

Senate Bill 416

Sponsored by Senator BEYER (at the request of Commissioner of the Bureau of Labor and Industries Brad Avakian) (Pre-session 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**.

Provides that Commissioner of Bureau of Labor and Industries may apply certain considerations to determine whether to divide public works project into separate contracts.

Requires all contracts for public works and all subcontracts related to public works contract to specify that contractor or subcontractor must have filed public works bond with Construction Contractors Board unless contractor or subcontractor is exempt from requirement.

Specifies that disadvantaged business enterprise, minority-owned business, woman-owned business, business that service-disabled veteran owns or emerging small business must file public works bond if commissioner finds that enterprise or business violated prevailing rate of wage law or rules commissioner adopts under prevailing wage law.

Specifies circumstances in which contractor or subcontractor violates provision against any other person paying all or portion of prevailing rate of wage or fringe benefits.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to regulating the prevailing rate of wage; creating new provisions; amending ORS 279C.827,
3 279C.830, 279C.836, 279C.840, 279C.860 and 279C.865; and declaring an emergency.

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

5 **SECTION 1.** ORS 279C.827 is amended to read:

6 279C.827. (1)(a) A **person or** public agency may not divide a public works project into more than
7 one contract for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.

8 (b) [*When*] **If** the Commissioner of the Bureau of Labor and Industries determines that a **person**
9 **or** public agency has divided a public works project into more than one contract for the purpose
10 of avoiding compliance with ORS 279C.800 to 279C.870, the commissioner shall issue an order com-
11 pelling compliance.

12 (c) In making determinations under this subsection, the commissioner shall consider:

13 (A) The physical separation of the project structures;

14 (B) The timing of the work on project phases or structures;

15 (C) The continuity of project contractors and subcontractors working on project parts or phases;

16 (D) The manner in which the public agency and the contractors administer and implement the
17 project;

18 (E) Whether a single public works project includes several types of improvements or structures;

19 and

20 (F) Whether the combined improvements or structures have an overall purpose or function.

21 (2)(a) **The commissioner may apply the considerations set forth in subsection (1)(c) of this**
22 **section to determine whether to divide a public works project into more than one contract,**
23 **regardless of whether the commissioner believes that a person or public agency divided the**
24 **public works project for the purpose of avoiding compliance with ORS 279C.800 to 279C.870.**

25 (b) If a project is a public works **project** of the type described in ORS 279C.800 (6)(a)(B) or (C),

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 the commissioner shall divide the project, if appropriate, after applying the considerations set forth
 2 in subsection (1)(c) of this section to separate the parts of the project that include funds of a public
 3 agency or that will be occupied or used by a public agency from the parts of the project that do
 4 not include funds of a public agency and that will not be occupied or used by a public agency. If
 5 the commissioner divides the project, any part of the project that does not include funds of a public
 6 agency and that will not be occupied or used by a public agency is not subject to ORS 279C.800 to
 7 279C.870.

8 (3) If a project includes parts that are owned by a public agency and parts that are owned by
 9 a private entity, the commissioner shall divide the project, if appropriate, after applying the con-
 10 siderations set forth in subsections (1)(c) and (2)(b) of this section to separate the parts of the
 11 project that are public works from the parts of the project that are not public works. If the com-
 12 missioner divides the project, parts of the project that are not public works are not subject to ORS
 13 279C.800 to 279C.870.

14 **SECTION 2.** ORS 279C.830 is amended to read:

15 279C.830. (1)(a) Except as provided in paragraph (e) of this subsection, the specifications for
 16 every contract for public works must [*contain a provision that states*] **state** the existing state pre-
 17 vailing rate of wage and, if applicable, the federal prevailing rate of wage required under the
 18 Davis-Bacon Act (40 U.S.C. 3141 et seq.) that must be paid to workers in each trade or occupation
 19 that the contractor or subcontractor or other person who is a party to the contract uses in per-
 20 forming all or part of the contract. If the prevailing rates of wage are available electronically or
 21 are accessible on the Internet, the **specifications may incorporate the** rates [*may be incorporated*
 22 *into the specifications*] by referring to the electronically accessible or Internet-accessible rates and
 23 by providing adequate information about how to access the rates.

