

## HOUSE AMENDMENTS TO HOUSE BILL 2870

By COMMITTEE ON BUSINESS AND LABOR

April 10

1 On page 1 of the printed bill, delete lines 5 through 30 and delete page 2.

2 On page 3, delete lines 1 through 16 and insert:

3 “**SECTION 1.** ORS 279C.560 is amended to read:

4 “279C.560. (1)(a) [*Unless a contracting agency that reserves an amount as retainage under ORS*  
5 *279C.570 (7) finds in writing that accepting a bond or instrument described in paragraph (a) or (b) of*  
6 *this subsection poses an extraordinary risk that is not typically associated with the bond or instrument,*  
7 *the]* **A contractor may submit and a contracting agency shall accept from a contractor** in lieu  
8 of withholding moneys [*from payment shall accept from a contractor*] **for all or a portion of the**  
9 **retainage required under a public contract:**

10 “[*a*] **(A)** Bonds, securities or other instruments of a character described in subsection (6) of this  
11 section that are deposited as provided in subsection (4) of this section; or

12 “[*b*] **(B)** A surety bond deposited as provided in subsection (7) of this section.

13 “**(b) A surety bond that a contractor submits under this section must be executed by a**  
14 **surety bonding company that is authorized to transact surety business in this state and may**  
15 **not be a surety obligation of an individual.**

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

17 “(a) Hold the moneys in a fund and pay the moneys to the contractor in accordance with ORS  
18 279C.570; or

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

22 “(3) If [*the*] **a** contracting agency incurs additional costs as a result of the **contractor’s** exercise  
23 of an option described in subsection (1) or (5) of this section, the contracting agency may recover  
24 the **additional** costs from the contractor by reducing the final payment. As work on the contract  
25 progresses, the contracting agency shall, upon demand, inform the contractor of all accrued costs.

26 “(4) [*The*] **A** contractor may deposit bonds, securities or other instruments with [*the*] **a** con-  
27 tracting agency or in a [*bank or trust company*] **financial institution** for the contracting agency to  
28 hold for the contracting agency’s benefit in lieu of moneys held as retainage. If [*the contracting*  
29 *agency accepts*] **a contractor or subcontractor submits** bonds, securities or other instruments  
30 [*deposited*] as provided in this subsection, the contracting agency shall reduce the moneys held as  
31 retainage in an amount equal to the value of the bonds, securities and other instruments and pay  
32 the amount of the reduction to the contractor in accordance with ORS 279C.570. Interest or earnings  
33 on the bonds, securities or other instruments shall accrue to the contractor.

34 “(5) If the contractor elects, the contracting agency shall deposit the retainage as accumulated  
35 in an interest-bearing account in a bank[, *savings bank, trust company or savings association*] **or**

1 **other financial institution** for the benefit of the contracting agency. [*When*] **If** the contracting  
2 agency is a state contracting agency, the account must be established through the State Treasurer.  
3 Earnings on the account accrue to the contractor.

4 “(6) 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 “(7) [*The*] **A contractor**[, *with the approval of the contracting agency,*] may deposit a surety bond  
15 for all or any portion of the amount of funds retained, or to be retained, by the contracting agency  
16 in a form [*acceptable to the contracting agency*] **that is substantially similar to the instruments**  
17 **specified in ORS 701.435.** The **surety** bond and any proceeds of the **surety** bond must be made  
18 subject to all claims and liens and in the same manner and priority as set forth for retainage under  
19 ORS 279C.550 to 279C.570 and 279C.600 to 279C.625. The contracting agency shall reduce the mon-  
20 eys the contracting agency holds as retainage in an amount equal to the value of the **surety** bond  
21 and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. [*Whenever*  
22 *a contracting agency accepts a surety bond from a contractor in lieu of retainage, the contractor shall*  
23 *accept like bonds from a subcontractor or supplier from which the contractor has retainage. The con-*  
24 *tractor shall then reduce the moneys the contractor holds as retainage in an amount equal to the value*  
25 *of the bond and pay the amount of the reduction to the subcontractor or supplier.*]

