Enrolled
House Bill 4006

Introduced and printed pursuant to House Rule 12.00. Presession filed (at the request of House Interim Committee on Business and Labor for Associated General Contractors, Associated Wall and Ceiling Contractors, Sheet Metal and Air Conditioning Contractors of North America, Plumbing and Mechanical Contractors Association)

CHAPTER .....

AN ACT

Relating to submitting surety bonds in lieu of retainage; creating new provisions; amending ORS 279C.560, 279C.570, 701.420 and 701.435; and declaring an emergency.

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

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

279C.560. (1)**(a)** [*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*] **A contractor may submit and a** contracting agency **shall accept from a contractor** in lieu of withholding moneys [*from payment shall accept from a contractor*] **for all or a portion of the retainage required under a public contract**:

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

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

(c) A contracting agency may reject bonds, securities or other instruments that a contractor submits under paragraph (a)(A) of this subsection or a surety bond that the contractor submits under paragraph (a)(B) of this subsection only if the contracting agency first finds in writing good cause for the rejection that is based on unique project circumstances.

(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)**(a)** If [*the*] **a** contracting agency incurs additional costs as a result of the **contractor's** exercise of an option described in subsection (1)**, (4)** or (5) of this section, the contracting agency may recover the **additional** 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.

(b) Except as provided in subsection (8) of this section, a contractor shall bear additional costs that arise from the contractor's exercise of an option described in subsection (1), (4) or (5) of this section that the contractor incurs after the date on which the contractor submits a bid or proposal to the contracting agency. These costs are not reimbursable project costs and the contracting agency is not responsible for paying these costs.

(4) [*The*] **A** contractor may deposit bonds, securities or other instruments with [*the*] **a** contracting agency or in a bank or [*trust company*] **other financial institution** for the contracting agency to hold for the contracting agency's benefit in lieu of moneys held as retainage. If [*the contracting agency accepts*] **a contractor submits** 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 contractor.

(5) If the contractor elects, the contracting agency shall deposit the retainage [*as accumulated*]**, as the retainage accumulates,** in an interest-bearing account in a bank[*, savings bank, trust company or savings association*] **or other financial institution** for the benefit of the contracting agency. [*When*] **If** the contracting agency is a state contracting agency, the account must be established through the State Treasurer. 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*] **A** contractor[*, with the approval of the contracting agency,*] may deposit a surety bond for all or any portion of the amount of funds retained, or to be retained, by the contracting agency in [*a form acceptable to the contracting agency*] **substantially the form specified in ORS 701.435 (4)**. The **surety** bond and any proceeds of the **surety** bond must be made subject to all claims and liens and in the same manner and priority [*as set forth*] **specified** 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 **surety** 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.*]

(8)(a) When a contracting agency accepts a surety bond in lieu of retainage from a contractor under this section, the contractor shall accept surety bonds from subcontractors or suppliers from which the contractor has withheld retainage. At any time before final payment on a public improvement contract, a subcontractor may submit a surety bond to a contractor and request that the contractor on the public improvement contract submit, in the manner provided in subsection (7) of this section, a surety bond to the contracting agency for the portion of the contractor's retainage that pertains to the subcontractor. The surety bond the subcontractor provides to the contractor must meet the requirements set forth in subsection (1)(b) of this section. When a contractor at a subcontractor's request obtains and submits to the contracting agency a surety bond under this subsection, the contractor may withhold from payments to the subcontractor an amount equivalent to the portion of the contractor's surety bond premium for which the subcontractor is responsible.

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

(A) The contracting agency finds good cause in writing to reject the surety bond based on unique project circumstances;

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

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

(c) A surety bond the subcontractor submits under this subsection, and any proceeds from the surety bond, must be made subject to all claims and liens and in the same manner and priority specified for retainage under ORS 279C.550 to 279C.570 and 279C.600 to 279C.625.

