

House Bill 2415

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of House Interim Committee on Business and Labor for Associated Wall and Ceiling 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**.

Prohibits retainage or performance security deduction from portion of progress payment relating to cost of materials or equipment stored at job site.

Prohibits retainage if contractor has supplied performance security equivalent to full amount that can be deducted as retainage on original contract price. Limits ability to refuse acceptance of performance security.

Requires that retainage be placed in interest-bearing escrow account if contract price exceeds \$250,000. Specifies interest accrual period.

Prohibits contractor retainage on payments to first-tier subcontractor made after 50 percent of work is completed if work is deemed progressing satisfactorily.

Establishes deadlines for payment of retainage after acceptance of work. Establishes requirement for payment of interest if retainage is not timely paid. Provides entitlement to costs and attorney fees to prevailing plaintiff in action for release of retainage amount due.

Requires written statement and certification of good faith if payment of retainage is withheld due to incomplete or defective work items or due to filed and documented claims. Limits amounts that may be withheld from release of retainage.

Makes offering of written contract form not meeting statutory progress payment or retainage provisions violation subject to fine, not to exceed \$2,000.

A BILL FOR AN ACT

1
2 Relating to payments on contracts; creating new provisions; and amending ORS 279C.560, 279C.570,
3 701.420, 701.430 and 701.435.

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

5 **SECTION 1. Section 2 of this 2019 Act is added to and made a part of ORS 279C.550 to**
6 **279C.570.**

7 **SECTION 2. The offeror of a written contract form containing progress payment or**
8 **retainage provisions that do not comply with ORS 279C.550 to 279C.570 commits a Class A**
9 **violation.**

10 **SECTION 3. Section 4 of this 2019 Act is added to and made a part of ORS chapter 701.**

11 **SECTION 4. The offeror of a written contract form containing progress payment or**
12 **retainage provisions that do not comply with the progress payment or retainage provisions**
13 **of this chapter commits a Class A violation.**

14 **SECTION 5. ORS 279C.560 is amended to read:**

15 279C.560. (1) [*Unless a contracting agency that reserves an amount as retainage under ORS*
16 *279C.570 (7) finds in writing that accepting a bond or instrument described in paragraph (a) or (b) of*
17 *this subsection poses an extraordinary risk that is not typically associated with the bond or instrument,*
18 *the]* **A contracting agency in lieu of withholding moneys from payment shall accept from a contrac-**
19 **tor:**

20 (a) Bonds, securities or other instruments of a character described in subsection (6) of this sec-
21 tion that are deposited as provided in subsection (4) of this section; or

22 (b) A surety bond deposited as provided in subsection (7) of this section.

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 (2) A contracting agency that holds moneys as retainage under ORS 279C.570 (7) shall:

2 (a) Hold the moneys in a fund and pay the moneys to the contractor in accordance with ORS
3 279C.570; or

4 (b) At the election of the contractor, pay the moneys to the contractor in accordance with
5 subsection (4) or (5) of this section and in a manner authorized by the Director of the Oregon De-
6 partment of Administrative Services.

7 (3) If the contracting agency incurs additional costs as a result of the exercise of an option de-
8 scribed in subsection (1) or (5) of this section, the contracting agency may recover the costs from
9 the contractor by reducing the final payment. As work on the contract progresses, the contracting
10 agency shall, upon demand, inform the contractor of all accrued costs.

11 (4) The contractor may deposit bonds, securities or other instruments with the contracting
12 agency or in a bank or trust company for the contracting agency to hold for the contracting
13 agency's benefit in lieu of moneys held as retainage. *[If]* **Upon** the contracting agency *[accepts]* **re-**
14 **ceiving** bonds, securities or other instruments deposited as provided in this subsection, the con-
15 tracting agency shall reduce the moneys held as retainage in an amount equal to the value of the
16 bonds, securities and other instruments and pay the amount of the reduction to the contractor in
17 accordance with ORS 279C.570. **If the contractor supplies a bond, security or other instrument**
18 **that is equivalent to the full amount that the contracting agency could withhold as retainage**
19 **on the original contract price, the contracting agency may not withhold retainage.** Interest
20 or earnings on the bonds, securities or other instruments shall accrue to the contractor.