26 “(8)(a) **At any time before final payment on a public improvement contract, a subcon-**  
27 **tractor may request the contractor on the public improvement contract to submit a surety**  
28 **bond to the contracting agency for the portion of the contractor’s retainage that pertains**  
29 **to the subcontractor. The surety bond must meet the requirements set forth in subsection**  
30 **(1)(b) of this section. If a contractor at the subcontractor’s request obtains a surety bond**  
31 **under this paragraph, the contractor may withhold from payments to the subcontractor an**  
32 **amount equivalent to the portion of the surety bond premium for which the subcontractor**  
33 **is responsible.**

34 “(b) **Within 30 days after a subcontractor’s request under paragraph (a) of this sub-**  
35 **section, the contractor shall provide, and the contracting agency shall accept, a surety bond**  
36 **that meets the requirements set forth in subsection (1)(b) of this section unless:**

37 “(A) **The contracting agency finds good cause in writing for not accepting the surety**  
38 **bond;**

39 “(B) **The surety bond is not commercially available; or**

40 “(C) **The subcontractor refuses to pay to the contractor the subcontractor’s portion of**  
41 **the surety bond premium or refuses to provide the contractor with a surety bond that meets**  
42 **the requirements of subsection (1)(b) of this section.**

43 “(c) **A surety bond the contractor submits under this subsection, and any proceeds from**  
44 **the surety bond, are subject to all claims and liens and in the same manner and priority**  
45 **specified for retainage under ORS 279C.550 to 279C.570.**

1       “(d) A contracting agency shall within 30 days after receiving a surety bond under this  
2 subsection release to the contractor an amount the contracting agency holds as retainage  
3 that is equivalent to the amount the contractor submitted as a surety bond.

4       “(e) When a contracting agency accepts a surety bond in lieu of retainage from a con-  
5 tractor under this section, the contractor shall accept surety bonds from subcontractors or  
6 suppliers from which the contractor has withheld retainage. The contractor must within 30  
7 days after receiving a surety bond from a subcontractor or supplier release to the subcon-  
8 tractor or supplier the amount the contractor holds as retainage that is equivalent to the  
9 amount the subcontractor or supplier submitted as the surety bond.

10       “(9) A surety bond under this section must be in substantially the form specified in ORS  
11 701.435 (4).”.

12       On page 5, delete lines 31 through 45 and delete pages 6 and 7.

13       On page 8, delete lines 1 through 30 and insert:

14       “**SECTION 4.** ORS 701.435 is amended to read:

15       “701.435. *[(1) When a contractor on a public contract deposits bonds, securities or other instru-*  
16 *ments under ORS 279C.560 (4), if the subcontract price exceeds \$50,000 and constitutes more than 10*  
17 *percent of the cost of the public contract, a subcontractor on the public contract may deposit bonds,*  
18 *securities or other instruments with the contractor or in a bank or trust company for the contractor to*  
19 *hold for the contractor’s benefit in lieu of moneys held as retainage. If the contractor accepts the bonds,*  
20 *securities or other instruments deposited as provided in this subsection, the contractor shall reduce the*  
21 *moneys held as retainage in an amount equal to the value of the bonds, securities and other instruments*  
22 *and pay the amount of the reduction to the subcontractor in accordance with ORS 701.420 and 701.430.*  
23 *Interest or earnings on the bonds, securities or other instruments shall accrue to the subcontractor.]*

24       “(1)(a) A contractor that performs work on a large commercial structure or under a  
25 public improvement contract may submit a surety bond for all or any portion of the  
26 retainage required for the large commercial structure or under the public improvement  
27 contract.

