CONSTRUCTION CONTRACT PAYMENTS

701.620 Definitions for ORS 701.620 to 701.640. As used in ORS 701.620 to 701.640:

(1) "Construction contract" means a written or oral construction agreement, including all drawings, specifications and addenda relating to:

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

(b) Creation or making of a building, structure or superstructure; and

(c) Alteration, partial construction and repairs done in and upon a building, structure or superstructure.

(2) "Contractor" has the meaning given that term in ORS 87.005.

(3) "Days" means calendar days.

(4) "Material supplier" means any person providing materials or products under a construction contract by oral authorization, written contract, purchase order, price agreement, rental agreement or other contractual means.

(5) "Original contractor" has the meaning given that term in ORS 87.005.

(6) "Owner" has the meaning given that term in ORS 701.410.

(7) "Subcontractor" has the meaning given that term in ORS 87.005. [2003 c.675 §54; 2011 c.553 §1]

Note: 701.620 to 701.645 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.

701.625 Progress payments; notice requirements; nonapproval of billing or estimate; withholding; final payment. (1) If a construction contract is for construction work that is expected to take 60 or more days to complete, an owner shall make progress payments to the original contractor. By mutual agreement with an original contractor, an owner may make progress payments to the original contractor under a construction contract for which the construction work is expected to take less than 60 days to complete.

(2) The owner shall make progress payments on the basis of a certified billing or estimate for work performed, and for materials or products supplied, during the preceding monthly billing cycle or during an alternative billing cycle identified in the construction contract. If a construction contract identifies an alternative billing cycle, the construction contract must expressly state in a clear and conspicuous manner that there is an alternative billing cycle and the owner must provide on each page of drawings and specifications in the construction contract a statement substantially similar to the following:

_____

Notice of Alternative Billing Cycle

The construction contract will allow the owner to require the submission of billings or estimates in billing cycles other than monthly cycles. Billings or estimates for the construction contract shall be submitted as follows:

_____

_____

_____

_____

(3)(a) Except as provided in this subsection, the owner shall:

(A) Make progress payments no later than 14 days after the date the billing is received; and

(B) Make final payment of all remaining amounts no later than seven days after the date that the owner approves the work.

(b) An owner may make progress payments or final payment later than the time allowed under paragraph (a) of this subsection if:

(A) The owner provides drawings and specifications that expressly state in a clear and conspicuous manner that an extended payment period is allowed and identify the extended payment period as a specific number of days after the date that the billing or estimate is received or the date that the owner approves all work; and

(B) The owner provides on each page of drawings and specifications a statement substantially similar to the following:

Notice of Extended Payment Provision

The construction contract will allow the owner to make:
(1) Progress payments no later than _____ days after the date a billing or estimate is received.
(2) Final payment of all remaining amounts no later than _____ days after the date the owner approves all work.

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(4) Payment is not required under this section unless the owner receives from the original contractor a billing or estimate for the work performed or the materials or products supplied in accordance with the terms of the construction contract.

(5) The owner is deemed to have received the billing or estimate when the billing or estimate is received by any person designated by the owner for the receipt, review or approval of the billing or estimate. A billing or estimate is deemed to be certified 10 days after the owner receives the billing or estimate, unless before that time the owner or the owner's agent prepares and issues a written statement detailing those items in the billing or estimate that are not approved. An owner may decline to approve a billing or estimate or portion of a billing or estimate because of:

(a) Unsatisfactory work progress;
(b) Defective construction work, materials or products not remedied;
(c) Disputed work, materials or products, except that the declined amount may not exceed 150 percent of the amount in dispute;
(d) Failure to comply with other material provisions of the construction contract;
(e) A third party claim being filed or reasonable evidence that a third party claim will be filed;
(f) Failure of the original contractor or a subcontractor to make timely payments to subcontractors and material suppliers for labor, equipment, materials and products;
(g) Damage to the owner;
(h) Reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum; or
(i) Other items as allowed under the construction contract terms and conditions.

(6) An owner may extend the period within which the billing or estimate may be certified if:

(a) The owner provides drawings and specifications that expressly allow in a clear and conspicuous manner an extended period within which a billing or estimate may be certified; and
(b) The owner provides for each page of drawings and specifications, including bid drawings and specifications and construction drawings and specifications, a statement substantially similar to the following statement:

Notice of
Extended Certification Period Provision

The construction contract will allow the owner to certify billings and estimates no later than _____ days after the billings and estimates are received from the original contractor.

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(7) Any requirement under this section that a statement be provided on a page of drawings or specifications may be satisfied by placing the required statement on either side of the page.