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

(e) A contractor must, within 30 days after receiving a surety bond from a subcontractor or supplier, release to the subcontractor or supplier the amount the contractor holds as retainage that is equivalent to the amount the subcontractor or supplier submitted as the surety bond.

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

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

279C.570. (1) [*It is*] The policy of the State of Oregon **is** that all payments due on a public improvement contract and owed by a contracting agency [*shall*] **must** 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 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 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 contractor or 15 days after 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. 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 is due.*]

(3) Interest shall be paid automatically when payments become overdue. The contracting agency shall document, calculate and pay any interest due when payment is made on the principal. Interest payments shall 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 shall be allowed only upon written application by the contractor, and the application shall 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 [*shall*] **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 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 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 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)*] **(2)** 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 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 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 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. 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 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 commence 30 days after the owner receives notice of full payment to the subcontractor.

SECTION 4. ORS 701.435 is amended to read:

701.435. [*(1) When a contractor on a public contract deposits bonds, securities or other instruments under ORS 279C.560 (4), if the subcontract price exceeds $50,000 and constitutes more than 10 percent of the cost of the public contract, a subcontractor on the public contract may deposit bonds, securities or other instruments with the contractor or in a bank or trust company for the contractor to hold for the contractor's benefit in lieu of moneys held as retainage. If the contractor accepts the bonds, securities or other instruments deposited as provided in this subsection, the contractor 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 subcontractor in accordance with ORS 701.420 and 701.430. Interest or earnings on the bonds, securities or other instruments shall accrue to the subcontractor.*]

(1)(a) A contractor that performs work on a large commercial structure or under a public improvement contract may submit to the project owner and any lender, and the owner and lender shall accept, a surety bond in lieu of all or any portion of the retainage required for the large commercial structure or under the public improvement contract.

(b) When an owner and any lender accept a surety bond in lieu of retainage from a contractor under this section, the contractor shall accept surety bonds from subcontractors or suppliers from which the contractor has withheld retainage. At any time before final payment for work on a large commercial structure or under a public improvement contract, a subcontractor may submit a surety bond to the contractor on the large commercial structure or under the public improvement contract and request that the contractor submit a surety bond to the project owner and any lender for the portion of the contractor's retainage that pertains to the subcontractor. The surety bond must be from a surety bonding company that is authorized to transact business in this state and may not be a surety obligation of an individual. The surety bond the subcontractor submits to the contractor must be in substantially the form specified in subsection (4) of this section. When a contractor at the subcontractor's request obtains and submits to the owner and any lender a surety bond under this subsection, the contractor may withhold from payments to the subcontractor an amount equivalent to the portion of the contractor's surety bond premium for which the subcontractor is responsible.

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

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

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

(d) A surety bond the contractor submits under this subsection, and any proceeds from the surety bond, are subject to all claims and liens and in the same manner and priority specified for retainage under this section and ORS 279C.550 to 279C.570, 279C.600 to 279C.625 and 701.420, as applicable.

(e) An owner and any lender shall, within 30 days after receiving a surety bond under this subsection, release to the contractor an amount the owner and lender hold as retainage that is equivalent to the amount the contractor submitted as a surety bond.

(f) The contractor must, within 30 days after receiving a surety bond from a subcontractor or supplier, reduce the amount the contractor holds as retainage in an amount equivalent to the amount the subcontractor or supplier submitted as a surety bond and shall pay the amount of the reduction to the subcontractor or supplier in accordance with ORS 701.420 and 701.430.

