

DRAFT

SUMMARY

Revises billing cycle requirement for prompt payment of amounts due under private construction contracts. Changes statement requirement for alternative billing cycles. Allows specification of alternative time limit for making final payment. Changes prevailing party entitlements regarding costs and attorney fees.

A BILL FOR AN ACT

Relating to prompt payment provisions for private construction contracts; creating new provisions; and amending ORS 701.620, 701.625, 701.630, 701.635 and 701.640.

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

SECTION 1. ORS 701.620 is amended to read:

701.620. As used in ORS 701.620 to 701.640:

(1) "Construction contract" means a written or oral construction agreement, including [*all plans, specifications and addenda*] **but not limited to any plans for a construction agreement**, 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

1 under a construction contract by *[any contractual means including]* oral au-
 2 thorization, written contract, purchase order, price agreement, *[or]* rental
 3 agreement **or other contractual means.**

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

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

6 (7) "Plans" means drawings and specifications that are provided in
 7 order to solicit bids for work to be performed under a construction
 8 contract.

9 [(7)] (8) "Subcontractor" has the meaning given that term in ORS 87.005.

10 **SECTION 2.** ORS 701.625 is amended to read:

11 701.625. *[(1) By mutual agreement with an original contractor, an owner*
 12 *may make progress payments to the original contractor on a construction con-*
 13 *tract that is anticipated to last less than 60 days. An owner shall make*
 14 *progress payments to the original contractor on all other construction contracts.*
 15 *Progress payments shall be made on the basis of a certified billing or estimate*
 16 *for the work performed and the materials or products supplied during the*
 17 *preceding 30-day billing cycle, or an alternate billing cycle as stated in the*
 18 *construction contract. If billings or estimates are to be submitted in alternate,*
 19 *rather than 30-day billing cycles, the construction contract shall specify the*
 20 *alternate billing cycles in a clear and conspicuous manner as prescribed in*
 21 *subsection (2) of this section. Except as provided in subsection (3) of this sec-*
 22 *tion, the owner shall make progress payments to the original contractor within*
 23 *14 days after the date the billing is submitted pursuant to subsection (4) of this*
 24 *section.]*

25 (1) **If a construction contract is for construction work that is ex-**
 26 **pected to take 60 or more days to complete, an owner shall make**
 27 **progress payments to the original contractor. By mutual agreement**
 28 **with an original contractor, an owner may make progress payments**
 29 **to the original contractor under a construction contract for which the**
 30 **construction work is expected to take less than 60 days to complete.**

31 (2) *[A construction contract may provide for an alternate billing cycle if the*

1 *plans and specifications specifically set forth*] The owner shall make
2 **progress payments on the basis of a certified billing or estimate for**
3 **work performed, and for materials or products supplied, during the**
4 **preceding monthly billing cycle or during an alternative billing cycle**
5 **identified in the construction contract. If a construction contract**
6 **identifies an alternative billing cycle, the construction contract must**
7 **expressly state in a clear and conspicuous manner that there is an [al-**
8 **ternate] alternative billing cycle and the owner [provides for] must provide**
9 **on each page of plans [and specifications] relating to the construction**
10 **contract a statement substantially similar to the following [statement]:**

11
12 Notice of [Alternate] Alternative Billing Cycle
13

14 The **construction** contract will allow the owner to require the sub-
15 mission of billings or estimates in billing cycles other than [30-day] **monthly**
16 **cycles. Billings or estimates for the construction contract shall be submit-**
17 **ted as follows:**

18
19
20
21
22
23 **(3)(a) Except as provided in this subsection, the owner shall:**

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

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

28 **(b) An owner may make progress payments or final payment later than**
29 **[14 days after the date the billing or estimate is submitted] the time allowed**
30 **under paragraph (a) of this subsection if:**

31 **[(a)] (A) The owner [is responsible for providing plans and specifications]**

1 **provides plans** that expressly [*allow*] **state** in a clear and conspicuous
2 **manner that** an extended payment[, *defined by a specified*] **period is allowed**
3 **and identify the extended payment period as a specific** number of days
4 **after the date that** the billing or estimate is [*submitted*] **received or the**
5 **date that the owner approves all work;** and

6 [(b)] (B) The owner provides [*for*] **on** each page of plans [*and specifica-*
7 *tions*] a statement substantially similar to the following [*statement*]:

8
9 Notice of Extended Payment Provision

10
11 The **construction** contract will allow the owner to make [*payment*
12 *within*]:

13 1) **Progress payments no later than** _____ days after the date a billing
14 or estimate is [*submitted*] **received.**