24 (b) If a public agency under paragraph (a) of this subsection must [*include*] **state** the state and
 25 federal prevailing rates of wage in the specifications, the public agency shall also require the con-
 26 tractor to pay the higher of the applicable state or federal prevailing rate of wage to all workers
 27 on the public works.

28 (c) Every contract and subcontract must provide that the workers must be paid not less than
 29 the specified minimum hourly rate of wage in accordance with ORS 279C.838 and 279C.840.

30 (d) If a public works project is subject both to ORS 279C.800 to 279C.870 and to the Davis-Bacon
 31 Act, every contract and subcontract must provide that workers on the public works must be paid
 32 not less than the higher of the applicable state or federal prevailing rate of wage.

33 (e) A public works project described in ORS 279C.800 (6)(a)(B) or (C) is subject to the existing
 34 state prevailing rate of wage or, if applicable, the federal prevailing rate of wage required under the
 35 Davis-Bacon Act that is in effect at the time a public agency enters into an agreement with a pri-
 36 vate entity for the project. After that time, the specifications for a contract for the public works
 37 must [*include*] **state** the applicable prevailing rate of wage.

38 (2)(a) The specifications for a contract for public works must provide that the contractor and
 39 every subcontractor must have a public works bond filed with the Construction Contractors Board
 40 before starting work on the project, unless **the contractor or subcontractor is** exempt under ORS
 41 279C.836 (4), (7), (8) or (9).

42 (b) Every contract that a contracting agency awards must require the contractor to:

43 [(a)] (A) Have a public works bond filed with the Construction Contractors Board before start-
 44 ing work on the project, unless **the contractor is** exempt under ORS 279C.836 (4), (7), (8) or (9).

45 [(b)] (B) Require, in every subcontract, that the subcontractor have a public works bond filed

1 with the Construction Contractors Board before starting work on the project, unless **the subcontractor** is exempt under ORS 279C.836 (4), (7), (8) or (9).

3 **(c) Every subcontract that a contractor or subcontractor awards in connection with a public works contract between a contractor and a public agency must require any subcontractor to have a public works bond filed with the Construction Contractors Board before starting work on the public works project, unless the subcontractor is exempt under ORS 279C.836 (4), (7), (8) or (9).**

8 **SECTION 3.** ORS 279C.836 is amended to read:

9 279C.836. (1) Except as provided in subsection (4), (7), (8) or (9) of this section, before starting work on a contract or subcontract for a public works project, a contractor or subcontractor shall file with the Construction Contractors Board a public works bond with a corporate surety authorized to do business in this state in the amount of \$30,000. The bond must provide that the contractor or subcontractor will pay claims ordered by the Bureau of Labor and Industries to workers performing labor upon public works projects. The bond must be a continuing obligation, and the surety's liability for the aggregate of claims that may be payable from the bond may not exceed the penal sum of the bond. The bond must remain in effect continuously until depleted by claims paid under this section, unless the surety sooner cancels the bond. The surety may cancel the bond by giving 30 days' written notice to the contractor or subcontractor, to the board and to the Bureau of Labor and Industries. [*When the bond is canceled,*] **Canceling the bond relieves** the surety [*is relieved*] of further liability for work performed on contracts entered into after the cancellation. The cancellation does not limit the surety's liability for work performed on contracts entered into before the cancellation.

23 (2) Before permitting a subcontractor to start work on a public works project, the contractor shall verify that the subcontractor has filed a public works bond as required under this section, has elected not to file a public works bond under subsection (7) or (8) of this section or is exempt under subsection (4) or (9) of this section.

27 (3) **This section does not require** a contractor or subcontractor [*is not required under this section*] to file a separate public works bond for each public works project for which the contractor or subcontractor has a contract.

30 (4) **This section does not require** a person that is not required under ORS 279C.800 to 279C.870 to pay prevailing rates of wage on a public works project [*is not required*] to file a public works bond under this section.

33 (5) A public works bond required by this section is in addition to any other bond the contractor or subcontractor is required to obtain.