(2) [*When a contractor on a public contract elects to have the public contracting agency deposit the accumulated retainage in an interest-bearing account under ORS 279C.560 (5),*] **If a contractor or a subcontractor performing work on a large commercial structure or under a public improvement contract does not deposit a surety bond in lieu of retainage, the contractor may elect to have the project owner or contracting agency deposit accumulated retainage in an interest-bearing account with a bank or other financial institution or pay interest on the accumulated retainage at the rate of two percent plus the discount rate on 90-day commercial paper that is in effect at the Federal Reserve Bank in the Federal Reserve district that includes this state on the date that the retainage is paid. Subject to subsection (3) of this section, if the contractor elects to have accumulated retainage pay interest,** the contractor, within 30 days following payment of the final amount due for construction of the **project or** public improvement, shall pay to each subcontractor [*who*] **that** performed work on the construction the subcontractor's proportional share of the interest earnings that accrued to the contractor as a result of the election. A subcontractor's share of the total amount of interest earnings under this subsection [*shall*] **must** be determined by the proportion that the amount of retainage withheld from the subcontractor bears to the amount of retainage withheld from the contractor and the length of time the retainage was withheld from the subcontractor. A share of the interest earnings shall be paid to a subcontractor under this subsection only when:

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

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

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

[*(4) 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.*]

(4) A surety bond under this section and ORS 279C.560 must be in substantially the following form:

RETAINAGE SURETY BOND

KNOW ALL BY THESE PRESENTS: That _____, a _____ authorized to do business in the State of Oregon, as Principal, and _____, a corporation organized and existing under the laws of the State of _____ and authorized to transact the business of surety in the State of Oregon, as Surety, are jointly and severally held and bound to _____ ("Obligee") and _____ ("Owner"), and their lenders, heirs, executors, administrators, successors and assigns in the penal sum of $_____, plus _____ % (not more than five percent) of any increases in the contract amount that may occur because of change orders or increases in the quantities of or that addition of any new item of work.

WHEREAS the Principal has executed a contract for _____ with the Obligee; and

WHEREAS Oregon law allows the Obligee to withhold from the Principal a sum equivalent to _____ % (not more than five percent) from moneys the Principal earns on estimates or progress payments during the progress of the work ("Earned Retained Funds"); and

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

NOW, THEREFORE, this obligation is such that the Surety and the Surety's successors and assigns are held and bound to Obligee, Owner and any lender, and to all beneficiaries for the sum set forth in the first paragraph of this retainage surety bond. This surety bond and any proceeds from this surety bond are subject to all claims and liens by the Obligee against the Principal in the same manner and priority as specified for retainage under ORS 279C.550 to 279C.570, 279C.600 to 279C.625 and 701.420, as applicable. The condition of this obligation is such that if the Principal satisfies all payment obligations to any Obligee that may lawfully claim against project sums due to the Principal and indemnify and hold the Obligee harmless from any and all loss, costs and damages that the Obligee may sustain by release of the retainage to the Principal or Surety, this obligation is null and void if the Obligee notifies the Surety that the Obligee released the obligation. The obligation otherwise remains in full force and effect.

IT IS HEREBY DECLARED AND AGREED that the Surety is liable under this obligation in the same manner and to the same extent as is Principal. The Surety will not be discharged or released from liability for any act, omission or defense of any kind or nature that would not also discharge the Principal.

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

lender and the beneficiaries of this obligation and their respective heirs, executors, administrators, successors and assigns.

SIGNED AND SEALED this _____ day of _____, 20____

Principal _____	**Surety** _____
Name _____	**Name** _____
Title _____	**Title** _____
Address _____	**Address** _____
City/State/Zip _____	**City/State/Zip** _____
Phone _____	**Phone** _____

SECTION 5. **The amendments to ORS 279C.560, 279C.570, 701.420 and 701.435 by sections 1 to 4 of this 2024 Act apply to contracts into which a contractor or subcontractor enters on and after the effective date of this 2024 Act.**

SECTION 6. **This 2024 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2024 Act takes effect on its passage.**

Passed by House February 13, 2024

.....
Timothy G. Sekerak, Chief Clerk of House

.....
Dan Rayfield, Speaker of House

Passed by Senate February 26, 2024

.....
Rob Wagner, President of Senate

Received by Governor:

.....M.,....., 2024

Approved:

.....M.,....., 2024

.....
Tina Kotek, Governor

Filed in Office of Secretary of State:

.....M.,....., 2024

.....
LaVonne Griffin-Valade, Secretary of State