(8) After a subcontractor or material supplier submits a bid or proposal or other written pricing information to an original contractor, an owner and the original contractor may agree in writing to change the specified number of days after certification during which the owner may make payment to the original contractor or within which the owner must certify a billing or estimate. The billings by any subcontractor or material supplier that does not provide written consent to the change remain subject to the certification period indicated in the drawings and specifications. A construction contract may not be changed in a manner that alters the right of any subcontractor or material supplier to receive prompt and timely progress payments as provided under ORS 701.630.

(9) An owner may withhold from a progress payment an amount that is sufficient to pay the direct expenses the owner reasonably expects to incur to correct any items detailed in a written statement under subsection (5) of this section. The owner may also withhold a reasonable amount as retainage. As used in this subsection, "retainage" has the meaning given that term in ORS 701.410.

(10) When an original contractor completes and an owner approves all work under a construction contract, the owner shall make payment in full of all remaining amounts due on the construction contract as described in subsection (3) of this section. When an original contractor completes and an owner approves all work under a portion of a construction contract for which the construction contract states a separate price, the owner shall make payment in full of all remaining amounts due on that portion of the construction contract, subject to the satisfaction of any items detailed under subsection (5) of this section or ORS 701.630 (4).

(11) If an owner or a person designated by the owner as responsible for making progress payments on a construction contract does not make a timely payment under this section, the owner shall pay the original contractor interest on the unpaid balance at the rate of one and one-half percent a month or fraction of a month, or at a higher rate as the parties to the construction contract may agree.

(12) On the written request of a subcontractor, the owner shall notify the subcontractor no later than five days after the issuance of a progress payment to the original contractor. On the written request of a subcontractor, the owner shall notify the subcontractor no later than five days after the owner makes the final payment to the original contractor on the construction contract.

(13) If the owner and original contractor are a single entity, that entity shall make progress and final payments to subcontractors and material suppliers as described in subsection (3) or (6) of this section.

(14) In any action, claim or arbitration brought to collect interest pursuant to this section, the prevailing party shall be awarded costs and reasonable attorney fees. [2003 c.675 §55; 2011 c.553 §2]

Note: See note under 701.620.

701.630 Payments to subcontractors and material suppliers; failure to pay; omission of payment. (1) An original contractor, subcontractor or material supplier that performs in accordance with a construction contract is entitled to payment from the party with whom the original contractor, subcontractor or material supplier contracts.

(2)(a) If a subcontractor has performed in accordance with a construction contract, and the original contractor receives payment from the owner for work performed by the subcontractor, the original contractor shall pay the subcontractor for that work no later than seven days after the original contractor receives the payment. If a material supplier has performed in accordance with a construction contract, and the original contractor receives payment from the owner for materials or products provided by the material supplier, the original contractor shall pay the material supplier for those materials and products no later than seven days after the original contractor receives the payment. An original subcontractor that receives payment under this subsection for work provided to the original subcontractor by another subcontractor, or for materials or products provided to the original subcontractor, shall pay the other subcontractor or material supplier for the work, materials or products no later than seven days after the original subcontractor receives the payment.

(b) Payment is not required under this subsection unless a subcontractor or material supplier provides to the original contractor or subcontractor a billing or invoice for the work performed or materials or products supplied in compliance with the terms of the contract between the parties. Each subcontractor or material supplier must provide an appropriate waiver of any lien for labor, equipment, services, materials or products in accordance with subcontract or purchase order terms and conditions. The original contractor or subcontractor may require that such waivers of lien be notarized.

(3) Any failure to reasonably account for the application or use of payments, as proven in a legal proceeding authorized under the terms of the construction contract, may constitute grounds for disciplinary action by the Construction Contractors Board under ORS 701.098.

(4) An original contractor that submits a billing or estimate to an owner, or an original subcontractor that submits a billing or estimate to the original contractor, may omit from the billing or estimate amounts to be withheld from payment to a subcontractor or material supplier because of:

(a) Unsatisfactory work progress;

(b) Defective construction work, materials or products not remedied;

(c) Disputed work, materials or products, except that the withheld amount may not exceed 150 percent of the amount in dispute;

(d) Failure to comply with other material provisions of the construction contract;

(e) A third party claim being filed or reasonable evidence that a third party claim will be filed;

(f) Failure of the subcontractor to make timely payments to subcontractors and material suppliers for labor, equipment, materials and products;

(g) Damage to an original contractor, subcontractor or material supplier;

(h) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum; or

(i) Other items as allowed under the subcontract or purchase order terms and conditions.

(5) An original contractor or original subcontractor may also omit from a billing or estimate a reasonable amount for retainage, except that the amount omitted may not exceed the actual percentage allowed by the construction contract, subcontract or purchase order. As used in this subsection, "retainage" has the meaning given that term in ORS 701.410.