28       “(b) At any time before final payment for work on a large commercial structure or under  
29 a public improvement contract, a subcontractor may request the contractor on the con-  
30 struction project or public improvement contract to submit a surety bond to the project  
31 owner and lender for the portion of the contractor’s retainage that pertains to the subcon-  
32 tractor. The surety bond must be from a surety bonding company that is authorized to  
33 transact business this state and may not be a surety obligation of an individual. The surety  
34 bond must be in substantially the form specified in subsection (4) of this section. If a con-  
35 tractor at the subcontractor’s request obtains a surety bond under this paragraph, the con-  
36 tractor may withhold from payments to the subcontractor an amount equivalent to the  
37 portion of the surety bond premium for which the subcontractor is responsible.

38       “(c) Within 30 days after a subcontractor’s request under paragraph (a) of this sub-  
39 section, the contractor shall provide and the owner and lender shall accept a surety bond  
40 that meets the requirements set forth in this subsection unless:

41       “(A) The surety bond is not commercially available; or

42       “(B) The subcontractor refuses to pay to the contractor the subcontractor’s portion of  
43 the surety bond premium or refuses to provide the contractor with a surety bond that meets  
44 the requirements of this subsection.

45       “(d) A surety bond the contractor submits under this subsection, and any proceeds from

1 the surety bond, are subject to all claims and liens and in the same manner priority specified  
2 for retainage under this section and ORS 279C.550 to 279C.570, 701.410, 701.420, 701.430 and  
3 701.440.

4 “(e) An owner shall within 30 days after receiving a surety bond under this subsection  
5 release to the contractor an amount the owner holds as retainage that is equivalent to the  
6 amount the contractor submitted as a surety bond.

7 “(f) When an owner accepts a surety bond in lieu of retainage from a contractor under  
8 this section, the contractor shall accept surety bonds from subcontractors or suppliers from  
9 which the contractor has withheld retainage. The contractor must within 30 days after re-  
10 ceiving a surety bond from a subcontractor or supplier reduce the amount the contractor  
11 holds as retainage in an amount equivalent to the amount the subcontractor or supplier  
12 submitted as a surety bond and shall pay the amount of the reduction to the subcontractor  
13 in accordance with ORS 701.420 and 701.430.

14 “(g) Interest or earnings on the surety bonds must accrue to the contractor.

15 “(2) [When a contractor on a public contract elects to have the public contracting agency deposit  
16 the accumulated retainage in an interest-bearing account under ORS 279C.560 (5),] If a contractor  
17 or a subcontractor performing work on a large commercial structure or under a public im-  
18 provement contract does not deposit surety bonds in lieu of retainage, the contractor may  
19 elect to have the project owner deposit accumulated retainage in an interest-bearing ac-  
20 count. Subject to subsection (3) of this section, if the contractor elects to have the project  
21 owner deposit the retainage in an interest-bearing account, the contractor, within 30 days fol-  
22 lowing payment of the final amount due for construction of the **project** or public improvement, shall  
23 pay to each subcontractor [who] **that** performed work on the construction the subcontractor’s pro-  
24 portional share of the interest earnings that accrued to the contractor as a result of the election.  
25 A subcontractor’s share of the total amount of interest earnings under this subsection [shall] **must**  
26 be determined by the proportion that the amount of retainage withheld from the subcontractor bears  
27 to the amount of retainage withheld from the contractor and the length of time the retainage was  
28 withheld from the subcontractor. A share of the interest earnings shall be paid to a subcontractor  
29 under this subsection only when:

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

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

33 “(3) If [the] a contractor incurs additional costs as a result of the exercise of an option described  
34 in subsection (1) or (2) of this section, the contractor may recover the **additional** costs from the  
35 subcontractor by reducing the final payment. As work on the subcontract progresses, the contractor  
36 shall, upon demand, inform the subcontractor of all accrued additional costs.

37 “[4] Bonds, securities and other instruments deposited or acquired in lieu of retainage, as per-  
38 mitted by this section, must be of a character approved by the Director of the Oregon Department of  
39 Administrative Services, including but not limited to:]

40 “[(a) Bills, certificates, notes or bonds of the United States.]

