

Requested by Representative EVANS (at the request of Associated General Contractors)

**PROPOSED AMENDMENTS TO  
HOUSE BILL 2870**

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

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

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

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

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

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

18 **“(b) A surety bond that a contractor submits under this section**  
19 **must be executed by a surety bonding company that is authorized to**  
20 **transact surety business in this state and may not be a surety obli-**  
21 **gation of an individual.**

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

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

5 “(b) At the election of the contractor, pay the moneys to the contractor  
6 in accordance with subsection (4) or (5) of this section and in a manner au-  
7 thorized by the Director of the Oregon Department of Administrative Ser-  
8 vices.

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

15 “(4) [*The*] **A** contractor may deposit bonds, securities or other instruments  
16 with [*the*] **a** contracting agency or in a [*bank or trust company*] **financial**  
17 **institution** for the contracting agency to hold for the contracting agency’s  
18 benefit in lieu of moneys held as retainage. If [*the contracting agency*  
19 *accepts*] **a contractor or subcontractor submits** bonds, securities or other  
20 instruments [*deposited*] as provided in this subsection, the contracting agency  
21 shall reduce the moneys held as retainage in an amount equal to the value  
22 of the bonds, securities and other instruments and pay the amount of the  
23 reduction to the contractor in accordance with ORS 279C.570. Interest or  
24 earnings on the bonds, securities or other instruments shall accrue to the  
25 contractor.

26 “(5) If the contractor elects, the contracting agency shall deposit the  
27 retainage as accumulated in an interest-bearing account in a bank[, *savings*  
28 *bank, trust company or savings association*] **or other financial institution**  
29 for the benefit of the contracting agency. [*When*] **If** the contracting agency  
30 is a state contracting agency, the account must be established through the

1 State Treasurer. Earnings on the account accrue to the contractor.

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

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

7 “(b) Other obligations of the United States or agencies of the United  
8 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 subdi-  
12 vision of the State of Oregon.

13 “(f) Irrevocable letters of credit issued by an insured institution, as de-  
14 fined in ORS 706.008.

15 “(7) *[The]* **A** contractor<sup>1</sup>, *with the approval of the contracting agency,* may  
16 deposit a surety bond for all or any portion of the amount of funds retained,  
17 or to be retained, by the contracting agency in a form *[acceptable to the*  
18 *contracting agency]* **that is substantially similar to the instruments**  
19 **specified in ORS 701.435.** The **surety** bond and any proceeds of the **surety**  
20 bond must be made subject to all claims and liens and in the same manner  
21 and priority as set forth for retainage under ORS 279C.550 to 279C.570 and  
22 279C.600 to 279C.625. The contracting agency shall reduce the moneys the  
23 contracting agency holds as retainage in an amount equal to the value of the  
24 **surety** bond and pay the amount of the reduction to the contractor in ac-  
25 cordance with ORS 279C.570. *[Whenever a contracting agency accepts a surety*  
26 *bond from a contractor in lieu of retainage, the contractor shall accept like*  
27 *bonds from a subcontractor or supplier from which the contractor has*  
28 *retainage. The contractor shall then reduce the moneys the contractor holds*  
29 *as retainage in an amount equal to the value of the bond and pay the amount*  
30 *of the reduction to the subcontractor or supplier.]*

1       **“(8)(a) At any time before final payment on a public improvement**  
2 **contract, a subcontractor may request the contractor on the public**  
3 **improvement contract to submit a surety bond to the contracting**  
4 **agency for the portion of the contractor’s retainage that pertains to**  
5 **the subcontractor. The surety bond must meet the requirements set**  
6 **forth in subsection (1)(b) of this section. If a contractor at the**  
7 **subcontractor’s request obtains a surety bond under this paragraph,**  
8 **the contractor may withhold from payments to the subcontractor an**  
9 **amount equivalent to the portion of the surety bond premium for**  
10 **which the subcontractor is responsible.**

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

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

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

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

22       **“(c) A surety bond the contractor submits under this subsection,**  
23 **and any proceeds from the surety bond, are subject to all claims and**  
24 **liens and in the same manner and priority specified for retainage un-**  
25 **der ORS 279C.550 to 279C.570.**

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

30       **“(e) When a contracting agency accepts a surety bond in lieu of**

1 retainage from a contractor under this section, the contractor shall  
2 accept surety bonds from subcontractors or suppliers from which the  
3 contractor has withheld retainage. The contractor must within 30 days  
4 after receiving a surety bond from a subcontractor or supplier release  
5 to the subcontractor or supplier the amount the contractor holds as  
6 retainage that is equivalent to the amount the subcontractor or sup-  
7 plier submitted as the surety bond.

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

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

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

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

13 “701.435. [(1) When a contractor on a public contract deposits bonds, secu-  
14 rities or other instruments under ORS 279C.560 (4), if the subcontract price  
15 exceeds \$50,000 and constitutes more than 10 percent of the cost of the public  
16 contract, a subcontractor on the public contract may deposit bonds, securities  
17 or other instruments with the contractor or in a bank or trust company for the  
18 contractor to hold for the contractor’s benefit in lieu of moneys held as  
19 retainage. If the contractor accepts the bonds, securities or other instruments  
20 deposited as provided in this subsection, the contractor shall reduce the moneys  
21 held as retainage in an amount equal to the value of the bonds, securities and  
22 other instruments and pay the amount of the reduction to the subcontractor in  
23 accordance with ORS 701.420 and 701.430. Interest or earnings on the bonds,  
24 securities or other instruments shall accrue to the subcontractor.]

