the contractor's or
29 subcontractor's payroll records, including the name and address of each worker, the worker's cor-
30 rect classification, rate of pay, daily and weekly number of hours worked and the gross wages the
31 worker earned upon the public works during each week identified in the certified statement.

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 (4) The contractor or subcontractor shall deliver or mail each certified statement required by
2 subsection (1) of this section to the public agency. Certified statements for each week during which
3 the contractor or subcontractor employs a worker upon the public works shall be submitted once
4 a month, by the fifth business day of the following month. Information submitted on certified state-
5 ments may be used only to ensure compliance with the provisions of ORS 279C.800 to 279C.870.

6 (5) Each contractor or subcontractor shall preserve the certified statements for a period of three
7 years from the date of completion of the contract.

8 (6) Certified statements received by a public agency are public records subject to the provisions
9 of ORS 192.410 to 192.505.

10 (7) Notwithstanding ORS [279C.555 or] 279C.570 (7), if a contractor is required to file certified
11 statements under this section, the public agency shall retain [25] **five** percent of any amount earned
12 by the contractor on the public works until the contractor has filed with the public agency certified
13 statements as required by this section. The public agency shall pay the contractor the amount re-
14 tained under this subsection within 14 days after the contractor files the certified statements as
15 required by this section, regardless of whether a subcontractor has failed to file certified statements
16 as required by this section. The public agency is not required to verify the truth of the contents of
17 certified statements filed by the contractor under this section.

18 (8) [Notwithstanding ORS 279C.555,] The contractor shall retain [25] **five** percent of any amount
19 earned by a first-tier subcontractor on a public works until the subcontractor has filed with the
20 public agency certified statements as required by this section. The contractor shall verify that the
21 first-tier subcontractor has filed the certified statements before the contractor may pay the subcon-
22 tractor any amount retained under this subsection. The contractor shall pay the first-tier subcon-
23 tractor the amount retained under this subsection within 14 days after the subcontractor files the
24 certified statements as required by this section. Neither the public agency nor the contractor is re-
25 quired to verify the truth of the contents of certified statements filed by a first-tier subcontractor
26 under this section.

27 **SECTION 3.** ORS 701.420 is amended to read:

28 701.420. (1) Partial payment is allowed and may be made on contracts for construction and home
29 improvement. Except as provided in ORS 701.430 (2), an owner, contractor or subcontractor may
30 withhold as retainage an amount equal to not more than five percent of the contract price of the
31 work completed. Partial payment allowed under this subsection is not acceptance or approval of
32 some of the work or a waiver of defects in the work.

33 (2) The owner, contractor or subcontractor shall pay interest at the rate of one percent per
34 month on the final payment due the contractor or subcontractor. [Except as provided in ORS 701.430
35 (2),] The interest shall commence 30 days after the contractor or subcontractor has completed and
36 the owner has accepted the work under the contract for construction for which the final payment
37 is due. The interest shall run until the date when final payment is tendered to the contractor or
38 subcontractor. When the contractor or subcontractor considers the work that the contractor or
39 subcontractor is contracted to perform to be complete, the contractor or subcontractor shall notify
40 the party to whom the contractor or subcontractor is responsible for performing the construction
41 work under the contract. The party shall, within 15 days after receiving the notice, either accept
42 the work or notify the contractor or subcontractor of work yet to be performed under the contract.
43 If the party does not accept the work or does not notify the contractor or subcontractor of work
44 yet to be performed within the time allowed, the interest required under this subsection shall com-
45 mence 30 days after the end of the 15-day period.

1 (3) When a contractor pays a subcontractor in full, including the amount the contractor with-
 2 held as retainage, the owner with whom the contractor has the contract shall pay the contractor,
 3 out of the amount that the owner withheld from the contractor as retainage, a sum equal to the
 4 amount of retainage that the contractor paid the subcontractor. The contractor shall notify the
 5 owner when the contractor pays a subcontractor in full under this section and the owner shall,
 6 within 15 days after receiving the notice, pay the contractor the amount due the contractor under
 7 this subsection. Interest on the amount due the contractor at the rate of one percent per month shall
 8 commence 30 days after the owner receives notice of full payment to the subcontractor.

9 **SECTION 4.** ORS 701.430 is amended to read:

10 701.430. (1) *[Except as provided in subsection (2) of this section,]* A contractor *[or subcontractor]*
 11 may execute and deliver to the owner~~], contractor or subcontractor~~ before the commencement of
 12 construction for which the contractor or subcontractor will be responsible for performing a good
 13 and sufficient bond in a sum equal to the contract price for the faithful performance of the contract.
 14 The term of the bond required under this subsection shall extend to include the period during which
 15 claims of lien or notices of other encumbrances based on the construction performed under the
 16 contract may be filed under applicable law. The bond must be approved by the owner, contractor
 17 or subcontractor entitled to withhold retainage. A faithful performance bond delivered under this
 18 section shall include, but not be limited to, provisions to the effect that:

19 (a) The obligations of the contract shall be faithfully performed;

20 (b) Payment shall promptly be made to all persons supplying labor or materials to the contractor
 21 or subcontractor for prosecution of the work provided in the contract;

22 (c) All contributions due the Industrial Accident Fund and the State Unemployment Compensa-
 23 tion Fund from the contractor or subcontractor in connection with the performance of the con-
 24 tract shall promptly be made; and

25 (d) All sums required to be deducted and retained from the wages of employees of the contractor
 26 or subcontractor pursuant to the Personal Income Tax Act of 1969, shall be paid over to the De-
 27 partment of Revenue.

28 *[(2) When a contractor or subcontractor does not obtain the bond required under subsection (1) of*
 29 *this section, the owner, contractor or subcontractor may withhold that percentage of the contract price*
 30 *of the work completed as retainage that is agreed to by the parties to the contract. The owner, con-*
 31 *tractor or subcontractor shall pay interest at the rate of one percent per month on the final payment*
 32 *due a contractor or subcontractor who was unable to obtain the bond required under subsection (1) of*
 33 *this section. The interest shall commence 10 days after the date on which claims of lien or notices of*
 34 *other encumbrances based on the construction performed under the contract must be properly filed un-*
 35 *der applicable law. For purposes of this subsection, "final payment due a contractor or*
 36 *subcontractor" means the amount withheld as retainage minus the total dollar amount of liens and*
 37 *other encumbrances resulting from the failure of the contractor or subcontractor to faithfully perform*
 38 *the obligations of the contract and properly filed within the time allowed under applicable law.]*

39 **(2) If a contractor obtains a bond as described in subsection (1) of this section, the owner**
 40 **shall reduce the moneys the owner holds as retainage in an amount equal to the value of the**
 41 **bond and pay the amount of the reduction to the contractor. If an owner accepts delivery**
 42 **of a bond described in subsection (1) of this section from a contractor in lieu of retainage,**
 43 **the contractor must accept any like bond from a subcontractor or supplier from which the**
 44 **contractor has retainage. The contractor shall reduce the moneys the contractor holds as**
 45 **retainage in an amount equal to the value of any accepted bond from a subcontractor or**

1 **supplier and pay the amount of the reduction to the subcontractor or supplier.**
2 **Notwithstanding ORS 701.420 (2), interest on the amount of the reduction paid under this**
3 **subsection shall cease to accumulate on the date of the reduction payment.**

4 **SECTION 5. The amendments to ORS 279C.555, 279C.845, 701.420 and 701.430 by sections**
5 **1 to 4 of this 2013 Act apply to contracts entered into on or after January 1, 2014.**

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