41 “[(b) Other obligations of the United States or agencies of the United States.]

42 “[(c) Obligations of a corporation wholly owned by the federal government.]

43 “[(d) Indebtedness of the Federal National Mortgage Association.]

44 “[(e) General obligation bonds of the State of Oregon or a political subdivision of the State of  
45 Oregon.]

1 “[f] Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.]

2 “(4) A surety bond under this section must be in substantially the following form:

3 “

4 \_\_\_\_\_  
5 **RETAINAGE SURETY BOND**

6  
7 **KNOW ALL BY THESE PRESENTS:** That \_\_\_\_\_, a \_\_\_\_\_  
8 authorized to do business in the State of Oregon, as Principal, and \_\_\_\_\_,  
9 Surety, a corporation organized and existing under the laws of the State of  
10 \_\_\_\_\_ and authorized to transact the business of surety in the State of  
11 Oregon, as Surety, are jointly and severally held and bound to \_\_\_\_\_  
12 (“Obligee”) and \_\_\_\_\_ (“Owner”), and their heirs, executors, administrators,  
13 successors and assigns in the penal sum of \$\_\_\_\_\_, plus five percent of any  
14 increases in the contract amount that may occur because of change orders or increases in  
15 the quantities of or that addition of any new item of work.

16  
17 **WHEREAS** the Principal has executed a contract for \_\_\_\_\_ with the  
18 Obligee; and

19  
20 **WHEREAS** Oregon law allows the Obligee to withhold from the Principal the sum of five  
21 percent from moneys the Principal earns on estimates during the progress of the work  
22 (“Earned Retained Funds”); and

23  
24 **WHEREAS** the Principal has requested that the Obligee or Owner accept a surety bond  
25 in lieu of Earned Retained Funds as allowed under ORS 279C.560 or 701.435;

26  
27 **NOW, THEREFORE,** this obligation is such that the Surety and the Surety’s successors  
28 and assigns are held and bound to Obligee and to all beneficiaries for the sum set forth in  
29 the first paragraph of this retainage surety bond. This surety bond and any proceeds from  
30 this surety bond are subject to all claims and liens by the Obligee against the Principal in  
31 the same manner and priority as set forth for retainage under ORS 279C.550 to 279C.570,  
32 701.410, 701.420, 701.430, 701.435 and 701.440, as applicable. The condition of this obligation is  
33 such that if the Principal satisfies all payment obligations to any Obligee that may lawfully  
34 claim against project sums due to the Principal and indemnify and hold the Obligee harmless  
35 from any and all loss, costs and damages that the Obligee may sustain by release of the  
36 retainage to the Principal or Surety, this obligation is null and void if the Obligee notifies the  
37 Surety that the Obligee released the obligation. The obligation otherwise remains in full force  
38 and effect.

39  
40 **IT IS HEREBY DECLARED AND AGREED** that the Surety is liable under this obligation  
41 as Principal. The Surety will not be discharged or released from liability for any act, omission  
42 or defense of any kind or nature that would not also discharge the Principal.

43  
44 **IT IS HEREBY FURTHER DECLARED AND AGREED** that this obligation is binding  
45 upon and inures to the benefit of the Principal, the Surety, the Obligee, the Owner, the

1 lender and the beneficiaries of this obligation and their respective heirs, executors, admin-  
2 istrators, successors and assigns.

3

4 SIGNED AND SEALED this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

5

6 Principal \_\_\_\_\_ Surety \_\_\_\_\_

7 Name \_\_\_\_\_ Name \_\_\_\_\_

8 Title \_\_\_\_\_ Title \_\_\_\_\_

9 Address \_\_\_\_\_ Address \_\_\_\_\_

10 City/State/Zip \_\_\_\_\_ City/State/Zip \_\_\_\_\_

11 Phone \_\_\_\_\_ Phone \_\_\_\_\_

12 “ \_\_\_\_\_ ”.

13

14 \_\_\_\_\_