

OAME/AGC COLLABORATION PROMPT PAYMENT WHITEPAPER

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INTRODUCTION

In April 2001, the Oregon Association of Minority Entrepreneurs (OAME) and the Associated General Contractors, Oregon-Columbia Chapter (AGC) entered into a collaborative working relationship to find solutions to issues of concern to women- and minority-owned and emerging small construction companies.

OAME surveyed its construction contractor members to develop a list of issues. From this list, a representative group from each organization determined that four would be of greatest benefit to both groups to pursue. Those four issues were prioritized, and OAME and AGC committed to addressing each issue on a quarterly schedule and producing a report of their findings at the conclusion of each quarter. The issues and timeline are:

- Prompt Payment — fourth quarter 2001
- Exploring opportunities for minority contractor joint venturing — first quarter 2002
- Developing an AGC system for reporting minority contractor utilization— second quarter 2002
- Bonding — third quarter 2002

This whitepaper is the result of work completed by following members of OAME and AGC:

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It is the intent of both OAME and AGC to use the findings of this whitepaper to educate the contracting community concerning their rights and obligations with regard to prompt payment and to work with public and private owners to improve the payment procedures of those who are seen as creating prompt payment difficulties for the construction industry as a whole, and women/minority owned and emerging small businesses specifically.

PROBLEM DEFINITION

For decades, it has been the desire of public agencies and many private owners to provide opportunities for women and minority owned and emerging small businesses through incentives in their construction contracts. Unfortunately, however, in many cases the desire to provide opportunities is thwarted by long payment cycles which result in adverse impacts on small construction businesses who are the least likely to have cash reserves or the ability to sustain extended periods between payments. Cash flow is a consistent difficulty for the construction industry—the magnitude of which is not always recognized by public and private owners.

The OAME/AGC working group also discovered that there is significant misunderstanding amongst women- and minority-owned and emerging small businesses about the legal requirements placed on public agencies and general contractors to pay promptly, their rights when they believe a general contractor has not paid within the law and the amount of time that is allowed by law for the payment process on public improvement contracts.

Prompt payment is addressed for Oregon public agencies (except higher education) in ORS 279 and federal agencies in Federal Acquisition Regulation (FAR) 52. There are no statutory requirements for prompt payment for private owners in Oregon.

Attachment 5 charts the payment cycles for Oregon public improvement contracts. Based upon these exhibits, it is easy to see that a second tier subcontractor or supplier on an Oregon public improvement project will experience a 65 day payment lag between the time he/she submits a request for payment to the first tier subcontractor and the date on which that payment must legally be provided back to the second tier subcontractor/supplier. **That is 65 days if everyone along the chain does everything perfectly legally!** If there is a dispute about the quantity or quality of the work being invoiced, or if the first tier subcontractor or general contractor is late with their payment request, the time for payment will be extended. It is also important to note that the 65 day cycle is from the date on which the second tier subcontractor or supplier submitted a request for payment, not the date on which the expense was incurred. The actual expense (payroll, supplies, etc) could have been incurred as much as two weeks prior to the subcontractor/supplier's submittal for payment.

Attachment 6 shows that federal construction prompt payment requirements are slightly better—resulting in an overall time lag of 43 days from time of submittal by a second tier subcontractor or supplier until payment is due. A major difference between the Oregon and federal law is that federal agencies are required to pay within 14 days whereas Oregon public agencies are given 30 days. Federal agencies also routinely use electronic funds transfers rather than paper checks for payment—this makes funds available to contractors faster and more efficiently.

While Oregon law allows public agencies 30 days to process payments, and general contractors and first tier subcontractors 10 days to make payments to subsequent tiers, OAME surveyed a their membership and discovered that some public agencies and contractors are providing payment voluntarily on an accelerated schedule. It was also discovered that some subcontractors have developed prompt payment “incentives” that are successful ways to minimize the amount of time between request for payment and receipt of payment. These “best practices” and creative solutions are discussed in the sections that follow.

EXAMPLES OF OWNER BEST PRACTICES

OAME surveyed its contractor members seeking information about public and private owners' and general contractors' prompt payment practices.

PUBLIC AGENCIES:

Of the public agencies listed on the OAME survey, the City of Portland and Tri Met were both recognized as agencies that pay more promptly than others. Excerpts from the specifications of those two agencies outlining payment procedures are provided below. ODOT was also recognized as an agency that has put in place a retainage payment policy that could offer some relief to subcontractors. The ODOT Reduction in Retainage portion of their project specification is also included.

City of Portland:

Section 110 Accelerated Payments:

110.01 Advance on Progress Payment

Owner will provide Contractor with an advance on the progress payment otherwise due under Section 109.07. Contractor will receive payment from Owner twice each month. Contractor still is required to follow the requirements of Section 109 of these specifications in order to receive a monthly progress payment. The procedures for receiving the advance payment are described below. The advance on the progress payment is not optional, but mandatory.

110.02 Procedure for Advance Payment

- A. On the 15th of each month, or on the next working day, Contractor will submit a good faith Estimate of Value for work performed that was not included within the Contractor's previously requested progress payment, if any. The Estimate of Value shall be based on any applicable unit prices, lump sum amounts, or contract price established by the contract, less any retainage.
- B. Owner may either approve the Contractor's Estimate or substitute its own Estimate of Value if it believes the Contractor's Estimate to be incorrect. Thereafter, Owner will pay Contractor an advance payment based on either the Contractor's or the Owner's Estimate of Value. Owner may deduct any amounts for retainage from the Estimate and advance payment.
- C. Advance payment by Owner pursuant to the Estimate will be deducted from any amounts due Contractor from the next monthly progress payment, or any subsequent advance payment or progress payment.
- D. The parties agree that disputes regarding the amount of the advance payment shall be limited to whether the Estimate was made in good faith. The parties acknowledge that the advance payment is simply a rough estimate made for the purpose of providing the Contractor and its subcontractors with funds in advance of the progress payment and is not intended to represent the exact amount owed.
- E. If the Engineer is not satisfied with the Estimate provided by Contractor, the Engineer may either request additional documentation or may calculate the Owner's Estimate of Value. Contractor shall provide documentation to establish its Estimate of Value upon request within three working days. Failure to provide additional documentation when requested precludes any dispute whether the Owner's Estimate was made in good faith.
- F. Owner is not required to make an advance payment if it is determined by Owner that the amount of work performed by the 15th of any month is minimal, or if there is a chance that the advance payment might exceed the remaining amount due the Contractor under the Contract.

- G. Nothing in this section requires Owner to pay for any portion of the work that is disputed or which would otherwise not be eligible for payment.
- H. Because the payment is an advance on the progress payment, no interest shall be owing on the advance payment until the time when interest would be due under the progress payment.