15 2) **Final payment of all remaining amounts no later than** _____ days
16 **after the date the owner approves all work.**

17
18
19 (4) **Payment is not required under this section unless the owner**
20 **receives from the original contractor a billing or estimate for the work**
21 **performed or the materials or products supplied in accordance with**
22 **the terms of the construction contract.**

23 [(4)] (5) The owner is deemed to have received the billing or estimate
24 when the billing or estimate is [*submitted to*] **received** by any person desig-
25 nated by the owner for the receipt, review or approval of the billing or es-
26 timate. A billing or estimate is deemed to be certified 10 days after the owner
27 receives the billing or estimate, unless before that time the owner or the
28 owner's agent prepares and issues a written statement detailing those items
29 in the billing or estimate that are not approved. An owner may decline to
30 approve a billing or estimate or portion of a billing or estimate [*for*] **because**
31 **of:**

1 (a) Unsatisfactory work progress;

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

3 (c) Disputed work, materials or products, **except that the declined**
4 **amount may** not [to] exceed 150 percent of the amount in dispute;

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

7 (e) A third party [claims] **claim being** filed or reasonable evidence that
8 [such] a **third party** claim will be filed;

9 (f) Failure of the original contractor or a subcontractor to make timely
10 payments to subcontractors and material suppliers for labor, equipment, ma-
11 terials and products;

12 (g) Damage to the owner;

13 (h) Reasonable evidence that the construction contract cannot be com-
14 pleted for the unpaid balance of the construction contract sum; or

15 (i) Other items as allowed under the **construction** contract terms and
16 conditions.

17 *[(5) An owner may withhold from a progress payment an amount that is*
18 *sufficient to pay the direct expenses the owner reasonably expects to incur to*
19 *correct any items set forth in writing pursuant to subsection (4) of this section.*
20 *The owner may also withhold a reasonable amount as retainage as defined in*
21 *ORS 701.410.]*

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

24 (a) The owner is responsible for providing plans [and specifications] that
25 expressly allow in a clear and conspicuous manner an extended period within
26 which a billing or estimate may be certified; and

27 (b) The owner provides for each page of plans [and specifications, includ-
28 ing bid plans and construction plans,] a statement substantially similar to the
29 following statement:

30
31 _____
Notice of

Extended Certification Period Provision

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

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

~~[(7)]~~ **(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** *[original contractor,]* subcontractor or material supplier that does not provide written consent to the change *[will continue to be paid as]* **remain subject to the certification period** indicated in the plans *[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.

~~[(8)]~~ **(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 *[within seven*

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

8 *[(9) Payment is not required under this section unless the original con-*
9 *tractor provides the owner with a billing or estimate for the work performed*
10 *or the materials or products supplied in accordance with the terms of the*
11 *construction contract between the parties.]*

12 *[(10) A construction contract may not alter the right of any original con-*
13 *tractor, subcontractor or material supplier to receive prompt and timely*
14 *progress payments as provided under this section.]*

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

21 (12) On the written request of a subcontractor, the owner shall notify the
22 subcontractor [*within*] **no later than** five days after the issuance of a
23 progress payment to the original contractor. On the written request of a
24 subcontractor, the owner shall notify the subcontractor [*within*] **no later**
25 **than** five days after the owner makes the final payment to the original
26 contractor on the construction contract.

27 *[(13) In any action, claim or arbitration brought to collect payments or in-*
28 *terest pursuant to this section, the prevailing party shall be awarded reason-*
29 *able costs and attorney fees.]*

30 [(14)] (13) If the owner and original contractor are a single entity, that
31 entity shall [*pay*] **make progress and final payments to** subcontractors

1 and material suppliers [*within 14 days after the billing or estimate is received*
 2 *unless the deadlines for certification or payment have been modified pursuant*
 3 *to*] **as described in** subsection (3) or (6) of this section.

4 **(14) In any action, claim or arbitration brought to collect interest**
 5 **pursuant to this section, the prevailing party shall be awarded costs**
 6 **and reasonable attorney fees.**

7 **SECTION 3.** ORS 701.630 is amended to read:

8 701.630. (1) [*Performance by*] An original contractor, subcontractor or
 9 material supplier [*in accordance with the provisions of a construction contract*
 10 *entitles the original contractor, subcontractor or material supplier*] **that per-**
 11 **forms in accordance with a construction contract is entitled** to payment
 12 from the party with whom the original contractor, subcontractor or material
 13 supplier contracts.

