



CITY OF  
**PORTLAND, OREGON**  
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February 5, 2024

Representative Paul Holvey, Chair  
House Committee on Business and Labor  
900 Court Street, NE  
Salem, OR 97301

Re: House Bill 4006

Dear Chair Holvey and Members of the Committee:

Thank you for the opportunity to give comments and request additional information on proposed House Bill 4006 (the "Proposed Bill").

Escrow Accounts

The City is generally supportive of the changes in the Proposed Bill that remove the requirements for contracting agencies to place retainage funds into escrow accounts on contracts over \$500,000. In addition to the costs associated with establishing and maintaining the escrow accounts, the City understands that the contracting community has been frustrated with the low interest rates on the retainage funds placed in those accounts. Moreover, once the funds have been deposited into an escrow account, it is difficult, if not impossible, to withdraw those funds, preventing early release of retainage. Accordingly, the City supports the changes removing the requirement to place retainage funds in escrow accounts. If the Proposed Bill is amended those include only those changes, the City will fully support it.

Bonds in Lieu of Retainage

The City hesitates to support the changes requiring bonds in lieu of retention and requests more information before supporting those changes in the Proposed Bill. Currently, ORS 279C.560 gives contracting agencies some flexibility to determine whether to accept bonds in lieu of retention, whereas the Proposed Bill would mandate that contracting agencies accept such bonds. And contracting agencies would be required to accept "pass-through" bonds in lieu of retention from subcontractors at any time during a project. The City has following questions:

- **Do bonds in lieu of retainage preserve the underlying purpose of retainage?**  
Generally, the purpose of retainage is for contracting agencies to have immediate access to project funds if work during a project is deficient or if a contractor stops or fails to complete work (and to encourage contractors to complete performance by withholding such funds). In order to recover on a surety bond to access the retainage that was already

paid to a contractor, contracting agencies will need to file a claim on a bond, and sureties often take months to investigate such claims. Not only is that an additional administrative burden and delay when a project is already distressed, but it seems counter to the purpose for Retainage: immediate access to funds to remedy a distressed project.

- **Does a bond in lieu of retainage provide any additional protection to contracting agencies from a performance bond?** Public contracts require a performance bond in the full amount of a project, which guarantee the contractor's performance (including any amounts paid out as retainage). Accordingly, it is unclear what additional benefit contracting agencies receive from a bond in lieu of retainage: contracting agencies can already seek remedy from a performance bond if the contractor fails to perform or performs deficient work, including when the contracting agency has paid out funds for that work.
- **Do subcontractor bonds in lieu of retainage respect the rules of privity of contract, and how will they be administered?** Contracting agencies do not have privity of contract with subcontractors, and it is unclear whether contracting agencies will be required to make decisions regarding subcontractor performance. For example, if there are issues with the overall contract performance (either by the contractor or another subcontractor), it is unclear whether contracting agencies would need to pay out retainage to subcontractors who post a bond, despite deficiencies in the overall contract. Moreover, it is unclear how these bonds will play out on disputed projects where there are multiple bonds and claims between parties on a contract. To avoid being involved in such disputes, contracting agencies protect subcontractors' payment interests by requiring a payment bond.
- **Has the prime contracting community weighed in?** Contractors have a similar interest in retainage to contracting agencies: ensuring subcontractors complete work and return to a project if there are deficiencies.
- **Has the private sector weighed in?** The Proposed Bill appears to extend certain bond in lieu of retention requirements to large commercial structures. This may impact the risk analysis on large project developments for developers and lenders that use retention to secure their interests in private commercial construction, which could result in less interest in development, more difficulties in securing funding, and higher lending costs.

The City appreciates that the Proposed Bill attempts to get funds into contractors' and subcontractors' hands more quickly. Until the City has further clarification on the above issues, however, it hesitates to support the changes requiring bonds in lieu of retainage.

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The City would be happy to attend a round table to discuss these or other concerns with the Proposed Bill.

Very truly yours,

Macaen Mahoney  
City of Portland, Deputy City Attorney,  
Construction

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