110.03 Contractor’s Duty to Pay Subcontractors

- A. Within five calendar days of receipt of payment from Owner, Contractor shall pay its subcontractors for work performed during the period covered by the Estimate of Value. Such payment is required regardless of any other payment provision agreed upon between the Contractor and its subcontractors. Such payment may be based on a good faith estimate of what is owed.
- B. “Receipt of payment” shall be the day on which the Contractor receives a warrant or check for payment from Owner, regardless of the day when it is negotiated or deposited.
- C. The Contractor is required to take all necessary good faith actions to ensure that it makes an advance payment to its subcontractors regardless of any specific action that may otherwise be required. Such good faith actions include, but are not limited to, the timely resolution of disputes about the performance of work.
- D. Upon request from Owner, Contractor shall inform Owner of the portion of any advance payment owed to any of its subcontractors.
- E. Nothing in this section requires the Contractor to pay its subcontractors for any portion of the work that is disputed or which otherwise would not be eligible for payment.

Tri Met:

Prompt Payment Invoicing Schedule

General Contractor and Tri-Met have both committed to a 10-day prompt payment period. To receive your payment in the least possible turnaround time, please adhere to the following schedule.

Using these procedures will streamline the process by 3 weeks.

Invoices missing items or incomplete paperwork will not be presented to Tri-Met until the next submission the following month after adjustments are made, resulting in an additional 30 day delay in processing. If your invoice misses the cutoff date, you will be notified.

1. 1st of the month submit Invoice to General Contractor by mail or hand delivery. No faxes. Be sure to use appropriate code numbers and matching items to speed up the reconciliation process.
2. 5th of every month Submit MER’s (employees) Mur’s (subcontractors for the previous month) reports and certified payrolls to General Contractor.
3. 5th of the Month cut off date for Invoice Clarifications and all original documentation to your Invoice.
4. 11th General Contractor submits Invoice to Tri-Met

Upon receipt & ACCEPTANCE of the invoice from General Contractor, the 30 day turnaround period begins.

5. Tri-Met pays the Invoice to General Contractor in 10 business days--by approximately the 25th.
6. Within 10 days after receipt of Payment from Tri-Met, General Contractor pays Invoices and checks are available for pickup at respective jobsites or mailing.

Total processing time after Invoice is accepted as complete and submitted by the General Contractor is 19-20 business days.

Invoicing

What your invoice should contain to ensure timely processing

1. **Cover Sheet – 1 page**
 - a. Company name
 - b. Prime's Name
 - c. Contract # and Project Identification
 - d. Your Reference Number
 - e. Description of Work – Short
 - i. Quantity of work
 - f. Date of work - Start - Finish
 - g. Dollar value of Invoice
 - h. Special Payment Instructions
 - i. Outline of Contents – Backup
2. **Back up should contain**
 - a. Total Cost
 - i. Calculation to arrive at Invoice dollar value
 - b. Quantity of work
 - i. Station to station on plans
 - ii. Identification of location on plans
 - iii. Cost per contract unit
 - iv. Inspection Certification Copy
 - c. Payrolls for period of all workers
 - i. Proper classification and rate
 - ii. Apprentices hours identified
 - iii. Documentation of process for new employees hired within period
 - d. Materials Used
 - i. Copy of purchase receipt of material used
 - ii. Quantity of material used
 - iii. Tickets for material placed
 - iv. Copy of submittal approval
 - v. Field Inspection Certification
 - vi. Cost per contract unit
 - e. Subcontractors invoice to you if any
 - i. Should contain the same back up as yours
 - f. Change Orders if any
 - i. Copy of Signed Change Order
 - ii. Cost Calculation
 - iii. Quantity of work

iv. Payrolls
v. Materials used
Field Inspection Certification

ODOT:

Reduction in Retainage:

When a subcontractor has satisfactorily completed all its work in this contract, it may request release of retainage for that work from the Contractor. The Contractor shall certify to the Department that the subcontractor's work is complete and that all contractual requirements pertaining to the subcontractor's work are satisfied, and request reduction of retainage in the amount withheld for that work. The Department will only release retainage for satisfactorily complete portions of the work represented by pay items in the bid schedule, or by pay items added by contract change order (CCO). Work not represented by a pay item, but which constitutes part of an uncompleted pay item, will not be regarded as satisfactorily completed work for the purposes of this subsection. Within 60 days of the end of the Progress Estimate cycle in which the Contractor certified to the Department that a subcontractor's work is complete, the Department will either notify the Contractor of any deficiencies which require completion before release of retainage, or verify that the work complies with the contract and release all retainage for that work on the next scheduled pay estimate. Within 10 days of receipt of retainage, the Contractor shall pay to the subcontractor all retainage due.

PRIVATE OWNER:

Nike, Inc – Nike's standard payment terms, as with many other companies, is net 45 days. However, any vendor or buyer is allowed to negotiate this to net 30. Invoices can also reflect due upon receipt as this typically speeds up the processing of payments.

The key points from a process standpoint are:

1. Make sure a purchase order is issued by the buyer at the time the transaction is agreed upon, not after the goods and/or services have been supplied.
2. Vendors/suppliers should send the original invoice to the attention of the Accounts Payable Dept. Doing so speeds up the process because a copy of the purchase order should be on file in Accounts Payable. If the invoice matches the PO for quantities, price etc. and whoever received the goods and/or services has noted in the system that they have been received, payment can be made within the designated timeframe and without issues to resolve.

Nike's current policy is to issue purchase orders for any transaction over \$500. It is going to be raised to \$1,000. If there is not a purchase order involved, the vendor/supplier needs to maintain contact with the buyer if there is any reason to think the invoice might not be processed promptly.

EXAMPLES OF CONTRACTOR SOLUTIONS

While the owners' payment process is often a contributing factor to how quickly a general contractor can make payments to subcontractors, the OAME survey determined that several general contractors paid more promptly than required by law. Additionally, the OAME/AGC working group discovered that some subcontractors have employed their own strategies for obtaining more frequent payments through contractual clauses with incentives. Examples of best practices from general contractors and an example of a subcontractor prompt payment clause are listed below.

GENERAL CONTRACTOR BEST PRACTICE:

Walsh Construction – Walsh Construction Company often pays subcontractors and/or suppliers regardless of whether they have been paid by the owner. Typically, if the subcontractor invoices Walsh by the 1st of the month, payment will be issued by the 20th of the month. Walsh is willing to make reasonable adjustments to this process, such as having two payments per month, if needed to meet payroll for small subcontractors. Retainage should be paid 30 days after a subcontractor has completed its work, as long as lien releases have been provided and there is no unfinished repair work.

Walsh encourages subcontractors/suppliers who experience payment difficulties to call the project manager to resolve the issue early in the process.

SUBCONTRACTOR CONTRACT CLAUSE:

The following is one example of a contract clause used successfully by an AGC subcontractor member. This contract clause is negotiated up front into all contracts between this subcontractor and any general contractor with whom it does business.

PAYMENT PROVISIONS:

Subcontractor will submit progress billings to Contractor on the first (1st) day and the fifteenth (15th) day of the month. Contractor is issue check no later than seven (7) days after billing is received by Contractor. A discount of one percent (1%) may be taken by Contractor on each progress billing.

Payments to Subcontractor not in accordance with the above will accrue interest at a rate of one and one-half (1 ½ %) per month on all delinquent payments.