21 (5) If the contractor elects, **or if the original contract price exceeds \$250,000**, the contracting
22 agency shall deposit the retainage as accumulated in an interest-bearing account in a bank, savings
23 bank, trust company or savings association for the benefit of the contracting agency. When the
24 contracting agency is a state contracting agency, the account must be established through the State
25 Treasurer. Earnings on the account accrue to the contractor. **Interest on the retainage amount**
26 **accrues from the date the payment request is approved until the date the retainage is paid**
27 **to the contractor to which it is due.**

28 (6) Bonds, securities and other instruments deposited or acquired in lieu of retainage, as per-
29 mitted by this section, must be of a character approved by the Director of the Oregon Department
30 of Administrative Services, including but not limited to:

31 (a) Bills, certificates, notes or bonds of the United States.

32 (b) Other obligations of the United States or agencies of the United States.

33 (c) Obligations of a corporation wholly owned by the federal government.

34 (d) Indebtedness of the Federal National Mortgage Association.

35 (e) General obligation bonds of the State of Oregon or a political subdivision of the State of
36 Oregon.

37 (f) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

38 (7) The contractor¹, *with the approval of the contracting agency,* may deposit a surety bond for
39 all or any portion of the amount of funds retained, or to be retained, by the contracting agency in
40 a form acceptable to the contracting agency. The bond and any proceeds of the bond must be made
41 subject to all claims and liens and in the same manner and priority as set forth for retainage under
42 ORS 279C.550 to 279C.570 and 279C.600 to 279C.625. The contracting agency shall reduce the
43 moneys the contracting agency holds as retainage in an amount equal to the value of the bond and
44 pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Whenever a
45 **contractor deposits a surety bond with a contracting agency** *[accepts a surety bond from a con-*

1 tractor] in lieu of retainage, the contractor shall accept like bonds from a subcontractor or supplier
 2 from which the contractor has retainage. The contractor shall then reduce the moneys the con-
 3 tractor holds as retainage in an amount equal to the value of the bond and pay the amount of the
 4 reduction to the subcontractor or supplier.

5 **SECTION 6.** ORS 279C.570 is amended to read:

6 279C.570. (1) It is the policy of the State of Oregon that all payments due on a public improve-
 7 ment contract and owed by a contracting agency shall be paid promptly. No contracting agency is
 8 exempt from the provisions of this section.

9 (2) Contracting agencies shall make progress payments on the contract monthly as work
 10 progresses on a public improvement contract. Payments shall be based upon estimates of work
 11 completed that are approved by the contracting agency. A progress payment is not considered ac-
 12 ceptance or approval of any work or waiver of any defects therein. The contracting agency shall
 13 pay to the contractor interest on the progress payment, not including retainage, due the contractor.
 14 The interest shall commence 30 days after receipt of the invoice from the contractor or 15 days after
 15 the payment is approved by the contracting agency, whichever is the earlier date. The rate of in-
 16 terest charged to the contracting agency on the amount due shall equal three times the discount
 17 rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve dis-
 18 trict that includes Oregon on the date that is 30 days after receipt of the invoice from the con-
 19 tractor or 15 days after the payment is approved by the contracting agency, whichever is the earlier
 20 date, but the rate of interest may not exceed 30 percent. **If the contract price exceeds \$250,000,**
 21 **the contracting agency shall place amounts deducted as retainage into an interest-bearing**
 22 **escrow account. Interest on the retainage amount accrues from the date the payment re-**
 23 **quest is approved until the date the retainage is paid to the contractor to which it is due.**

24 (3) Interest shall be paid automatically when payments become overdue. The contracting agency
 25 shall document, calculate and pay any interest due when payment is made on the principal. Interest
 26 payments shall accompany payment of net due on public improvement contracts. The contracting
 27 agency may not require the contractor to petition, invoice, bill or wait additional days to receive
 28 interest due **on the payment.**

29 (4) When an invoice is filled out incorrectly, when there is any defect or impropriety in any
 30 submitted invoice or when there is a good faith dispute, the contracting agency shall so notify the
 31 contractor within 15 days stating the reason or reasons the invoice is defective or improper or the
 32 reasons for the dispute. A defective or improper invoice, if corrected by the contractor within seven
 33 days of being notified by the contracting agency, may not cause a payment to be made later than
 34 specified in this section unless interest is also paid.

35 (5) If requested in writing by a first-tier subcontractor, the contractor, within 10 days after re-
 36 ceiving the request, shall send to the first-tier subcontractor a copy of that portion of any invoice,
 37 request for payment submitted to the contracting agency or pay document provided by the con-
 38 tracting agency to the contractor specifically related to any labor or materials supplied by the
 39 first-tier subcontractor.