14 [(2) *If a subcontractor or material supplier has performed in accordance*
 15 *with the provisions of a construction contract, the original contractor shall pay*
 16 *to the subcontractor or material supplier, and each subcontractor shall pay to*
 17 *its subcontractors or material suppliers, the full amount received for such*
 18 *subcontractor's work and for materials and products supplied based on the*
 19 *subcontract or purchase order terms and conditions within seven days of re-*
 20 *ceipt by the original contractor or subcontractor of a progress payment or final*
 21 *payment.*]

22 **(2)(a) If a subcontractor has performed in accordance with a con-**
 23 **struction contract, and the original contractor receives payment from**
 24 **the owner for work performed by the subcontractor, the original con-**
 25 **tractor shall pay the subcontractor for that work no later than seven**
 26 **days after the original contractor receives the payment. If a material**
 27 **supplier has performed in accordance with a construction contract,**
 28 **and the original contractor receives payment from the owner for ma-**
 29 **terials or products provided by the material supplier, the original**
 30 **contractor shall pay the material supplier for those materials and**
 31 **products no later than seven days after the original owner receives the**

1 **payment. An original subcontractor that receives payment under this**
 2 **subsection for work provided to the original subcontractor by another**
 3 **subcontractor, or for materials or products provided to the original**
 4 **subcontractor, shall pay the other subcontractor or material supplier**
 5 **for the work, materials or products no later than seven days after the**
 6 **original subcontractor receives the payment.**

7 (b) Payment is not required under this subsection unless a subcontractor
 8 or material supplier provides to the original contractor or subcontractor a
 9 billing or invoice for the work performed or materials or products supplied
 10 in compliance with the terms of the contract between the parties. Each
 11 subcontractor or material supplier must provide an appropriate waiver of any
 12 [*mechanic's or materialman's*] **lien for labor, equipment, services, mate-**
 13 **rials or products** in accordance with subcontract or purchase order terms
 14 and conditions. The original contractor or subcontractor may require that
 15 such waivers of lien be notarized.

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

20 (4) [*Nothing in this section prevents*] An original contractor [*when sub-*
 21 *mitting a bill*] **that submits a billing** or estimate to an owner, or [*a*] **an**
 22 **original** subcontractor [*when submitting a bill*] **that submits a billing** or
 23 estimate to the original contractor, [*from omitting from the bill*] **may omit**
 24 **from the billing or** estimate amounts **to be** withheld from payment to a
 25 subcontractor or material supplier [*for*] **because of:**

- 26 (a) Unsatisfactory work progress;
 27 (b) Defective construction work, materials or products not remedied;
 28 (c) Disputed work, materials or products, **except that the withheld**
 29 **amount may not** [*to*] exceed 150 percent of the amount in dispute;
 30 (d) Failure to comply with other material provisions of the construction
 31 contract;

1 (e) A third party [*claims*] **claim being** filed or reasonable evidence that
2 [*such*] a **third party** claim will be filed;

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

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

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

9 [(i) A reasonable amount for retainage, as defined in ORS 701.410, that
10 does not exceed the actual percentage allowed by the subcontract or purchase
11 order; or]

12 [(j)] (i) Other items as allowed under the subcontract or purchase order
13 terms and conditions.

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

20 [(5)] **(6) If a progress or final payment to a subcontractor or material**
21 **supplier is delayed by more than seven days after receipt of a progress or**
22 **final payment by an original contractor or subcontractor, the original con-**
23 **tractor or subcontractor shall pay its subcontractor or material supplier in-**
24 **terest beginning on the eighth day, except during periods of time during**
25 **which payment is withheld pursuant to subsection (4) or (5) of this section,**
26 **at the rate of one and one-half percent a month or a fraction of a month on**
27 **the unpaid balance or at such higher rate as the parties agree.**

28 [(6)] **(7) In any action, claim or arbitration brought to collect payments**
29 **or interest under this section, the prevailing party shall be awarded [rea-**
30 **sonable] costs and reasonable attorney fees.**

31 **SECTION 4.** ORS 701.635 is amended to read:

1 701.635. (1) An original contractor may suspend performance under a
2 construction contract, or **if performance is suspended for longer than**
3 **one month may** terminate a construction contract, if [*performance is sus-*
4 *pending for longer than 30 days, for failure by*] the owner **fails** to make timely
5 payment of the amount certified under ORS 701.625. An original contractor
6 shall provide written notice to an owner at least seven days before the ori-
7 ginal contractor suspends performance or terminates the **construction** con-
8 tract, unless a shorter notice period is prescribed in the **construction**
9 contract. An original contractor may not be deemed in breach of a con-
10 struction contract for suspending performance or terminating a construction
11 contract pursuant to this subsection. A construction contract may not extend
12 the notice period under this subsection.