OTHER SOLUTIONS AVAILABLE TO CONTRACTORS

While negotiating a line of credit with a financial institution is generally accepted as being a necessary requirement of success in the commercial construction industry, women and minority owned and emerging small businesses often do not have the capability to do so. In an effort to provide this service and bridge a gap in the marketplace, several agencies have created short term financing vehicles that are available to women and minority owned and emerging small businesses.

The following list may not include all resources available in the state of Oregon, but is a representative sample of programs as of the publication of this report.

OAME

4134 N. Vancouver
Portland, OR 97217
Phone (503) 249-7744
Fax (503) 249-2027

Cascadia Revolving Fund

1020 SW Taylor, Suite 800
Portland, OR 97205
Phone (503) 248-9030
Fax (503) 223-6695

Oregon Economic and Community Development Dept.

775 Summer Street, NE
Salem, Oregon 97310
Phone (503) 986-0123
Fax (503) 581-5115

Portland Development Commission (PDC)

1900 SW Fourth Ave.
Portland, OR 97201-5304
Phone (503) 823-3200
Fax (503) 823-3368

US Small Business Administration

1515 SW 5th Ave., Suite 1050
Portland, OR 97201
Phone (503) 326-2682
Fax (503) 326-2808

CONCLUSIONS

Based upon the information received and reviewed, the OAME/AGC Prompt Payment Working Group has the following conclusions:

- The amount of time allowed by ORS 279 for public owner payments to general contractors is a significant contributor to slow receipt of payment at all levels on a project. A fourteen day or twice monthly payment cycle (as used in Federal contracts and by some Oregon agencies) is preferred by all contractors and especially preferred by subcontractors
- Most Oregon owners have been slow to incorporate technology as a tool for speeding payment to contractors. Federal contracts provide for electronic funds transfers, which is preferred to paper checks or warrants as a more efficient and effective means of making payment. Other uses of technology should be explored by contractors and owners.
- Public and private owners should explore contract clauses that designate advance payments as “good faith estimates” that can be reconciled against future payments. This would alleviate some of the difficulties with layers of approval of documentation that is currently experienced.
- When owners are unable or unwilling to release retainage for work completed and accepted in an early phase of construction, subcontractor’s profit margins and ability to bid on subsequent projects are adversely impacted. The ODOT process alleviates this problem.
- Most subcontractors do not understand their responsibilities for submitting timely and accurate requests for payment to the next higher tier on the project nor do they understand their legal remedies when they do not receive prompt payment. Training provided by OAME and AGC can help in this regard; however, if all owners implemented a pre-construction meeting with the general contractor and subcontractors on the project where payment schedules and requirements are discussed, much of the confusion could be eliminated.
- Subcontractors can do a better job of negotiating payment terms up front with their general contractor and should consider providing the general contractor with a prompt payment discount.
- General contractors and owners who are contracting directly with women and minority owned and emerging small businesses should establish a relationship with the financing agencies listed in this report to create a system of payment advances for contractors who have cash flow constraints

NEXT STEPS

In addition to publication and distribution of this report to interested parties, the OAME/AGC Prompt Payment Working Group has committed to the following additional steps to be taken.

EDUCATION:

- OAME and AGC are co-sponsoring a series of brown bag luncheons designed to respond to the theme of “The Business Side of Construction.” These are being offered free of charge to anyone interested in attending, and announcements of the dates and topics are distributed to all OAME members, Sheltered Market contractors, Port of Portland protégés and all AGC women, minority and emerging small business members. The February 2002, topic will be prompt payment.
- AGC is collaborating with a number of public owner associations (League of Oregon Cities, Association of Oregon Counties, Special Districts Association, Oregon School Boards Association, etc) to provide public contracting seminars for public agencies throughout the state of Oregon in April and May of 2002. A portion of the curriculum of these day-long seminars will focus on the public agencies’ responsibilities for paying promptly. The OAME/AGC Prompt Payment Whitepaper will be provided as a handout.
- AGC facilitates a large group of public agencies and commercial construction stakeholders known as the Public Contracting Coalition. The goal of this group is to review public contracting policies and practices and make recommendations for improvement. AGC will take the OAME/AGC Prompt Payment Whitepaper to this group for discussion.
- OAME conducts a contractors forum meeting on the 2nd Friday of each month at the OAME Cascade Plaza, 4134 N. Vancouver Ave., Portland, OR 97211
- OAME provides technical assistance and collaborates with the Housing Development with Portland State University, Small Business Development Center, City, State, County and Federal. Technical assistance provided to help minority, women and emerging small businesses to grow and develop.

INFORMATION DISSEMINATION:

- The OAME/AGC Prompt Payment Whitepaper will be distributed through OAME’s contractor committee, the Port of Portland Mentor-Protégé Program, the City of Portland Sheltered Market Program and AGC to all women and minority owned and emerging small businesses.
- The Whitepaper will be used as a basis for ongoing conversations with significant public and private owners about how they can use the best practices already used by others and detailed in the whitepaper to improve their prompt payment policies and procedures.
- AGC and OAME will post the Whitepaper on their website and include an article in their respective newsletters to inform readers how to access the information.

- OAME/AGC proposes a working forum of public and private owners and contractors to review the finding and best practices from this prompt payment paper

LEGISLATIVE REMEDY:

- AGC staff has had preliminary discussions about pursuing a legislative remedy, which would modify the thirty day period allowed in ORS 279 for public agencies to remit payment to general contractors. Discussions will continue with a group of interested stakeholders including subcontractor groups, OAME, AGC, ABC and others.

**ATTACHMENT 1
EXERPTS FROM ORS 279
RETAINAGE, PAYMENT, SUBCONTRACTORS**

Retainage:

279.400 Withholding of retainage. (1) The withholding of retainage by a contractor or subcontractor on public contracts for public improvements shall be in accordance with ORS 701.420 and 701.430 except when the charter of the public agency that is a party to a public contract contains provisions requiring retainage by the public agency of more than five percent of the contract price of the work completed.

(2) As used in this section:

(a) “Public contract” means any purchase, lease or sale by a public agency of personal property, public improvements or services other than agreements which are for personal service.

(b) “Public agency” or “public contracting agency” means any agency of the State of Oregon or any political subdivision thereof authorized by law to enter into public contracts.

(c) “Public improvement” means any construction of improvements on real property by or for a public agency. [Formerly 279.358; 1979 c.196 s.3]

279.410 “Retainage” defined for ORS 279.011 to 279.542. As used in ORS 279.011 to 279.542, unless the context otherwise requires, “retainage” means the difference between the amount earned by the contractor on a public contract and the amount paid on the contract by the public contracting agency. [1977 c.727 s.3]

279.420 Form of retainage. (1) Money retained by a public contracting agency under ORS 279.435 (7) shall be:

(a) Retained in a fund by the public contracting agency and paid to the contractor in accordance with ORS 279.435; or

(b) At the option of the contractor, paid to the contractor in accordance with subsection (3) or (4) of this section and in a manner authorized by the Director of the Oregon Department of Administrative Services.