40 (6) Payment of interest may be postponed when payment on the principal is delayed because of
 41 disagreement between the contracting agency and the contractor. Whenever a contractor brings
 42 formal administrative or judicial action to collect interest due under this section, **except as limited**
 43 **under subsection (8)(e) of this section,** the prevailing party is entitled to costs and reasonable
 44 attorney fees.

45 (7)(a) A contracting agency may reserve as retainage from any progress payment on a public

1 improvement contract an amount not to exceed five percent of the payment. As work progresses, a
2 contracting agency may reduce the amount of the retainage and the contracting agency may elimi-
3 nate retainage on any remaining monthly contract payments after 50 percent of the work under the
4 contract is completed if, in the contracting agency's opinion, such work is progressing satisfactorily.
5 Elimination or reduction of retainage shall be allowed only upon written application by the con-
6 tractor, and the application shall include written approval of the contractor's surety. However, when
7 the contract work is 97.5 percent completed the contracting agency may, at the contracting agency's
8 discretion and without application by the contractor, reduce the retained amount to 100 percent of
9 the value of the contract work remaining to be done. Upon receipt of a written application by the
10 contractor, the contracting agency shall respond in writing within a reasonable time.

11 **(b) Notwithstanding paragraph (a) of this subsection, a contracting agency may not de-**
12 **duct retainage or retain performance security for any portion of a progress payment relating**
13 **to the cost of materials or to equipment that is stored at the job site.**

14 (8)(a) **Except as provided in this subsection,** the retainage held by a contracting agency shall
15 be included in and paid to the contractor as part of the final payment of the contract price.

16 **(b) When the contractor considers the work that the contractor is responsible for per-**
17 **forming to be complete, the contractor shall notify the contracting agency to which con-**
18 **tractor is responsible for performance of the work. The contracting agency shall, within 15**
19 **days after receiving the notice, either accept the work or notify the contractor of work yet**
20 **to be performed under the contract. Except as provided in paragraph (c) of this subsection,**
21 **no later than 30 days after a contracting agency accepts a portion of a project, the con-**
22 **tracting agency shall pay the amount deducted as retainage on the accepted portion and any**
23 **interest that accrues on the amount.**

24 **(c) If a contracting agency provides a contractor that is due payment with a written list**
25 **of outstanding, incomplete or defective work and deliverables, the factual or contractual**
26 **basis for the claims, and the value attributable to each item, the contracting agency may**
27 **withhold the following from a payment due under paragraph (b) of this subsection until the**
28 **items have been remedied:**

29 **(A) If there are incomplete or defective work items, 120 percent of the reasonable cost**
30 **to complete or correct the item.**

31 **(B) The reasonable value of any filed and documented claims against the contractor from**
32 **which the payment is being withheld, plus any costs or attorney fees allowed under the**
33 **contract.**

34 **(d) Upon satisfactory remedy of an incomplete or defective work item for which retainage**
35 **is withheld under paragraph (c) of this subsection or satisfaction of a claim for which**
36 **retainage is withheld under paragraph (c) of this subsection, the payment shall become due**
37 **in accordance with the schedule described in paragraph (b) of this subsection.**

38 **(e) If retainage is not paid as due after completion and acceptance of work, interest ac-**
39 **crues on the unpaid retainage at the rate of 18 percent per annum. If an action is brought**
40 **against a contracting agency for refusing to timely pay amounts deducted as retainage as**
41 **required by this subsection, the contracting agency shall pay a prevailing plaintiff the**
42 **retainage amount, interest, costs and attorney fees.**

43 **(f) The contracting agency shall pay to the contractor interest at the rate of 1.5 percent per**
44 **month on the final payment due the contractor, interest to commence 30 days after the work under**
45 **the contract has been completed and accepted and to run until the date when the final payment is**

1 tendered to the contractor. The contractor shall notify the contracting agency in writing when the
 2 contractor considers the work complete and the contracting agency shall, within 15 days after re-
 3 ceiving the written notice, either accept the work or notify the contractor of work yet to be per-
 4 formed on the contract. If the contracting agency does not, within the time allowed, notify the
 5 contractor of work yet to be performed to fulfill contractual obligations, the interest provided by
 6 this subsection shall commence to run 30 days after the end of the 15-day period.

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

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

15 (B) Thirty days after the date on which the claim for the payment under dispute was presented
 16 to the contracting agency by the contractor in writing or in accordance with applicable provisions
 17 of the contract.

18 (b) Interest shall be added to and not made a part of the settlement or judgment.

