137-049-0820
Retainage

(1) Withholding of Retainage. ~~A Contracting Agency shall not retain an amount in excess of five percent of the Contract Price for Work completed. If the Contractor has performed at least 50 percent of the Contract Work and is progressing satisfactorily, upon the Contractor's submission of Written application containing the surety's Written approval, the Contracting Agency may, in its discretion, reduce or eliminate retainage on any remaining progress payments. The Contracting Agency shall respond in Writing to all such applications within a reasonable time. When the Contract Work is 97-1/2 percent completed, the Contracting Agency may, at its discretion and without application by the Contractor, reduce the retained amount to 100 percent of the value of the remaining unperformed Contract Work. A Contracting Agency may at any time reinstate retainage. Retainage shall be included in the final payment of the Contract Price.~~A Contracting Agency may withhold amounts from a Contractor's progress payments on Public Improvement Contracts as retainage in an amount not to exceed five percent of the payment.

(a) Determination to withhold. Prior to soliciting a Public Improvement Contract, each Contracting Agency must determine whether it will withhold retainage on the project, and if so, the amount of retainage (up to 5%) it will withhold. In making the determination, the Contracting Agency shall consider whether the withholding of retainage on the Public Improvement Project would incentivize the Contractor to satisfactorily progress the work and complete the Project on schedule or otherwise protect the Contracting Agency's interests.

(b) Inclusion of retainage requirements in Solicitation Documents and resulting Contract. If a Contracting Agency determines that it will withhold retainage on a Public Improvement Contract, it must include the retainage requirement and amount of retainage in the Solicitation Documents and resulting Contract.

(2) ~~Cash Retainage - Contract Price $500,000 or Less. When the Contract Price for a Public Improvement Contract is $500,000 or less, a Contracting Agency may reserve as retainage from any progress payment an amount not to exceed five percent, pursuant to ORS 279C.570(7). The Contracting Agency shall hold all retained moneys in a Contracting Agency fund or account, and interest is not required to accrue on the retained moneys.~~Procedures for Holding Retainage.

(a) Contract Price $500,000 or less. The Contracting Agency shall hold all retained moneys in a Contracting Agency fund or account, and interest is not required to accrue on the retained moneys.

(i) Interest Bearing Account. If the Contractor elects, the Contracting Agency shall deposit the retainage, as the retainage accumulates, in an interest bearing account in a bank or other financial institution for the benefit of the Contracting Agency. 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. When a Contractor on a Public Improvement Contract elects to have the Contracting Agency deposit the accumulated retainage in an interest-bearing account, 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 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 the amount of interest earnings due the subcontractor exceeds $100.

(b) Contract Price exceeding $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) ~~Cash Retainage - Contract Price in Excess of $500,000. When the Contract Price for a Public Improvement Contract exceeds $500,000, the Contracting Agency shall, in the ordinary course, deposit cash retainage in an amount not to exceed five percent from any progress payment due under the Public Improvement Contract into an interest-bearing escrow account, pursuant to ORS 279C.570(2) [House Bill 2415 (2019 Oregon Laws, Chapter 486)]. The Contractor under the Public Improvement Contract is entitled to receive interest on the retained moneys from the date the Contractor's related payment request is fully approved by the Contracting Agency until the date the retained moneys are paid by the Contracting Agency to the Contractor. For purposes of this section, a payment of retainage is deemed to be "paid" by a Contracting Agency when the payment is transmitted to the Contractor, or otherwise applied against an obligation of the Contractor under the Public Improvement Contract.~~ Reduction or Elimination of Retainage.

(a) 50% Completion Milestone. After 50 percent of the work under the Public Improvement Contract is complete, the Contractor may request elimination or reduction of retainage by Written application, which shall include Written approval of the Contractor's surety. Following receipt of a Written application by the Contractor, the Contracting Agency shall consider whether work is progressing satisfactorily, requirements are being met, and the Contracting Agency's interests will be protected if retainage is eliminated or reduced. In its sole discretion, the Contracting Agency shall decide whether to grant the reduction or elimination of retainage and shall respond in Writing with its decision within a reasonable time.

Formatted: Font: 10 pt

Formatted: Font: +Body (Calibri), Font color: Auto

Formatted: Normal, Pattern: Clear

(b) 97.5% Completion Milestone. After 97.5 percent of the work under the Public Improvement Contract is complete, at the Contracting Agency's discretion and without application by the Contractor, the Contracting Agency may reduce the retained amount to 100 percent of the value of the Contract work remaining to be done.