(2) If the public agency incurs additional costs as a result of the exercise of the options described in subsection (1) of this section, the agency may recover such costs from the contractor by reduction of the final payment. As work on the contract progresses, the agency shall, upon demand, inform the contractor of all accrued costs.

(3) The contractor may deposit bonds or securities with the public contracting agency or in any bank or trust company to be held in lieu of the cash retainage for the benefit of the public contracting agency. In such event the public agency shall reduce the retainage in an amount equal to the value of the bonds and securities and pay the amount of the reduction to the contractor in accordance with ORS 279.435. Interest on such bonds or securities shall accrue to the contractor.

(4) If the contractor elects, the retainage as accumulated shall be deposited by the public contracting agency in an interest-bearing account in a bank, savings bank, trust company or savings association for the benefit of the public contracting agency. When the public contracting agency is an agency of the State of Oregon, the account shall be established through the State Treasurer. Earnings on such an account shall accrue to the contractor.

(5) Bonds and securities deposited or acquired in lieu of retainage, as permitted by this section, shall 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 its agencies.

(c) Obligations of any corporation wholly owned by the federal government.

(d) Indebtedness of the Federal National Mortgage Association.

(6) The contractor, with the approval of the public contracting agency, may deposit a surety bond for all or any portion of the amount of funds retained, or to be retained, by the public contracting agency in a form acceptable to the public contracting agency. Such bond and any proceeds therefrom shall be made subject to all claims and liens and in the same manner and priority as set forth for retainage under ORS 279.400 to 279.542. The public contracting agency shall reduce the retainage in an amount equal to the value of the bond and pay the amount of the reduction to the contractor in accordance with ORS 279.435. Whenever a public contracting agency accepts a surety bond from a contractor in lieu of retainage, the contractor shall accept like bonds from any subcontractor or supplier from which the contractor has retainage. The contractor shall then reduce the retainage in an amount equal to the value of the bond and pay the amount of the reduction to the subcontractor or supplier. [1977 c.727 s.4; 1983 c.690 s.15; 1989 c.106 s.1; 1991 c.516 s.3; 1999 c.689 s.11]

279.430 Limitation on retainage requirements. Unless otherwise specifically included by statute, the provisions of ORS 279.420 or 279.542 shall only apply as between the public contracting agency and the party with whom it contracts. [1977 c.727 s.5]

Payment:

279.435 Prompt payment policy; progress payments on public contracts; retainage; interest; exception; settlement of compensation disputes. (1) It is the policy of this state that all payments due on a public contract for a public improvement and owed by a public contracting agency shall be paid promptly. No public contracting agency shall be exempt from the provisions of this section.

(2) Public contracting agencies shall make progress payments on the contract monthly as work progresses on a public contract for a public improvement. Payments shall be based upon estimates of work completed that are approved by the public contracting agency. A progress payment shall not be considered acceptance or approval of any work or waiver of any defects therein. The public contracting agency shall pay to the contractor interest on the progress payment, not including retainage, due the contractor. The interest shall commence 30 days after receipt of the invoice from the contractor or 15 days after the payment is approved by the agency, whichever is the earlier date. The rate of interest charged to the public contracting agency on the amount due shall equal three times the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date that is 30 days after receipt of the invoice from the contractor or 15 days after the payment is approved by the agency, whichever is the earlier date, but the rate of interest shall not exceed 30 percent.

(3) Interest shall be paid automatically when payments become overdue. The public contracting agency shall document, calculate and pay any interest due when payment is made on the principal. Interest payments shall accompany payment of net due on public contracts. The public

contracting agency shall not require the contractor to petition, invoice, bill or wait additional days to receive interest due.

(4) In instances when an invoice is filled out incorrectly, or when there is any defect or impropriety in any submitted invoice or when there is a good faith dispute, the public contracting agency shall so notify the contractor within 15 days stating the reason or reasons the invoice is defective or improper or the reasons for the dispute. A defective or improper invoice, if corrected by the contractor within seven days of being notified by the agency, shall not cause a payment to be made later than specified in this section unless interest is also paid.

(5) If requested in writing by a first-tier subcontractor, the contractor, within 10 calendar days after receiving the request, shall send to the first-tier subcontractor a copy of that portion of any invoice, request for payment submitted to the public contracting agency or pay document provided by the public contracting agency to the contractor specifically related to any labor or materials supplied by the first-tier subcontractor.

(6) Payment of interest may be postponed when payment on the principal is delayed because of disagreement between the public contracting agency and the contractor. Whenever a contractor brings formal administrative or judicial action to collect interest due under this section, the prevailing party shall be entitled to costs and reasonable attorney fees.

(7) A public contracting agency may reserve as retainage from any progress payment on a public contract an amount not to exceed five percent of the payment. As work progresses, an agency may reduce the amount of the retainage and the agency may eliminate retainage on any remaining monthly contract payments after 50 percent of the work under the contract is completed if, in the agency's opinion, such work is progressing satisfactorily. Elimination or reduction of retainage shall be allowed only upon written application by the contractor, which application shall include written approval of the contractor's surety; except that when the contract work is 97-1/2 percent completed the agency may, at its discretion and without application by the contractor, reduce the retained amount to 100 percent of the value of the contract work remaining to be done. Upon receipt of a written application by the contractor, the agency shall respond in writing within a reasonable time.

(8) The retainage held by a public contracting agency shall be included in and paid to the contractor as part of the final payment of the contract price. The public contracting agency shall pay to the contractor interest at the rate of one and one-half 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. The contractor shall notify the public contracting agency in writing when the contractor considers the work complete and the public contracting agency shall, within 15 days after receiving the written notice, either accept the work or notify the contractor of work yet to be performed on the contract. If the public contracting agency does not within the time allowed notify the contractor of work yet to be performed to fulfill contractual obligations, the interest provided by this subsection shall commence to run 30 days after the end of the 15-day period.

(9)(a) The public contracting agency shall pay, upon settlement or judgment in favor of the contractor regarding any dispute as to the compensation due a contractor for work performed under the terms of a public contract, the amount due plus interest at the rate of two times the discount rate, but not to exceed 30 percent, on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve district that includes Oregon on the date and accruing from the later of:

(A) The due date of any progress payment received under the contract for the period in which such work was performed; or

(B) Thirty days after the date on which the claim for the payment under dispute was presented to the public contracting agency by the contractor in writing or in accordance with applicable provisions of the contract.

(b) Such interest shall be added to and not made a part of the settlement or judgment. [Formerly 279.575; 1991 c.516 s.1; 1999 c.689 s.2]

Subcontractors:

279.445 Contractor's relations with subcontractors. (1) This section applies to contracts for contractors of public improvements.

(2) A contractor shall not request payment from the public contracting agency of any amount withheld or retained in accordance with subsection (6) of this section until such time as the contractor has determined and certified to the public contracting agency that the subcontractor has determined and certified to the public contracting agency that the subcontractor is entitled to the payment of such amount.