19 **SECTION 7.** ORS 701.420 is amended to read:

20 701.420. (1) Partial payment is allowed and may be made on contracts for construction and home
 21 improvement. An owner, contractor or subcontractor may withhold as retainage an amount equal
 22 to not more than five percent of the contract price of the work completed. **However, an owner,**
 23 **contractor or subcontractor may not withhold retainage or retain performance security for**
 24 **any portion of a progress payment relating to the cost of materials or to equipment that is**
 25 **stored at the job site.** Partial payment allowed under this subsection is not acceptance or approval
 26 of some of the work or a waiver of defects in the work.

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

40 (b) **If the contract price exceeds \$250,000, the owner, contractor or subcontractor shall**
 41 **place amounts withheld as retainage into an interest-bearing escrow account. Interest on the**
 42 **retainage amount accrues from the date the payment request is approved until the date the**
 43 **retainage is paid to the contractor to which it is due. The contractor shall eliminate**
 44 **retainage on any remaining payments to a first-tier subcontractor after 50 percent of the**
 45 **work under the subcontract is completed if, in the contractor's opinion work under the**

1 subcontract is progressing satisfactorily.

2 (c) No later than 30 days after a party accepts a portion of a project, the party shall pay
 3 the amount deducted as retainage on the accepted portion and any interest that accrues on
 4 the amount. No later than seven days after receiving a payment under this paragraph, a
 5 contractor shall pay to a first-tier subcontractor any proportional share of the payment from
 6 retainage that is due the first-tier subcontractor for the accepted portion of the work. No
 7 later than seven days after receiving a payment under this paragraph, any subcontractor
 8 shall pay to any lower-tier subcontractor any proportional share of the payment that is due
 9 the lower-tier subcontractor for the accepted portion of the work.

10 (d) If a party responsible for payment has provided the contractor or subcontractor that
 11 is due payment with a written list of outstanding, incomplete or defective work and deliver-
 12 ables, the factual or contractual basis for the claims, and the value attributable to each item,
 13 the party may withhold the following from a payment due under paragraph (c) of this sub-
 14 section until the items have been remedied:

15 (A) If there are incomplete or defective work items, 120 percent of the reasonable cost
 16 to complete or correct the item.

17 (B) The reasonable value of any filed and documented claims against the contractor or
 18 subcontractor from which the payment is being withheld, plus any costs or attorney fees
 19 allowed under the contract.

20 (e) Upon satisfactory remedy of an incomplete or defective work item for which retainage
 21 is withheld under paragraph (d) of this subsection or satisfaction of a claim for which
 22 retainage is withheld under paragraph (d) of this subsection, the payment shall become due
 23 in accordance with the schedule described in paragraph (c) of this subsection.

24 (f) If retainage is not paid as due after completion and acceptance of work, interest ac-
 25 crues on the unpaid retainage at the rate of 18 percent per annum. If an action is brought
 26 against a party refusing to timely pay amounts deducted as retainage as required by this
 27 subsection, the party shall pay a prevailing plaintiff the retainage amount, interest, costs and
 28 attorney fees.

29 (3) When a contractor pays a subcontractor in full, including the amount the contractor with-
 30 held as retainage, the owner with whom the contractor has the contract shall pay the contractor,
 31 out of the amount that the owner withheld from the contractor as retainage, a sum equal to the
 32 amount of retainage that the contractor paid the subcontractor. The contractor shall notify the
 33 owner when the contractor pays a subcontractor in full under this section and the owner shall,
 34 within 15 days after receiving the notice, pay the contractor the amount due the contractor under
 35 this subsection. Interest on the amount due the contractor at the rate of one percent per month shall
 36 commence 30 days after the owner receives notice of full payment to the subcontractor. **This sub-**
 37 **section does not apply if the owner did not withhold amounts, other than bonds or other**
 38 **security, from the contractor as retainage.**

39 **SECTION 8.** ORS 701.430 is amended to read:

40 701.430. A contractor or subcontractor may execute and deliver to the owner, contractor or
 41 subcontractor before the commencement of construction for which the contractor or subcontractor
 42 will be responsible for performing a good and sufficient bond in a sum equal to the contract price
 43 for the faithful performance of the contract. **If the bond is equivalent to the full amount that**
 44 **the owner, contractor or subcontractor could deduct as retainage on the original contract**
 45 **price, the owner, contractor or subcontractor may not deduct retainage.** The term of the bond