35 (6) The board may, by rule, require a contractor or subcontractor to obtain a new public works bond if a surety pays a claim out of an existing public works bond. The new bond must be in the amount of \$30,000. The board may allow a contractor or subcontractor to obtain, instead of a new bond, a certification that the surety remains liable for the full penal sum of the existing bond, notwithstanding payment by the surety on the claim.

40 (7)(a) A disadvantaged business enterprise, a minority-owned business, a woman-owned business, a business that a service-disabled veteran owns or an emerging small business certified under ORS 200.055 may, for up to four years after certification, elect not to file a public works bond as required under subsection (1) this section. If an enterprise or a business elects not to file a public works bond, the enterprise or business shall give the board written verification of the certification and written notice that the enterprise or business elects not to file the bond.

1 **(b) Notwithstanding paragraph (a) of this subsection, if the Commissioner of the Bureau**
 2 **of Labor and Industries finds that an enterprise or a business has violated a provision of ORS**
 3 **279C.800 to 279C.870 or an administrative rule adopted under ORS 279C.800 to 279C.870, the**
 4 **enterprise or business must file a public works bond in accordance with subsection (1) of this**
 5 **section.**

6 [(b)] (c) An enterprise or a business that elects not to file a public works bond under this sub-
 7 section shall notify the public agency for whose benefit the contract was awarded or, if the enter-
 8 prise or business is a subcontractor, the contractor of the election before starting work on a public
 9 works project. [When] If an enterprise or a business elects not to file a public works bond under this
 10 subsection, a claim for unpaid wages may be made against the payment bond of the enterprise or
 11 business or, if the enterprise or business is a subcontractor, the payment bond of the contractor.

12 [(c)] (d) An election not to file a public works bond expires four years after the date the enter-
 13 prise or business is certified. After an election has expired and before starting or continuing work
 14 on a contract or subcontract for a public works project, the enterprise or business shall file a public
 15 works bond with the board [as required under] **in accordance with** subsection (1) of this section.

16 (8) A contractor or subcontractor may elect not to file [a] **the** public works bond [as] required
 17 under subsection (1) of this section for any public works project for which the contract price does
 18 not exceed \$100,000.

19 (9) In cases of emergency, or [when] **if** the interest or property of the public agency for whose
 20 benefit the contract was awarded probably would suffer material injury by delay or other cause, the
 21 requirement for filing a public works bond may be excused, if a declaration of the emergency is
 22 made in accordance with rules adopted under ORS 279A.065.

23 (10) The board shall make available on a searchable public website information concerning
 24 public works bonds filed with the board, claims made on those bonds, elections made by certified
 25 business enterprises not to file those bonds and the expiration date of each election. The board may
 26 adopt rules necessary to perform the duties required of the board by this section.

27 (11) The commissioner [of the Bureau of Labor and Industries], with approval of the board, shall
 28 adopt rules that establish language for public works bonds.

29 **SECTION 4.** ORS 279C.840 is amended to read:

30 279C.840. (1) The hourly rate of wage [to be paid by any] **that a** contractor or subcontractor
 31 **must pay** to workers upon all public works [shall be] **may not be** less than the prevailing rate of
 32 wage for an hour's work in the same trade or occupation in the locality where the labor is per-
 33 formed. [The obligation of] A contractor or subcontractor **may discharge the obligation** to pay the
 34 prevailing rate of wage [may be discharged] by making the payments in cash, by [the] making [of]
 35 contributions of a type [referred to] **described** in ORS 279C.800 (1)(a), or by [the assumption of] **as-**
 36 **suming** an enforceable commitment to bear the costs of [a plan or program] **fringe benefits** of a
 37 type [referred to] **described** in ORS 279C.800 (1)(b), or any combination [thereof] **of payments,**
 38 **contributions and assumption of costs**, where the aggregate of any such payments, contributions
 39 and **assumption of costs** is not less than the prevailing rate of wage. The contractor or subcon-
 40 tractor shall pay all wages due and owing to the contractor's or subcontractor's workers upon
 41 public works on the regular payday established and maintained under ORS 652.120.

42 (2) After a contract for public works is executed with any contractor or work is commenced
 43 upon any public works, **a contractor or subcontractor may not subject** the amount of the pre-
 44 vailing rate of wage [is not subject] to attack in any legal proceeding [by any contractor or subcon-
 45 tractor] in connection with that contract.