(3) A dispute between a contractor and first-tier subcontractor relating to the amount or entitlement of a first-tier subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract pursuant to subsection (4) or (5) of this section does not constitute a dispute to which the public contracting agency is a party. The public contracting agency shall not be included as a party in any administrative or judicial proceeding involving such a dispute.

(4) Each contract awarded by a public contracting agency shall include a clause that requires the contractor to include in each subcontract for property or services entered into by the contractor and a first-tier subcontractor, including a material supplier, for the purpose of performing a construction contract:

(a) A payment clause that obligates the contractor to pay the first-tier subcontractor for satisfactory performance under its subcontract within 10 days out of such amounts as are paid to the contractor by the public contracting agency under such contract; and

(b) An interest penalty clause that obligates the contractor, if payment is not made within 30 days after receipt of payment from the public contracting agency, to pay to the first-tier subcontractor an interest penalty on amounts due in the case of each payment not made in accordance with the payment clause included in the subcontract pursuant to paragraph (a) of this subsection. A contractor or first-tier subcontractor shall not be obligated to pay an interest penalty if the only reason that the contractor or first-tier subcontractor did not make payment when payment was due is that the contractor or first-tier subcontractor did not receive payment from the public contracting agency or contractor when payment was due. The interest penalty shall be:

(A) For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

(B) Computed at the rate specified in ORS 279.314 (2).

(5) The contract awarded by the public contracting agency shall further require the contractor to include in each of its subcontracts, for the purpose of performance of such contract condition, a provision requiring the first-tier subcontractor to include a payment clause and an interest penalty clause conforming to the standards of subsection (4) of this section in each of its subcontracts and to require each of its subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

(6)(a) The clauses required by subsections (4) and (5) of this section are not intended to impair the right of a contractor or a subcontractor at any tier to negotiate, and to include in the subcontract, provisions that:

(A) Permit the contractor or a subcontractor to retain, in the event of a good faith dispute, an amount not to exceed 150 percent of the amount in dispute from the amount due a subcontractor under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties consider appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(B) Permit the contractor or subcontractor to make a determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

(C) Permit such withholdings without incurring any obligation to pay a late payment interest penalty if:

(i) A notice conforming to the standards of subsection (9) of this section has been previously furnished to the subcontractor; and

(ii) A copy of any notice issued by a contractor pursuant to sub-subparagraph (i) of this subparagraph has been furnished to the public contracting agency.

(b) As used in this subsection, "good faith dispute" means a documented dispute concerning:

(A) Unsatisfactory job progress.

(B) Defective work not remedied.

(C) Third party claims filed or reasonable evidence that claims will be filed.

(D) Failure to make timely payments for labor, equipment and materials.

(E) Damage to prime contractor or subcontractor.

(F) Reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum.

(7) If, after making application to a public contracting agency for payment under a contract but before making a payment to a subcontractor for the subcontractor's performance covered by such application, a contractor discovers that all or a portion of the payment otherwise due such subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, the prime contractor shall:

(a) Furnish to the subcontractor a notice conforming to the standards of subsection (9) of this section as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for subcontractor payment;

(b) Furnish to the public contracting agency, as soon as practicable, a copy of the notice furnished to the subcontractor pursuant to paragraph (a) of this subsection;

(c) Reduce the subcontractor's progress payment by an amount not to exceed the amount specified in the notice of withholding furnished under paragraph (a) of this subsection;

(d) Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency;

(e) Make such payment within:

(A) Seven days after correction of the identified subcontract performance deficiency unless the funds therefor must be recovered from the public contracting agency because of a reduction under paragraph (f)(A) of this subsection; or

(B) Seven days after the contractor recovers such funds from the public contracting agency;

(f) Notify the public contracting agency upon:

(A) Reduction of the amount of any subsequent certified application for payment; or

(B) Payment to the subcontractor of any withheld amounts of a progress payment, specifying:

(i) The amounts of the progress payments withheld under paragraph (a) of this subsection; and

(ii) The dates that such withholding began and ended; and

(g) Be obligated to pay to the public contracting agency an amount equal to interest on the withheld payments computed in the manner provided in ORS 279.435 from the 11th day after receipt of the withheld amounts from the public contracting agency until:

(A) The day the identified subcontractor performance deficiency is corrected; or

(B) The date that any subsequent payment is reduced under paragraph (f)(A) of this subsection.

(8)(a) If a contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor a written notice asserting a deficiency in such first-tier subcontractor's performance under the contract for which the contractor may be ultimately liable and the contractor determines that all or a portion of future payments otherwise due such first-tier subcontractor is subject to withholding in accordance with the subcontract agreement, the contractor may, without incurring an obligation to pay a late payment interest penalty under subsection (7)(e) of this section:

(A) Furnish to the first-tier subcontractor a notice conforming to the standards of subsection (9) of this section as soon as practicable upon making such determination; and

(B) Withhold from the first-tier subcontractor's next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under subparagraph (A) of this paragraph.

(b) As soon as practicable, but not later than 10 days after receipt of satisfactory written notification that the identified subcontract performance deficiency has been corrected, the contractor shall pay the amount withheld under paragraph (a)(B) of this subsection to such first-tier subcontractor, or shall incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed at the rate specified in ORS 279.435.

(9) A written notice of any withholding shall be issued to a subcontractor, with a copy to the public contracting agency of any such notice issued by a prime contractor, specifying:

(a) The amount to be withheld;

(b) The specified causes for the withholding under the terms of the subcontract; and

(c) The remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

(10) Except as provided in subsection (3) of this section, this section shall not limit or impair any contractual, administrative or judicial remedies otherwise available to a contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by a contractor or deficient subcontractor performance or nonperformance by a subcontractor.

(11) A contractor's obligation to pay a late payment interest penalty to a subcontractor pursuant to the clause included in a subcontract under subsection (4) or (5) of this section is not intended

to be an obligation of the public contracting agency for such late payment interest penalty. A contract modification shall not be made for the purpose of providing reimbursement of such late payment interest penalty. A cost reimbursement claim shall not include any amount for reimbursement of such late payment interest penalty. [1991 c.516 s.2; 1999 c.689 s.2a]

ATTACHMENT 2
PENALTIES FOR NOT PAYING PROMPTLY
ORS 701

701.135 Grounds for discipline; civil penalty; injunctions. (1) The Construction Contractors Board may revoke, suspend or refuse to issue or reissue a license and the board may assess a civil penalty as provided in ORS 701.992 if it determines after notice and opportunity for hearing:

(j) That the licensee or applicant has not, within 90 days after the date when payment was received from the public contracting agency, or contractor in the case of a subcontractor, made payment to any person for supplying labor or materials contracted for with a public contract for a public improvement plus the amount of interest due.

(k) That the licensee or applicant has repeatedly reported bad faith or false claims of nonpayment against contractors or subcontractors.

701.227 Disqualification from eligibility for certain public contracts; list of disqualified contractors. (1) The Construction Contractors Board shall begin an action to determine whether a contractor or a subcontractor shall not be considered qualified to hold or participate in a public contract for a public improvement upon receipt of information from a public contracting agency or from any person who supplied labor or materials in connection with a public contract for a public improvement indicating that the contractor or subcontractor has not made payment to persons who supplied labor or materials within 60 days after the date when the payment was received by the contractor or subcontractor and that the payment was not a subject of a good faith dispute as defined in ORS 279.445.