(4) ~~Alternatives In Lieu of Cash Retainage. Unless a Contracting Agency that reserves an amount as retainage finds in writing that accepting bonds, securities or other instruments described in part (a) of this section or a surety bond described in part (b) of this section poses an extraordinary risk that is not typically associated with the bonds, securities, other instruments or surety bond, as applicable, the Contracting Agency, in lieu of withholding moneys from payment, shall accept from the Contractor:~~

~~(a) Bonds, securities or other instruments that are deposited and accepted as provided in subsection (6)(a) of this rule; or~~

~~(b) A surety bond deposited as provided in subsection (6)(b) of this rule.~~ Procedures for Payment of Retainage. The retainage held by a Contracting Agency shall be included in and paid to the Contractor as part of the final payment of the Contract Price.

(a) Notification of Final Completion. The Contractor shall notify the Contracting Agency in Writing when the Contractor considers the work complete. Within 15 days after receipt, the Contracting Agency shall either:

(i) Notify the Contractor that the work has been accepted and pay the amount held as retainage to the Contractor as part of the final payment of the Contract Price. Additionally, the Contracting Agency shall pay 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; or

(ii) Notify the Contractor that the work has not been accepted and describe the work yet to be performed on the Contract; however, if the Contracting Agency does not provide such notice within the 15-day period, the interest provided by this subsection shall commence to run 30 days after the end of the 15-day period. The amount held as retainage shall be paid following the Contractor's completion of the work and the Contracting Agency's acceptance, as part of final payment of the Contract Price.

(b) Failure to Reach Final Completion. If the Contractor abandons the work or leaves the work unfinished or otherwise defaults on the Contract, the amount retained will accrue to the Contracting Agency and the Contractor shall have no entitlement or claim to such sums.

~~(5) Deposit in interest-bearing accounts. Upon election of the Contractor and when the Contract Price in the Public Improvement Contract is $500,000 or less, a Contracting Agency shall deposit cash retainage in an interest-bearing account in a bank, savings bank, trust company, or savings association, for the benefit of the Contracting Agency. Earnings on such an account shall accrue on the cash retainage from the date the Contractor's related payment request is fully approved by the Contracting Agency until the date the retained moneys are paid by the Contracting Agency to the Contractor. For purposes of this section, a payment of retainage is deemed to be "paid" by a Contracting Agency when the payment is transmitted to the Contractor, or otherwise applied against an obligation of the Contractor under the Public Improvement Contract. State Contracting Agencies shall establish the interest-bearing account through the State Treasurer. When the contractor makes an election for deposit of retainage into an interst-bearing account and the Contract Price in the Public Improvement Contract exceeds $500,000, the Contractor's election shall be satisfied by the Contracting Agency's establishment of an interest-bearing escrow account, pursuant to ORS 279C.570(2) [House Bill 2415 (2019 Oregon Laws, Chapter 486)].~~

(5~~6~~) Alternatives In Lieu of Cash Retainage - Requirements~~. In lieu of cash retainage to be held by a Contracting Agency, the Contractor may substitute one of the following:~~

~~(a) Deposit of bonds, securities or other instruments:~~

~~(A) The Contractor may deposit bonds, securities or other instruments with the Contracting Agency or in any bank or trust company to be held for the benefit of the Contracting Agency. If the Contracting Agency accepts the deposit, the Contracting Agency shall reduce the cash retainage by an amount equal to the value of the bonds and securities, and reimburse the excess to the Contractor.~~

~~(B) Bonds, securities or other instruments deposited or acquired in lieu of cash retainage must be of a character approved by the Oregon Department of Administrative Services, which may include, without limitation:~~

~~(i) Bills, certificates, notes or bonds of the United States.~~

~~(ii) Other obligations of the United States or agencies of the United States.~~

~~(iii) Obligations of a corporation wholly owned by the Federal Government.~~

~~(iv) Indebtedness of the Federal National Mortgage Association.~~

~~(v) General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.~~

~~(vii) Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.~~

~~(C) Upon the Contracting Agency's determination that all requirements for the protection of the Contracting Agency's interests have been fulfilled, it shall release to the Contractor all bonds and securities deposited in lieu of retainage.~~