(6) If a progress or final payment to a subcontractor or material supplier is delayed by more than seven days after receipt of a progress or final payment by an original contractor or subcontractor, the original contractor or subcontractor shall pay its subcontractor or material supplier interest beginning on the eighth day, except during periods of time during which payment is withheld pursuant to subsection (4) or (5) of this section, at the rate of one and one-half percent a month or a fraction of a month on the unpaid balance or at such higher rate as the parties agree.

(7) In any action, claim or arbitration brought to collect interest under this section, the prevailing party shall be awarded costs and reasonable attorney fees. [2003 c.675 §56; 2011 c.553 §3]

Note: See note under 701.620.

701.635 Suspension of performance. (1) An original contractor may suspend performance under a construction contract, or if performance is suspended for longer than one month may terminate a construction contract, if the owner fails to make timely payment of the amount certified under ORS 701.625. An original contractor shall provide written notice to an owner at least seven days before the original contractor suspends performance or terminates the construction contract, unless a shorter notice period is prescribed in the construction contract. An original contractor may not be deemed in breach of a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract may not extend the notice period under this subsection.

(2) A subcontractor may suspend performance under a construction contract, or if performance is suspended for longer than one month may terminate a construction contract, if the owner fails to make timely payment of amounts certified under ORS 701.625 or the subcontractor does not receive payment for the certified work under ORS 701.630 (2). A subcontractor shall provide written notice to the original contractor and owner at least three days before the subcontractor suspends performance or terminates the construction contract, unless a shorter notice period is prescribed in the construction contract. A subcontractor may not be deemed in breach of a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract may not extend the notice period under this subsection.

(3) A subcontractor may suspend performance under a construction contract, or if performance is suspended for longer than one month may terminate a construction contract, if the owner makes timely payment of amounts certified under ORS 701.625 for the subcontractor's work but the original contractor fails to pay the subcontractor for the certified work. A subcontractor shall provide written notice to the original contractor and owner at least seven days before the subcontractor suspends performance or terminates the construction contract, unless a shorter notice period is prescribed in the construction contract. A subcontractor may not be deemed in breach of a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract may not extend the notice period under this subsection.

(4) A subcontractor may suspend performance under a construction contract, or if performance is suspended for longer than one month may terminate a construction contract, if the owner declines or fails to approve portions of the contractor's billing or estimate under ORS 701.625 for that subcontractor's work and the reasons for nonapproval are not the fault of or directly related to the subcontractor's work. A subcontractor shall provide written notice to the original contractor and the owner at least seven days before the subcontractor suspends

performance or terminates the construction contract, unless a shorter notice period is prescribed in the construction contract. A subcontractor may not be deemed in breach of a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract may not extend the notice period under this subsection.

(5) A contractor or subcontractor may not submit a notice of suspension under this section until the lawful period for payment to the contractor or subcontractor has expired.

(6) An original contractor or subcontractor that suspends performance as provided in this section may condition the supplying of further labor, equipment, services, materials or products upon the owner or original contractor paying, in addition to any amounts certified under ORS 701.625, any documented, substantial and reasonably incurred costs for mobilization resulting from the shutdown or start-up of a project.

(7) In any action, claim or arbitration brought pursuant to this section, the prevailing party shall be awarded costs and reasonable attorney fees.

(8) Written notice required under this section is deemed to have been provided if the notice:

(a) Is delivered in person to the owner, original contractor, subcontractor or a person designated by the owner, original contractor or subcontractor to receive notice; or

(b) Is delivered by certified mail, return receipt requested, or other means that provides written, third party verification of delivery to the last business address of the owner, original contractor or subcontractor known to the party giving notice. [2003 c.675 §57; 2011 c.553 §4]

Note: See note under 701.620.

701.640 Prohibition against contrary provisions, covenants or clauses. (1) A construction contract may not include any provision, covenant or clause that:

(a) Makes the construction contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the construction contract to be conducted in another state; or

(b) States that a party to the construction contract cannot suspend performance under the construction contract or terminate the construction contract if another party to the construction contract fails to make prompt payments under the construction contract pursuant to ORS 701.620 to 701.640.

(2) Any provision, covenant or clause described in subsection (1) of this section is void and unenforceable. [2003 c.675 §58; 2011 c.553 §5]

Note: See note under 701.620.

701.645 Contracts and housing not subject to ORS 701.620 to 701.640.ORS 701.620 to 701.640 do not apply to:

(1) A contract for the construction, alteration, repair, maintenance, moving or demolition of a building that is subject to the Low-Rise Residential Dwelling Code;

(2) A public contract under ORS 279.835 to 279.855 or ORS chapter 279A, 279B or 279C; or

(3) Housing in which all or part of the dwelling units are reserved for rental to persons having an income equal to or less than 80 percent of the median household income for the area as determined by the Housing and Community Services Department. [2003 c.675 §59; 2003 c.794 §331d]

Note: See note under 701.620.