RETAINAGE

701.410 Definitions. (1) As used in ORS 279C.555, 279C.570, 701.410, 701.420, 701.430, 701.435 and 701.440:

(a) "Construction" means:

(A) Excavating, landscaping, demolishing and detaching existing structures, leveling, filling in and otherwise preparing land for the making and placement of a building, structure or superstructure;

(B) Creating or making a building, structure or superstructure; and

(C) Altering, partially constructing and doing repairs in and upon a building, structure or superstructure.

(b) "Contractor" means a person that contracts with an owner on predetermined terms to be responsible for performing all or part of a job of construction in accordance with established specifications or plans, and that retains control of the means, method and manner of accomplishing the desired result.

(c) "Owner" means a person that is or claims to be the owner in fee or a lesser estate of the land, building, structure or superstructure on which construction is performed and that enters into an agreement with a contractor for the construction.

(d) "Subcontractor" means a person that contracts with a contractor or another subcontractor on predetermined terms to be responsible for performing all or part of a job of construction in accordance with established specifications or plans.

(2) As used in ORS 701.410, 701.420, 701.430, 701.435 and 701.440, "retainage" means the difference between the amount a contractor or subcontractor earns under a construction contract and the amount the owner pays on the contract to the contractor, the amount the contractor pays on the contract to the subcontractor or the amount the subcontractor pays on the contract to another subcontractor. [1975 c.772 §1; 1987 c.158 §148; 1999 c.59 §209; 2003 c.794 §319; 2005 c.22 §§480,481; 2010 c.77 §7]

Note: 701.410 to 701.440 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 701 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

701.420 Partial payment; retainage; effect; interest; notice of completion; payment by contractor and owner. (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) 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.

(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. [1975 c.772 §2; 2010 c.77 §8; 2013 c.410 §2]

Note: See note under 701.410.

701.430 Performance bond; terms. A contractor or subcontractor may execute and deliver to the owner, contractor or subcontractor before the commencement of construction for which the contractor or subcontractor will be responsible for performing a good and sufficient bond in a sum equal to the contract price for the faithful performance of the contract. The term of the bond obtained under this subsection must extend to include the period during which claims of lien or notices of other encumbrances based on the construction performed under the contract may be filed under applicable law. The bond must be approved by the owner, contractor or subcontractor entitled to withhold retainage. A faithful performance bond delivered under this section must include, but not be limited to, provisions to the effect that:

(1) The obligations of the contract must be faithfully performed;

(2) Payment must promptly be made to all persons supplying labor or materials to the contractor or subcontractor for prosecution of the work provided in the contract;

(3) All contributions due the Industrial Accident Fund and the Unemployment Compensation Trust Fund from the contractor or subcontractor in connection with the performance of the contract must be made promptly; and

(4) All sums required to be deducted and retained from the wages of employees of the contractor or subcontractor pursuant to the Personal Income Tax Act of 1969, must be paid over to the Department of Revenue. [1975 c.772 §3; 2013 c.410 §3]

Note: See note under 701.410.

701.435 Deposits in lieu of cash retainage. (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.

(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), the contractor, within 30 days following payment of the final amount due for construction of the public improvement, shall pay to each subcontractor who 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 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 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 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. [1977 c.767 §2; 1983 c.690 §16; 2003 c.794 §320; 2009 c.568 §2]

Note: See note under 701.410.

701.440 Applicability to federal projects. ORS 279C.555, 701.410, 701.420 and 701.430 do not apply when the owner is the United States or any agency thereof or when the construction is paid for, in whole or in part, with federal moneys. [1975 c.772 §6; 2003 c.794 §321]

Note: See note under 701.410.