Senate Bill 722

Sponsored by Senator GIROD (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.

Permits contracting agency, owner, contractor or subcontractor to mutually agree to deposit retainage withheld into account other than interest-bearing account in bank, savings bank, trust company or savings association.

Takes effect on 91st day after adjournment sine die.

A BILL FOR AN ACT

Relating to retainage in construction contracts; creating new provisions; amending ORS 279C.560, 279C.570 and 701.420; and prescribing an effective date.

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

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

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

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

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

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

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

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

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

(4) The contractor may deposit bonds, securities or other instruments with the contracting agency or in a bank or trust company for the contracting agency to hold for the contracting agency's benefit in lieu of moneys held as retainage. If the contracting agency accepts bonds, securities or other instruments deposited as provided in this subsection, the contracting agency shall reduce the moneys held as retainage in an amount equal to the value of the bonds, securities and other instruments and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Interest or earnings on the bonds, securities or other instruments shall accrue to the

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.

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contractor.

(5) If the contractor elects, the contracting agency shall deposit the retainage as accumulated in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the contracting agency. The contracting agency and the contractor may mutually agree to deposit the retainage in another type of account. [When] If the contracting agency is a state contracting agency, the account must be established through the State Treasurer unless the contracting agency and the contractor mutually agree to deposit the retainage in an account other than an account described in this subsection. Earnings on the account accrue to the contractor.

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

(a) Bills, certificates, notes or bonds of the United States.
(b) Other obligations of the United States or agencies of the United States.
(c) Obligations of a corporation wholly owned by the federal government.
(d) Indebtedness of the Federal National Mortgage Association.
(e) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.

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

(7) The contractor, with the approval of the contracting agency, may deposit a surety bond in a form acceptable to the contracting agency for all or any portion of the amount of funds the contracting agency retains or will retain [retained, or to be retained, by the contracting agency in a form acceptable to the contracting agency]. The bond and any proceeds of the bond must be subject to all claims and liens and in the same manner and priority as set forth for retainage under ORS 279C.550 to 279C.570 and 279C.600 to 279C.625. The contracting agency shall reduce the moneys the contracting agency holds as retainage in an amount equal to the value of the bond and pay the amount of the reduction to the contractor in accordance with ORS 279C.570. Whenever a contracting agency accepts a surety bond from a contractor in lieu of retainage, the contractor shall accept like bonds from a subcontractor or supplier from which the contractor has retainage. The contractor shall then reduce the moneys the contractor holds as retainage in an amount equal to the value of the bond and pay the amount of the reduction to the subcontractor or supplier.

SECTION 2. ORS 279C.570 is amended to read:

279C.570. (1) [It is] The policy of the State of Oregon [that] is to pay promptly all payments due on a public improvement contract and owed by a contracting agency [shall be paid promptly]. No contracting agency is exempt from the provisions of this section.

(2) Contracting agencies shall make progress payments on the contract monthly as work progresses on a public improvement contract. Payments [shall] must be based upon estimates of work completed that are approved by the contracting agency. A progress payment is not considered acceptance or approval of any work or waiver of any defects therein. The contracting agency shall pay to the contractor interest on the progress payment, not including retainage, due the contractor. The interest shall commence 30 days after receipt of the invoice from the contractor or 15 days after the payment is approved by the contracting agency, whichever is the earlier date. The rate of interest charged to the contracting agency on the amount due [shall] must equal three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date that is 30 days after receipt of the invoice from the

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contractor or 15 days after the **contracting agency approves the payment** [is approved by the contracting agency], whichever is the earlier date, but the rate of interest may not exceed 30 percent. If the contract price exceeds $500,000, the contracting agency shall place amounts deducted as retainage into an interest-bearing escrow account or into another type of account if the contracting agency and the contractor agree to deposit the amounts in another type of account. Interest on the retainage amount accrues from the date the payment request is approved until the date the retainage is paid to the contractor to which [it] the retainage is due.

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

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

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

(6) Payment of interest may be postponed when payment on the principal is delayed because of disagreement between the contracting agency and the contractor. Whenever a contractor brings formal administrative or judicial action to collect interest due under this section, the prevailing party is entitled to costs and reasonable attorney fees.

(7) A contracting agency may reserve as retainage from any progress payment on a public improvement contract an amount not to exceed five percent of the payment. As work progresses, a contracting agency may reduce the amount of the retainage and the contracting agency may eliminate retainage on any remaining monthly contract payments after 50 percent of the work under the contract is completed if, in the contracting agency's opinion, such work is progressing satisfactorily. Elimination or reduction of retainage may be allowed only upon written application by the contractor, and the application must include written approval of the contractor's surety. However, when the contract work is 97.5 percent completed the contracting agency may, at the contracting agency's discretion and without application by the contractor, reduce the retained amount to 100 percent of the value of the contract work remaining to be done. Upon receipt of a written application by the contractor, the contracting agency shall respond in writing within a reasonable time.

(8) The retainage held by a contracting agency must be included in and paid to the contractor as part of the final payment of the contract price. The contracting agency shall pay to the contractor interest at the rate of 1.5 percent per month on the final payment due the contractor, interest to commence 30 days after the work under the contract has been completed and accepted and to run until the date when the final payment is tendered to the contractor. The contractor shall notify the contracting agency in writing when the contractor considers the work complete and the
contracting agency shall, within 15 days after receiving the written notice, either accept the work or notify the contractor of work yet to be performed on the contract. If the contracting agency does not, within the time allowed, notify the contractor of work yet to be performed to fulfill contractual obligations, the interest provided by this subsection [shall commence] begins to run 30 days after the end of the 15-day period.

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

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

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

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

SECTION 3. ORS 701.420 is amended to read:

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

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

(b) If the contract price exceeds $500,000, the owner, contractor or subcontractor shall place amounts withheld as retainage into an interest-bearing escrow account. The contracting agency and the contractor may mutually agree to deposit the retainage in another type of account. Interest on the retainage amount accrues from the date the payment request is approved until the date the retainage is paid to the contractor or subcontractor to which it the retainage is due.

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

SECTION 4. (1) The amendments to ORS 279C.560, 279C.570 and 701.420 by sections 1 to 3 of this 2023 Act apply to procurements that a contracting agency advertises or solicits or, if the contracting agency does not advertise or solicit the procurement, to public improvement contracts or contracts for public works into which the contracting agency enters on or after the operative date specified in section 5 of this 2023 Act.

(2) The amendments to ORS 279C.560, 279C.570 and 701.420 by sections 1 to 3 of this 2023 Act apply to contracts into which an owner, contractor or subcontractor enters on or after the operative date specified in section 5 of this 2023 Act.

SECTION 5. (1) The amendments to ORS 279C.560, 279C.570 and 701.420 by sections 1 to 3 of this 2023 Act become operative on January 1, 2024.

(2) The Attorney General, the Director of the Oregon Department of Administrative Services, the Director of Transportation and a contracting agency that adopts rules under ORS 279A.065 or 279A.070 may adopt rules and take any other action before the operative date specified in subsection (1) of this section that is necessary to enable the Attorney General, the director or the contracting agency to undertake and exercise all of the duties, functions and powers conferred on the Attorney General, the director or the contracting agency by the amendments to ORS 279C.560, 279C.570 and 701.420 by sections 1 to 3 of this 2023 Act.

SECTION 6. This 2023 Act takes effect on the 91st day after the date on which the 2023 regular session of the Eighty-second Legislative Assembly adjourns sine die.