1 obtained under this subsection must extend to include the period during which claims of lien or
 2 notices of other encumbrances based on the construction performed under the contract may be filed
 3 under applicable law. The bond must be approved by the owner, contractor or subcontractor entitled
 4 to withhold retainage. **An owner, contractor or subcontractor may not refuse to approve a**
 5 **bond, security or other instrument that meets the requirements of this section.** A faithful
 6 performance bond delivered under this section must include, but not be limited to, provisions to the
 7 effect that:

8 (1) The obligations of the contract must be faithfully performed;

9 (2) Payment must promptly be made to all persons supplying labor or materials to the contractor
 10 or subcontractor for prosecution of the work provided in the contract;

11 (3) All contributions due the Industrial Accident Fund and the Unemployment Compensation
 12 Trust Fund from the contractor or subcontractor in connection with the performance of the contract
 13 must be made promptly; and

14 (4) All sums required to be deducted and retained from the wages of employees of the contractor
 15 or subcontractor pursuant to the Personal Income Tax Act of 1969, must be paid over to the De-
 16 partment of Revenue.

17 **SECTION 9.** ORS 701.435 is amended to read:

18 701.435. (1) When a contractor on a public contract deposits bonds, securities or other instru-
 19 ments under ORS 279C.560 (4), if the subcontract price exceeds \$50,000 and constitutes more than
 20 10 percent of the cost of the public contract, a subcontractor on the public contract may deposit
 21 bonds, securities or other instruments with the contractor or in a bank or trust company for the
 22 contractor to hold for the contractor's benefit in lieu of moneys held as retainage. If the contractor
 23 accepts the bonds, securities or other instruments deposited as provided in this subsection, the
 24 contractor shall reduce the moneys held as retainage in an amount equal to the value of the bonds,
 25 securities and other instruments and pay the amount of the reduction to the subcontractor in ac-
 26 cordance with ORS 701.420 and 701.430. **A contractor may not refuse to approve a bond, secu-**
 27 **rity or other instrument that meets the requirements of this section. If the bond, security**
 28 **or other instrument is equivalent to the full amount that the contractor could withhold from**
 29 **the subcontractor as retainage, the contractor may not deduct retainage from amounts due**
 30 **the subcontractor.** Interest or earnings on the bonds, securities or other instruments shall accrue
 31 to the subcontractor.

32 (2) When a contractor on a public contract elects to have the public contracting agency deposit
 33 the accumulated retainage in an interest-bearing account under ORS 279C.560 (5), the contractor,
 34 within 30 days following payment of the final amount due for construction of the public improve-
 35 ment, shall pay to each subcontractor who performed work on the construction the subcontractor's
 36 proportional share of the interest earnings that accrued to the contractor as a result of the election.
 37 A subcontractor's share of the total amount of interest earnings under this subsection shall be de-
 38 termined by the proportion that the amount of retainage withheld from the subcontractor bears to
 39 the amount of retainage withheld from the contractor and the length of time the retainage was
 40 withheld from the subcontractor. A share of the interest earnings shall be paid to a subcontractor
 41 under this subsection only when:

42 (a) Retainage is withheld from the subcontractor for more than 60 days after the day on which
 43 the first partial payment was due the subcontractor under the terms of the subcontract; and

44 (b) The amount of interest earnings due the subcontractor exceeds \$100.

45 (3) If the contractor incurs additional costs as a result of the exercise of an option described in

1 subsection (1) or (2) of this section, the contractor may recover the costs from the subcontractor
2 by reducing the final payment. As work on the subcontract progresses, the contractor shall, upon
3 demand, inform the subcontractor of all accrued additional costs.

4 (4) Bonds, securities and other instruments deposited or acquired in lieu of retainage, as per-
5 mitted by this section, must be of a character approved by the Director of the Oregon Department
6 of Administrative Services, including but not limited to:

7 (a) Bills, certificates, notes or bonds of the United States.

8 (b) Other obligations of the United States or agencies of the United States.

9 (c) Obligations of a corporation wholly owned by the federal government.

10 (d) Indebtedness of the Federal National Mortgage Association.

11 (e) General obligation bonds of the State of Oregon or a political subdivision of the State of
12 Oregon.

13 (f) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

14 **SECTION 10. (1) Sections 2 and 4 of this 2019 Act apply to contract offers presented on**
15 **or after the effective date of this 2019 Act.**

16 **(2) The amendments to ORS 279C.560, 279C.570, 701.420, 701.430 and 701.435 by sections 5**
17 **to 9 of this 2019 Act apply to contracts entered into on or after the effective date of this 2019**
18 **Act.**

19