(2) If the board determines after notice and opportunity for hearing that a contractor or a subcontractor did not make payment to persons who supplied labor or materials in connection with a public contract for a public improvement within 60 days after the date when payment was received by the contractor or subcontractor, the board shall place the contractor or the subcontractor on the list of persons who have been determined not to be qualified to hold or participate in a public contract for a public improvement. The board may not place a contractor or subcontractor on the list if the only reason that the contractor or subcontractor did not make payment to a person when payment was due is that the contractor or subcontractor did not receive payment from the public contracting agency, contractor or subcontractor when payment was due. The contractor or subcontractor shall remain on the list for a period of not less than six months from the date when the board received the information under subsection (1) of this section.

(3) If the board determines that the claim made against a contractor or subcontractor was made in bad faith or was false, the person filing the bad faith or false claim shall be placed on the list of persons who have been determined not to be qualified to hold or participate in a public contract for a public improvement.

(4) The board shall create and maintain a list of contractors and subcontractors who have been determined not to be qualified to hold or participate in a public contract for a public improvement under subsection (2) of this section. The list may include any corporation, partnership or other business entity of which the contractor or subcontractor is an owner, shareholder or officer of the business or was an owner or officer of the business. The board shall provide access to the list to all public contracting agencies, contractors and subcontractors. [1999 c.689 s.9]

ATTACHMENT 3 FEDERAL APPLICABILITY (PER ORS 279)

279.056 When federal law and rules prevail over ORS 279.011 to 279.063. Notwithstanding any provision of ORS 279.011 to 279.063, the applicable federal laws, rules and regulations shall govern in any case where federal funds are involved and the federal laws, rules and regulations conflict with any of the provisions of ORS 279.011 to 279.063 or require additional conditions in public contracts not authorized by ORS 279.011 to 279.063. [1979 c.504 s.2]

279.748 Federal laws and rules govern where federal granted funds. Notwithstanding any provision in ORS 279.545 to 279.746 to the contrary, in all cases where federal granted funds are involved, the federal laws, rules and regulations applicable thereto shall govern.

ATTACHMENT 4
FEDERAL PROMPT PAYMENT REQUIREMENTS
EXERPTS FROM FEDERAL ACQUISITION RULE (FAR) 52

52.232-27 Prompt Payment for Construction Contracts.

Notwithstanding any other payment terms in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or the date of an electronic funds transfer. Definitions of pertinent terms are set forth in sections 2.101 and 32.902 of the Federal Acquisition Regulation. All days referred to in this clause are calendar days, unless otherwise specified. (However, see paragraph (a)(3) concerning payments due on Saturdays, Sundays, and legal holidays.)

(a) Invoice payments-

(1) *Types of invoice payments.* For purposes of this clause, there are several types of invoice payments that may occur under this contract, as follows:

(i) Progress payments, if provided for elsewhere in this contract, based on Contracting Officer approval of the estimated amount and value of work or services performed, including payments for reaching milestones in any project:

(A) The due date for making such payments shall be 14 days after receipt of the payment request by the designated billing office. If the designated billing office fails to annotate the payment request with the actual date of receipt at the time of receipt, the payment due date shall be the 14th day after the date of the Contractor's payment request, provided a proper payment request is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(B) The due date for payment of any amounts retained by the Contracting Officer in accordance with the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, shall be as specified in the contract or, if not specified, 30 days after approval for release to the Contractor by the Contracting Officer.

(ii) Final payments based on completion and acceptance of all work and presentation of release of all claims against the Government arising by virtue of the contract, and payments for partial deliveries that have been accepted by the Government (*e.g.*, each separate building, public work, or other division of the contract for which the price is stated separately in the contract):

(A) The due date for making such payments shall be either the 30th day after receipt by the designated billing office of a proper invoice from the Contractor, or the 30th day after Government acceptance of the work or services completed by the Contractor, whichever is later. If the designated billing office fails to annotate the invoice with the date of actual receipt at the time of receipt, the invoice payment due date shall be the 30th day after the date of the Contractor's invoice, provided a proper invoice is received and there is no disagreement over quantity, quality, or Contractor compliance with contract requirements.

(B) On a final invoice where the payment amount is subject to contract settlement actions (*e.g.*, release of claims), acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(2) *Contractor's invoice.* The Contractor shall prepare and submit invoices to the designated billing office specified in the contract. A proper invoice must include the items listed in paragraphs (a)(2)(i) through (a)(2)(ix) of this clause. If the invoice does not comply with these requirements, it shall be returned within 7 days after the date the designated billing office received the invoice, with a statement of the reasons why it is not a proper invoice. Untimely notification will be taken into account in computing any interest penalty owed the Contractor in the manner described in paragraph (a)(4) of this clause.

(i) Name and address of the Contractor.

(ii) Invoice date. (The Contractor is encouraged to date invoices as close as possible to the date of mailing or transmission.)

(iii) Contract number or other authorization for work or services performed (including order number and contract line item number).

(iv) Description of work or services performed.

(v) Delivery and payment terms (*e.g.*, prompt payment discount terms).

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in the event of a defective invoice.

(viii) For payments described in subdivision (a)(1)(i) of this clause, substantiation of the amounts requested and certification in accordance with the requirements of the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts.

(ix) Any other information or documentation required by the contract.

(x) While not required, the Contractor is strongly encouraged to assign an identification number to each invoice.

(3) *Interest penalty.* An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made by the due date and the conditions listed in subdivisions (a)(3)(i) through (a)(3)(iii) of this clause are met, if applicable. However, when the due date falls on a Saturday, Sunday, or legal holiday when Federal Government offices are closed and Government business is not expected to be conducted, payment may be made on the following business day without incurring a late payment interest penalty.

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was processed and there was no disagreement over quantity, quality, Contractor compliance with any contract term or condition, or requested progress payment amount.

(iii) In the case of a final invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(4) *Computing penalty amount.* The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date, except where the interest penalty is prescribed by other governmental authority (*e.g.*, tariffs). This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the *Federal Register* semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on

the invoice principal payment amount approved by the Government until the payment date of such approved principal amount; and will be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice principal payment amount and will be subject to interest penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the Contractor of a defective invoice within the periods prescribed in paragraph (a)(2) of this clause, the due date on the corrected invoice will be adjusted by subtracting from such date the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor for payments described in subdivision (a)(1)(ii) of this clause, Government acceptance or approval shall be deemed to have occurred constructively on the 7th day after the Contractor has completed the work or services in accordance with the terms and conditions of the contract. In the event that actual acceptance or approval occurs within the constructive acceptance or approval period, the determination of an interest penalty shall be based on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, or Contractor compliance with a contract provision. These requirements also do not compel Government officials to accept work or services, approve Contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The period taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 7 days.