1 (3) It is not a defense in any legal proceeding that the prevailing rate of wage is less than the
 2 amount required to be in the specifications of a contract for public works, or that *[there was an*
 3 *agreement between]* the employee **agreed with** *[and]* the employer to work at less than the wage
 4 rates required to be paid under this section.

5 (4) Every contractor or subcontractor engaged on a project for which there is a contract for a
 6 public works shall keep the prevailing rates of wage for that project posted in a conspicuous and
 7 accessible place in or about the project. The Commissioner of the Bureau of Labor and Industries
 8 shall furnish without charge copies of the prevailing rates of wage to contractors and subcontrac-
 9 tors.

10 (5) Every contractor or subcontractor engaged on a project for which there is a contract for a
 11 public works to which the prevailing wage requirements apply that also provides or contributes to
 12 a health and welfare plan or a pension plan, or both, for the contractor or subcontractor's employees
 13 on the project shall post a notice describing the plan in a conspicuous and accessible place in or
 14 about the project. The notice preferably shall be posted in the same place as the notice required
 15 under subsection (4) of this section. In addition to the description of the plan, the notice shall con-
 16 tain information on how and where to make claims and where to obtain further information.

17 (6)(a) Except as provided in paragraph *[(c)]* **(d)** of this subsection, *[no]* a person other than the
 18 contractor or subcontractor may **not** pay or contribute any portion of the prevailing rate of wage
 19 paid by the contractor or subcontractor to workers employed in the performance of a public works
 20 contract.

21 **(b) A contractor or subcontractor violates paragraph (a) of this subsection if a person**
 22 **other than the contractor or subcontractor pays or contributes any portion of the prevailing**
 23 **rate of wage that the contractor or subcontractor owes or pays to workers who perform la-**
 24 **bor on a public works project or the person assumes an enforceable commitment to bear the**
 25 **costs of fringe benefits of a type described in ORS 279C.800 (1)(b) that the contractor or**
 26 **subcontractor provides.**

27 *[(b)]* **(c)** For the purpose of this subsection, the prevailing rate of wage is the prevailing rate
 28 of wage specified in the contract.

29 *[(c)]* **(d)** This subsection *[is not intended to]* **does not** prohibit:

30 **(A)** Payments to a worker who is enrolled in any government-subsidized training or retraining
 31 program[.]; **or**

32 **(B) A surety or public agency from paying the prevailing rate of wage.**

33 (7) A person may not take any action that circumvents the payment of the prevailing rate of
 34 wage to workers employed on a public works contract, including, but not limited to, reducing an
 35 employee's regular rate of pay on any project **that is** not subject to ORS 279C.800 to 279C.870 in
 36 a manner that has the effect of offsetting the prevailing rate of wage on a public works project.

37 **SECTION 5.** ORS 279C.860 is amended to read:

38 279C.860. (1) A contractor or a subcontractor or a firm, corporation, partnership, limited liability
 39 company or association in which the contractor or subcontractor has a financial interest may not
 40 receive a contract or subcontract for public works for a period of three years after the date on
 41 which the Commissioner of the Bureau of Labor and Industries publishes the contractor's or
 42 subcontractor's name on the list described in subsection (2) of this section. The commissioner shall
 43 add a contractor's or subcontractor's name to the list after determining, in accordance with ORS
 44 chapter 183, that:

45 (a) The contractor or subcontractor *[has]* intentionally failed or refused to pay the prevailing

1 rate of wage to workers employed upon public works;

2 **(b) The contractor failed to pay to the contractor's employees amounts required under**
 3 **ORS 279C.840 and a surety or another person paid the amounts on the contractor's behalf;**

4 [(b)] (c) The subcontractor [has] failed to pay to the subcontractor's employees amounts required
 5 under ORS 279C.840 and the contractor, **a surety or another person** [has] paid the amounts on the
 6 subcontractor's behalf;

7 [(c)] (d) The contractor or subcontractor [has] intentionally failed or refused to post the pre-
 8 vailing rates of wage as required under ORS 279C.840 (4); or

9 [(d)] (e) The contractor or subcontractor [has] intentionally falsified information in the certified
 10 statements the contractor or subcontractor submitted under ORS 279C.845.