~~(b) Deposit of surety bond. A Contracting Agency, at its discretion, may allow the Contractor to deposit a surety bond in a form acceptable to the Contracting Agency in lieu of all or a portion of funds retained or to be retained. A Contractor depositing such a bond shall accept surety bonds from its subcontractors and suppliers in lieu of retainage. In such cases, retainage shall be reduced by an amount equal to the value of the bond, and the excess shall be reimbursed.~~. A Contractor may submit and a Contracting Agency shall accept from a Contractor in lieu of withholding moneys for all or a portion of the retainage required under a Public Improvement Contract: (i) a Retainage Surety Bond, or (ii) deposit of bonds, securities or other instruments. A Contracting Agency may reject security bonds, bonds, securities or other instruments that a Contractor submits only if the Contracting Agency first finds in Writing good cause for the rejection that is based on unique project circumstances.

(a) Retainage Surety Bonds. A Retainage Surety Bond compliant with the requirements of this section may be submitted to a Contracting Agency in lieu of all or any portion of the amount of funds retained, or to be retained, by the Contracting Agency. A Retainage Surety Bond must be in substantially the form specified in ORS 701.435(4). A surety bond must be executed by a surety bonding company that is authorized to transact surety business in Oregon and may not be a surety obligation of an individual. 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 specified for retainage under ORS 279C.550 to 279C.570 and 279C.600 to 279C.625.

(i) Amount of Retainage Surety Bond.

(A) Full Retainage Surety Bond. A Contractor may provide a Retainage Surety Bond in lieu of all retainage required by the Public Improvement Contract. The amount of the Retainage Surety Bond shall be calculated by applying the retainage percentage to the Contract Price and must include a provision for coverage of any increases in the Contract Price. If a full Retainage Surety Bond is provided by a Contractor at any time after the first progress payment has been made, the Contracting Agency, within 30 days after receipt, shall pay any retained amount to the Contractor.

(B) Partial Retainage Surety Bond. A Contractor may provide a Retainage Surety Bond in lieu of a portion of the retainage required by the Public Improvement Contract. Following receipt of a Retainage Surety Bond in an amount less than the full amount required to be retained, the Contracting Agency, within 30 days of receipt, shall pay to the Contractor any retained amounts up to the amount of the Retainage Surety Bond. If the amount of the Retainage Surety Bond is less than the amount retained by the Contracting Agency, the Contracting Agency will pay to the Contractor the retainage in the amount of the Retainage Surety Bond, and the remaining required retainage will be subject to Section (4). If the amount of the Retainage Surety Bond is in excess of the amount retained by the Contracting Agency, the Contracting Agency will pay to the Contractor the retained amount, and will reduce the moneys the Contracting Agency holds as retainage from progress payments in an amount equal to the value of the Retainage Surety Bond in excess of the amount retained as of the date of the bond.

(ii) Subcontracting Requirements for Retainage Surety Bonds. When a Contracting Agency accepts a Retainage 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.

(A) 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 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 (a)(i). 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, the Contractor shall provide, and the Contracting Agency shall accept, a surety bond that meets the requirements set forth in subsection (a) unless:

- The Contracting Agency finds good cause in Writing to reject the surety bond based on unique project circumstances;
- The surety bond is not commercially available; or
- 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 (a).

Formatted: Bulleted + Level: 1 + Aligned at: 0.25" + Indent at: 0.5"

(C) A surety bond the subcontractor submits under this section, 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 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.

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

(b) Requirements for Deposit of Bonds, Securities or Other Instruments ("Deposit") Submitted by a Contractor in Lieu of Retainage.

(i) Bonds, securities and other instruments deposited or acquired by a Contractor in lieu of retainage must be of a character approved by the Director of the Oregon Department of Administrative Services, including but not limited to:

- Bills, certificates, notes or bonds of the United States.
- Other obligations of the United States or agencies of the United States.
- Obligations of a corporation wholly owned by the federal government.
- Indebtedness of the Federal National Mortgage Association.
- General obligation bonds of the State of Oregon or a political subdivision of the State of Oregon.
- Irrevocable letters of credit issued by an insured institution, as defined in ORS 706.008.

Formatted: Bulleted + Level: 1 + Aligned at: 0.28" + Indent at: 0.53"

(ii) Bonds, securities or other instruments may be deposited with: (i) the Contracting Agency, or (ii) in a bank or other financial institution for the Contracting Agency to hold for the Contracting Agency's benefit.

(iii) Interest or earnings on the bonds, securities or other instruments accrue to the Contractor.

(iv) Amount of Deposit.