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(C) For incorrect electronic funds transfer (EFT) information, in accordance with the EFT clause of this contract.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233-1, Disputes, or for more than 1 year. Interest penalties of less than \$1 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and the Contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.2331, Disputes.

(5) *Prompt payment discounts.* An interest penalty also shall be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(6) *Additional interest penalty.*

(i) A penalty amount, calculated in accordance with subdivision (a)(6)(iii) of this clause, shall be paid in addition to the interest penalty amount if the Contractor-

(A) Is owed an interest penalty of \$1 or more;

(B) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(C) Makes a written demand to the designated payment office for additional penalty payment, in accordance with subdivision (a)(6)(ii) of this clause, postmarked not later than 40 days after the date the invoice amount is paid.

(ii)(A) Contractors shall support written demands for additional penalty payments with the following data. No additional data shall be required. Contractors shall-

(1) Specifically assert that late payment interest is due under a specific invoice, and request payment of all overdue late payment interest penalty and such additional penalty as may be required;

(2) Attach a copy of the invoice on which the unpaid late payment interest was due; and

(3) State that payment of the principal has been received, including the date of receipt.

(B) Demands must be postmarked on or before the 40th day after payment was made, except that-

(1) If the postmark is illegible or nonexistent, the demand must have been received and annotated with the date of receipt by the designated payment office on or before the 40th day after payment was made; or

(2) If the postmark is illegible or nonexistent and the designated payment office fails to make the required annotation, the demand's validity will be determined by the date the Contractor has placed on the demand; provided such date is no later than the 40th day after payment was made.

(iii)(A) The additional penalty shall be equal to 100 percent of any original late payment interest penalty except-

(1) The additional penalty shall not exceed \$5,000;

(2) The additional penalty shall never be less than \$25; and

(3) No additional penalty is owed if the amount of the underlying interest penalty is less than \$1.

(B) If the interest penalty ceases to accrue in accordance with the limits stated in subdivision (a)(4)(iii) of this clause, the amount of the additional penalty shall be calculated on the amount of interest penalty that would have accrued in the absence of these limits, subject to the overall limits on the additional penalty specified in subdivision (a)(6)(iii)(A) of this clause.

(C) For determining the maximum and minimum additional penalties, the test shall be the interest penalty due on each separate payment made for each separate contract. The maximum and minimum additional penalty shall not be based upon individual invoices unless the invoices are paid separately. Where payments are consolidated for disbursing purposes, the maximum and minimum additional penalty determination shall be made separately for each contract therein.

(D) The additional penalty does not apply to payments regulated by other Government regulations (*e.g.*, payments under utility contracts subject to tariffs and regulation).

(b) *Contract financing payments-*

(1) *Due dates for recurring financing payments.* If this contract provides for contract financing, requests for payment shall be submitted to the designated billing office as

specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the [*insert day as prescribed by Agency head; if not prescribed, insert 30th day*] day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified.

(2) *Due dates for other contract financing.* For advance payments, loans, or other arrangements that do not involve recurring submissions of contract financing requests, payment shall be made in accordance with the corresponding contract terms or as directed by the Contracting Officer.

(3) *Interest penalty not applicable.* Contract financing payments shall not be assessed an interest penalty for payment delays.

(c) *Subcontract clause requirements.* The Contractor shall include in each subcontract for property or services (including a material supplier) for the purpose of performing this contract the following:

(1) *Prompt payment for subcontractors.* A payment clause that obligates the Contractor to pay the subcontractor for satisfactory performance under its subcontract not later than 7 days from receipt of payment out of such amounts as are paid to the Contractor under this contract.

(2) *Interest for subcontractors.* An interest penalty clause that obligates the Contractor to pay to the subcontractor an interest penalty for each payment not made in accordance with the payment clause-

(i) For the period beginning on the day after the required payment date and ending on the date on which payment of the amount due is made; and

(ii) Computed at the rate of interest established by the Secretary of the Treasury, and published in the *Federal Register*, for interest payments under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(3) *Subcontractor clause flowdown.* A clause requiring each subcontractor to include a payment clause and an interest penalty clause conforming to the standards set forth in paragraphs (c)(1) and (c)(2) of this clause in each of its subcontracts, and to require each of its subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.

(d) *Subcontract clause interpretation.* The clauses required by paragraph (c) of this clause shall not be construed to impair the right of the Contractor or a subcontractor at any tier to negotiate, and to include in their subcontract, provisions that-

(1) *Retainage permitted.* Permit the Contractor or a subcontractor to retain (without cause) a specified percentage of each progress payment otherwise due to a subcontractor for satisfactory performance under the subcontract without incurring any obligation to pay a late payment interest penalty, in accordance with terms and conditions agreed to by the parties to the subcontract, giving such recognition as the parties deem appropriate to the ability of a subcontractor to furnish a performance bond and a payment bond;

(2) *Withholding permitted.* Permit the Contractor or subcontractor to make a determination that part or all of the subcontractor's request for payment may be withheld in accordance with the subcontract agreement; and

(3) *Withholding requirements.* Permit such withholding without incurring any obligation to pay a late payment penalty if-

(i) A notice conforming to the standards of paragraph (g) of this clause previously has been furnished to the subcontractor; and

(ii) A copy of any notice issued by a Contractor pursuant to subdivision (d)(3)(i) of this clause has been furnished to the Contracting Officer.

(e) *Subcontractor withholding procedures.* If a Contractor, after making a request for payment to the Government but before making a payment to a subcontractor for the subcontractor's performance covered by the payment request, discovers that all or a portion of the payment otherwise due such subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, then the Contractor shall-

(1) *Subcontractor notice.* Furnish to the subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon ascertaining the cause giving rise to a withholding, but prior to the due date for subcontractor payment;

(2) *Contracting Officer notice.* Furnish to the Contracting Officer, as soon as practicable, a copy of the notice furnished to the subcontractor pursuant to paragraph (e)(1) of this clause;

(3) *Subcontractor progress payment reduction.* Reduce the subcontractor's progress payment by an amount not to exceed the amount specified in the notice of withholding furnished under paragraph (e)(1) of this clause;

(4) *Subsequent subcontractor payment.* Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency, and-

(i) Make such payment within-

(A) Seven days after correction of the identified subcontract performance deficiency (unless the funds therefor must be recovered from the Government because of a reduction under subdivision (e)(5)(i)) of this clause; or

(B) Seven days after the Contractor recovers such funds from the Government; or

(ii) Incur an obligation to pay a late payment interest penalty computed at the rate of interest established by the Secretary of the Treasury, and published in the *Federal Register*, for interest payments under section 12 of the Contracts Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty;

(5) *Notice to Contracting Officer.* Notify the Contracting Officer upon-

(i) Reduction of the amount of any subsequent certified application for payment; or

(ii) Payment to the subcontractor of any withheld amounts of a progress payment, specifying-

(A) The amounts withheld under paragraph (e)(1) of this clause; and

(B) The dates that such withholding began and ended; and

(6) *Interest to Government.* Be obligated to pay to the Government an amount equal to interest on the withheld payments (computed in the manner provided in 31 U.S.C. 3903(c)(1)), from the 8th day after receipt of the withheld amounts from the Government until-

(i) The day the identified subcontractor performance deficiency is corrected; or

(ii) The date that any subsequent payment is reduced under subdivision (e)(5)(i) of this clause.