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

29 “(b) At any time before final payment for work on a large com-  
30 mercial structure or under a public improvement contract, a subcon-

1 tractor may request the contractor on the construction project or  
2 public improvement contract to submit a surety bond to the project  
3 owner and lender for the portion of the contractor's retainage that  
4 pertains to the subcontractor. The surety bond must be from a surety  
5 bonding company that is authorized to transact business this state and  
6 may not be a surety obligation of an individual. The surety bond must  
7 be in substantially the form specified in subsection (4) of this section.  
8 If a contractor at the subcontractor's request obtains a surety bond  
9 under this paragraph, the contractor may withhold from payments to  
10 the subcontractor an amount equivalent to the portion of the surety  
11 bond premium for which the subcontractor is responsible.

12       “(c) Within 30 days after a subcontractor's request under paragraph  
13 (a) of this subsection, the contractor shall provide and the owner and  
14 lender shall accept a surety bond that meets the requirements set  
15 forth in this subsection unless:

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

17       “(B) The subcontractor refuses to pay to the contractor the  
18 subcontractor's portion of the surety bond premium or refuses to  
19 provide the contractor with a surety bond that meets the requirements  
20 of this subsection.

21       “(d) A surety bond the contractor submits under this subsection,  
22 and any proceeds from the surety bond, are subject to all claims and  
23 liens and in the same manner priority specified for retainage under  
24 this section and ORS 279C.550 to 279C.570, 701.410, 701.420, 701.430 and  
25 701.440.

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

30       “(f) When an owner accepts a surety bond in lieu of retainage from

1 a contractor under this section, the contractor shall accept surety  
2 bonds from subcontractors or suppliers from which the contractor has  
3 withheld retainage. The contractor must within 30 days after receiving  
4 a surety bond from a subcontractor or supplier reduce the amount the  
5 contractor holds as retainage in an amount equivalent to the amount  
6 the subcontractor or supplier submitted as a surety bond and shall pay  
7 the amount of the reduction to the subcontractor in accordance with  
8 ORS 701.420 and 701.430.

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

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

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

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

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

10 “[*(4) Bonds, securities and other instruments deposited or acquired in lieu*  
11 *of retainage, as permitted by this section, must be of a character approved by*  
12 *the Director of the Oregon Department of Administrative Services, including*  
13 *but not limited to:*]

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

15 “[*(b) Other obligations of the United States or agencies of the United*  
16 *States.*]

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

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

20 “[*(e) General obligation bonds of the State of Oregon or a political subdi-*  
21 *vision of the State of Oregon.*]

22 “[*(f) Irrevocable letters of credit issued by an insured institution, as defined*  
23 *in ORS 706.008.*]

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

26 “ \_\_\_\_\_

27 **RETAINAGE SURETY BOND**

28

29 **KNOW ALL BY THESE PRESENTS: That \_\_\_\_\_, a**  
30 **\_\_\_\_\_ authorized to do business in the State of Oregon, as**



1 Principal, and \_\_\_\_\_, Surety, a corporation organized and  
2 existing under the laws of the State of \_\_\_\_\_ and authorized  
3 to transact the business of surety in the State of Oregon, as Surety,  
4 are jointly and severally held and bound to \_\_\_\_\_  
5 (“Obligee”) and \_\_\_\_\_ (“Owner”), and their heirs, executors,  
6 administrators, successors and assigns in the penal sum of  
7 \$\_\_\_\_\_, plus five percent of any increases in the contract  
8 amount that may occur because of change orders or increases in the  
9 quantities of or that addition of any new item of work.

10

11 WHEREAS the Principal has executed a contract  
12 for \_\_\_\_\_ with the Obligee; and

13

14 WHEREAS Oregon law allows the Obligee to withhold from the  
15 Principal the sum of five percent from moneys the Principal earns on  
16 estimates during the progress of the work (“Earned Retained  
17 Funds”); and

18

19 WHEREAS the Principal has requested that the Obligee or Owner  
20 accept a surety bond in lieu of Earned Retained Funds as allowed un-  
21 der ORS 279C.560 or 701.435;

22

23 NOW, THEREFORE, this obligation is such that the Surety and the  
24 Surety’s successors and assigns are held and bound to Obligee and to  
25 all beneficiaries for the sum set forth in the first paragraph of this  
26 retainage surety bond. This surety bond and any proceeds from this  
27 surety bond are subject to all claims and liens by the Obligee against  
28 the Principal in the same manner and priority as set forth for  
29 retainage under ORS 279C.550 to 279C.570, 701.410, 701.420, 701.430,  
30 701.435 and 701.440, as applicable. The condition of this obligation is

1 such that if the Principal satisfies all payment obligations to any  
2 Obligee that may lawfully claim against project sums due to the  
3 Principal and indemnify and hold the Obligee harmless from any and  
4 all loss, costs and damages that the Obligee may sustain by release  
5 of the retainage to the Principal or Surety, this obligation is null and  
6 void if the Obligee notifies the Surety that the Obligee released the  
7 obligation. The obligation otherwise remains in full force and effect.

8

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

13

14 IT IS HEREBY FURTHER DECLARED AND AGREED that this  
15 obligation is binding upon and inures to the benefit of the Principal,  
16 the Surety, the Obligee, the Owner, the lender and the beneficiaries  
17 of this obligation and their respective heirs, executors, administrators,  
18 successors and assigns.

19

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

21

22 Principal \_\_\_\_\_ Surety \_\_\_\_\_

23 Name \_\_\_\_\_ Name \_\_\_\_\_

24 Title \_\_\_\_\_ Title \_\_\_\_\_

25 Address \_\_\_\_\_ Address \_\_\_\_\_

26 City/State/Zip \_\_\_\_\_ City/State/Zip \_\_\_\_\_

27 Phone \_\_\_\_\_ Phone \_\_\_\_\_

28 “ \_\_\_\_\_ ”.

29 \_\_\_\_\_