13 (2) A subcontractor may suspend performance under a construction con-
14 tract, or **if performance is suspended for longer than one month may**
15 terminate a construction contract, if [*performance is suspended for longer*
16 *than 30 days, for failure by*] the owner **fails** to make timely payment of
17 amounts certified under ORS 701.625 or the subcontractor [*fails to*] **does not**
18 receive payment for the certified work under ORS 701.630 (2). A subcontrac-
19 tor shall provide written notice to the original contractor and owner at least
20 three days before the subcontractor suspends performance or terminates the
21 **construction** contract, unless a shorter notice period is prescribed in the
22 **construction** contract. A subcontractor may not be deemed in breach of a
23 construction contract for suspending performance or terminating a **con-**
24 **struction** contract pursuant to this subsection. A construction contract may
25 not extend the notice period under this subsection.

26 (3) A subcontractor may suspend performance under a construction con-
27 tract, or **if performance is suspended for longer than one month may**
28 terminate a construction contract, [*if performance is suspended for longer*
29 *than 30 days,*] if the owner makes timely payment of amounts certified under
30 ORS 701.625 for the subcontractor's work but the original contractor fails
31 to pay the subcontractor for the certified work. A subcontractor shall pro-

1 vide written notice to the original contractor and owner at least seven days
2 before the subcontractor suspends performance or terminates the **con-**
3 **struction** contract, unless a shorter notice period is prescribed in the **con-**
4 **struction** contract. A subcontractor may not be deemed in breach of a
5 construction contract for suspending performance or terminating a **con-**
6 **struction** contract pursuant to this subsection. A construction contract may
7 not extend the notice period under this subsection.

8 (4) A subcontractor may suspend performance under a construction con-
9 tract, or **if performance is suspended for longer than one month may**
10 terminate a construction contract, [*if performance is suspended for longer*
11 *than 30 days,*] if the owner **declines** or fails to approve portions of the
12 contractor's billing or estimate under ORS 701.625 for that subcontractor's
13 work [*but*] **and** the reasons for [*that failure*] **nonapproval** are not the fault
14 of or directly related to the subcontractor's work. A subcontractor shall
15 provide written notice to the original contractor and the owner at least
16 seven days before the subcontractor suspends performance or terminates the
17 **construction** contract, unless a shorter notice period is prescribed in the
18 **construction** contract. A subcontractor may not be deemed in breach of a
19 construction contract for suspending performance or terminating a **con-**
20 **struction** contract pursuant to this subsection. A construction contract may
21 not extend the notice period under this subsection.

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

25 (6) An original contractor or subcontractor that suspends performance as
26 provided in this section [*is not required to furnish further labor, materials,*
27 *products or services until the original contractor or subcontractor is paid the*
28 *amount that was certified under ORS 701.625, together with*] **may condition**
29 **the supplying of further labor, equipment, services, materials or pro-**
30 **ducts upon the owner paying, in addition to any amounts certified**
31 **under ORS 701.625, any documented, substantial and reasonably incurred**

1 costs for mobilization resulting from the shutdown or start-up of a project.

2 (7) In any action, claim or arbitration brought pursuant to this section,
3 the prevailing party shall be awarded [*reasonable*] costs and **reasonable** at-
4 torney fees.

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

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

10 (b) Is delivered by certified mail, return receipt requested, or other means
11 that provides written, third party verification of delivery to the last business
12 address of the owner, original contractor or subcontractor known to the
13 party giving notice.

14 **SECTION 5.** ORS 701.640 is amended to read:

15 701.640. (1) A construction contract may not include any provision,
16 covenant or clause that:

17 (a) Makes the **construction** contract subject to the laws of another state
18 or that requires any litigation, arbitration or other dispute resolution pro-
19 ceeding arising from the **construction** contract to be conducted in another
20 state; or

21 (b) States that a party to the **construction** contract cannot suspend per-
22 formance under the **construction** contract or terminate the **construction**
23 contract if another party to the **construction** contract fails to make prompt
24 payments under the **construction** contract pursuant to ORS 701.620 to
25 701.640.

26 (2) Any provision, covenant or clause described in subsection (1) of this
27 section is void and unenforceable.

28 **SECTION 6.** The amendments to ORS 701.620, 701.625, 701.630, 701.635
29 and 701.640 by sections 1 to 5 of this 2011 Act apply to construction
30 contracts that a property owner enters into on or after the effective
31 date of this 2011 Act.