(A) Deposit Equivalent to Full Amount of Retainage. A Contractor may provide a Deposit meeting the requirements of this section in lieu of all retainage required by the Public Improvement Contract. The amount of the Deposit shall be calculated by applying the retainage percentage to the Contract Price and must include a provision for coverage of any increases in the Contract Price. If a Deposit equivalent to the full amount of retainage is provided by a Contractor at any time after the first progress payment has been made, the Contracting Agency shall pay any retained amount to the Contractor.

(B) Partial Deposit. If a Contractor provides a Deposit in lieu of a portion of the retainage required by the Public Improvement Contract in an amount less than the full amount required to be retained, the Contracting Agency shall pay to the Contractor any retained amounts up to the amount of the Deposit. If the amount of the Deposit is less than the amount retained by the Contracting Agency, the Contracting Agency will pay to the Contractor the retainage in the amount of the Deposit, and the remaining retainage will be remain subject to Section (4). If the amount of the Deposit is in excess of the amount retained by the Contracting Agency, the Contracting Agency will pay to the Contractor the retained amount, and will reduce the moneys the Contracting Agency holds as retainage from progress payments in an amount equal to the value of the surety bond in excess of the amount retained as of the date of the Deposit .

(6~~7~~) ~~Recovery of Additional Costs. Pursuant to ORS 279A.560(3), a Contracting Agency may recover from the Contractor all additional costs incurred in the proper handling of retainage alternatives requested by the Contractor, whether a request for the deposit of bonds, securities or other instruments in lieu of cash retainage, a request for a surety bond in lieu of cash retainage or an election for an interest-bearing account. If a Contracting Agency incurs costs associated with establishing a fund or account under section (2) of this rule or establishing an interest-bearing escrow account under section (3) of this rule, the Contracting Agency is not permitted to recover such costs from the Contractor.~~ Costs Incurred Holding Retainage or Amounts in Lieu of Retainage.

(a) Contractor's costs. A Contractor shall bear additional costs that arise from (a) utilizing Retainage Surety Bonds, Bonds, Securities, or Other Instruments in lieu of holding retainage as described in Section (5) (including Retainage Surety Bond premiums), or (b) requesting establishment of an interest bearing account as set forth in Section 2(i)(1) 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.

(b) Recovery of Additional Costs Incurred by Agency. If a Contracting Agency incurs additional costs arising from a Contractor's exercise of (a) utilizing Retainage Surety Bonds, Bonds, Securities, or Other Instruments in lieu of holding retainage as described in Section (5), or (b) requesting establishment of an interest bearing account as set forth in Section 2(1)(ii), 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.

(7~~8~~) ~~Additional Retainage When Certified Payroll Statements Not Filed. Pursuant to ORS 279C.845(7), if a Contractor is required to file certified payroll statements and fails to do so, the Contracting Agency shall retain 25 percent of any amount earned by the Contractor on a Public Works Contract until the Contractor has filed such statements with the Contracting Agency. The Contracting Agency shall pay the Contractor the amount retained under this provision within 14 days after the Contractor files the certified statements, regardless of whether a subcontractor has filed such statements (but see 279C.845(1) regarding the requirement for both contractors and subcontractors to file certified statements with the Contracting Agency)~~ . Separate Retainage When Certified Payroll Statements Not Filed - Notwithstanding ORS 279C.555 or 279C.570(7) or OAR 137-049-0820 , if a Contractor is required to file certified statements under ORS 279C.845(7), the Contracting Agency shall retain 25 percent of any amount earned by the Contractor on the public works until the Contractor has filed with the Contracting Agency certified statements in accordance with applicable BOLI rules. ~~See BOLI rule at OAR 839-025-0010.~~

Statutory/Other Authority: ORS 279A.065 & ORS 279C.845
Statutes/Other Implemented: ORS 279C.560, ORS 279C.570 & ORS 701.420
History:
DOJ 11-2022, minor correction filed 09/23/2022, effective 09/23/2022
DOJ 15-2019, amend filed 12/23/2019, effective 01/01/2020
DOJ 2-2015, f. & cert. ef. 2-3-15
Reverted to DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
DOJ 10-2014(Temp), f. & cert. ef. 7-1-14 thru 12-26-14
DOJ 15-2009, f. 12-1-09, cert. ef. 1-1-10
DOJ 20-2005, f. 12-27-05, cert. ef. 1-1-06
DOJ 11-2004, f. 9-1-04, cert. ef. 3-1-05

Formatted: Font: 10 pt