11 (2) The commissioner shall maintain a written list of the names of contractors and subcontrac-
 12 tors the commissioner determines are ineligible under this section and the period of time for which
 13 the contractors and subcontractors are ineligible. The commissioner shall publish the list, furnish
 14 a copy of the list upon request and make the list available to contracting agencies.

15 (3) If a contractor or subcontractor is a corporation or a limited liability company, the pro-
 16 visions of this section apply to any corporate officer or agent of the corporation or any member or
 17 manager of the limited liability company who is responsible for failing or refusing to pay or post the
 18 prevailing rate of wage, **failing to pay to the contractor's employees amounts required under**
 19 **ORS 279C.840 that a surety or other person pays on the contractor's behalf**, failing to pay to
 20 a subcontractor's employees amounts required under ORS 279C.840 that the contractor, **a surety**
 21 **or another person** pays on the subcontractor's behalf or intentionally falsifying information in the
 22 certified statements the contractor or subcontractor submits under ORS 279C.845.

23 (4) For good cause shown, the commissioner may remove the name of a contractor or subcon-
 24 tractor from the ineligible list.

25 (5) [When] **If** a prevailing rate of wage claim is filed or the commissioner receives evidence in-
 26 dicating that a violation has occurred, a contractor or subcontractor required to pay the prevailing
 27 rate of wage to workers employed upon public works under ORS 279C.800 to 279C.870 shall send a
 28 certified copy of the payroll for workers employed upon public works when the commissioner re-
 29 quests the certified copy.

30 **SECTION 6.** ORS 279C.865 is amended to read:

31 279C.865. (1) In addition to any other penalty provided by law, the Commissioner of the Bureau
 32 of Labor and Industries may assess a civil penalty not to exceed \$5,000 for each violation of any
 33 provision of ORS 279C.800 to 279C.870 or any rule [of] the commissioner adopted [thereunder] **under**
 34 **ORS 279C.800 to 279C.870.**

35 **(2) For purposes of this section, a failure to pay the required prevailing rate of wage and**
 36 **a failure to pay required fringe benefits are separate violations.**

37 [(2)] (3) Civil penalties under this section [shall] **must** be imposed as provided in ORS 183.745.

38 [(3)] (4) All moneys collected as penalties under this section [shall] **must** be [first] applied **first**
 39 toward [reimbursement of] **reimbursing** costs incurred in determining violations, conducting
 40 hearings and assessing and collecting the penalties. The remainder, if any, of moneys collected as
 41 penalties under this section [shall] **must** be paid into the State Treasury and credited to the General
 42 Fund and are available for general governmental expenses.

43 **SECTION 7. The amendments to ORS 279C.827, 279C.830, 279C.836, 279C.840, 279C.860 and**
 44 **279C.865 by sections 1 to 6 of this 2017 Act apply to contracts for public works that a public**
 45 **agency first advertises or otherwise solicits on or after the operative date specified in section**

1 **8 of this 2017 Act or, if the public agency does not advertise or otherwise solicit the contract**
2 **for public works, to contracts for public works into which a public agency enters on or after**
3 **the operative date specified in section 8 of this 2017 Act.**

4 **SECTION 8. (1) The amendments to ORS 279C.827, 279C.830, 279C.836, 279C.840, 279C.860**
5 **and 279C.865 by sections 1 to 6 of this 2017 Act become operative on January 1, 2018.**

6 **(2) The Commissioner of the Bureau of Labor and Industries may adopt rules and take**
7 **any other action before the operative date specified in subsection (1) of this section that is**
8 **necessary to enable the commissioner, on and after the operative date specified in subsection**
9 **(1) of this section, to exercise all of the duties, powers and functions conferred on the com-**
10 **missioner by the amendments to ORS 279C.827, 279C.830, 279C.836, 279C.840, 279C.860 and**
11 **279C.865 by sections 1 to 6 of this 2017 Act.**

12 **SECTION 9. This 2017 Act being necessary for the immediate preservation of the public**
13 **peace, health and safety, an emergency is declared to exist, and this 2017 Act takes effect**
14 **on its passage.**