OFFICE OF THE SECRETARY OF STATE
SHEMIA FAGAN
SECRETARY OF STATE

CHERYL MYERS
DEPUTY SECRETARY OF STATE

ARCHIVES DIVISION
STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

STATUTORY MINOR CORRECTION

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& LEGISLATIVE COUNSEL

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CHAPTER 137
DEPARTMENT OF JUSTICE

FILING CAPTION: Amends Model Public Contract Rules pursuant to 2019 legislative changes.

CONTACT: Angie Emmert
971-304-8157
angie.emmert@doj.state.or.us

Oregon Department of Justice
1162 Court Street NE
Salem,OR 97301

Filed By:
Angie Emmert
Rules Coordinator

AGENCY ATTESTS THE FOLLOWING CHANGES HAVE BEEN MADE, ACCORDING TO ORS 183.335(7):

Correcting spelling

AMEND: 137-049-0820

RULE TITLE: Retainage

RULE SUMMARY: The Attorney General proposes to amend the Model Public Contract Rules to respond to legislative changes enacted in the 2019 Regular Session of the Oregon Legislative Assembly. Correcting spelling of "Contractor" in section (3), and "Contract" in section (5)

RULE TEXT:

(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.

(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.

(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.

(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.

(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)].

(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.

(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.

(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). 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