(f) *Third-party deficiency reports-*

(1) *Withholding from subcontractor.* If a Contractor, after making payment to a first-tier subcontractor, receives from a supplier or subcontractor of the first-tier subcontractor (hereafter referred to as a “second-tier subcontractor”) a written notice in accordance with section 2 of the Act of August 24, 1935 (40 U.S.C. 270b, Miller Act), asserting a deficiency in such first-tier subcontractor’s performance under the contract for which the Contractor may be ultimately liable, and the Contractor determines that all or a portion of future payments otherwise due such first-tier subcontractor is subject to withholding in accordance with the subcontract agreement, the Contractor may, without incurring an obligation to pay an interest penalty under paragraph (e)(6) of this clause-

(i) Furnish to the first-tier subcontractor a notice conforming to the standards of paragraph (g) of this clause as soon as practicable upon making such determination; and

(ii) Withhold from the first-tier subcontractor’s next available progress payment or payments an amount not to exceed the amount specified in the notice of withholding furnished under subdivision (f)(1)(i) of this clause.

(2) *Subsequent payment or interest charge.* As soon as practicable, but not later than 7 days after receipt of satisfactory written notification that the identified subcontract performance deficiency has been corrected, the Contractor shall-

(i) Pay the amount withheld under subdivision (f)(1)(ii) of this clause to such first-tier subcontractor; or

(ii) Incur an obligation to pay a late payment interest penalty to such first-tier subcontractor computed at the rate of interest established by the Secretary of the Treasury, and published in the *Federal Register*, for interest payments under section 12 of the Contracts Disputes Act of 1978 (41 U.S.C. 611) in effect at the time the Contractor accrues the obligation to pay an interest penalty.

(g) *Written notice of subcontractor withholding.* A written notice of any withholding shall be issued to a subcontractor (with a copy to the Contracting Officer of any such notice issued by the Contractor), specifying-

(1) The amount to be withheld;

(2) The specific causes for the withholding under the terms of the subcontract; and

(3) The remedial actions to be taken by the subcontractor in order to receive payment of the amounts withheld.

(h) *Subcontractor payment entitlement.* The Contractor may not request payment from the Government of any amount withheld or retained in accordance with paragraph (d) of this clause until such time as the Contractor has determined and certified to the Contracting Officer that the subcontractor is entitled to the payment of such amount.

(i) *Prime-subcontractor disputes.* A dispute between the Contractor and subcontractor relating to the amount or entitlement of a subcontractor to a payment or a late payment interest penalty under a clause included in the subcontract pursuant to paragraph (c) of this clause does not constitute a dispute to which the United States is a party. The United States may not be interpleaded in any judicial or administrative proceeding involving such a dispute.

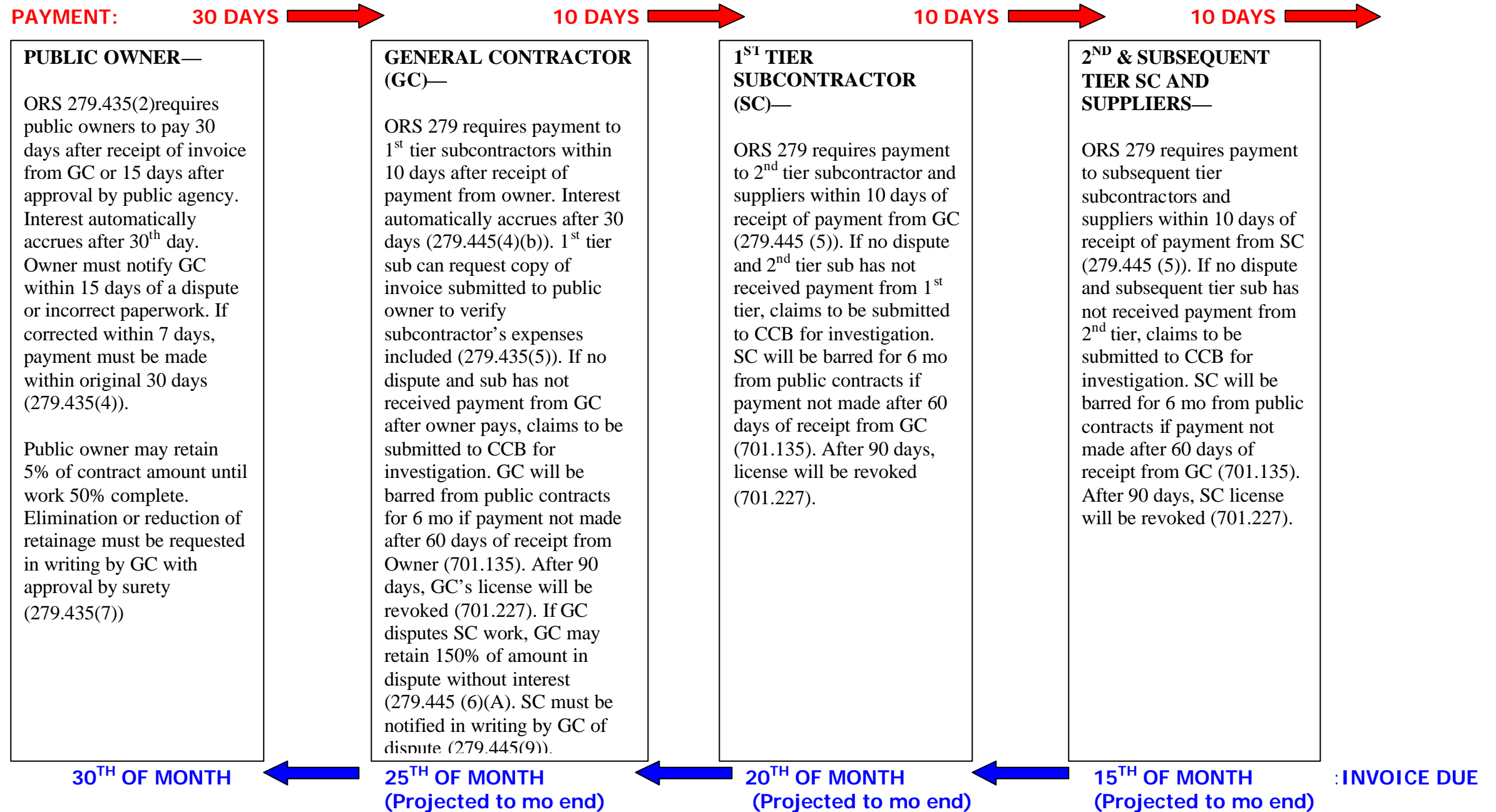
(j) *Preservation of prime-subcontractor rights.* Except as provided in paragraph (i) of this clause, this clause shall not limit or impair any contractual, administrative, or judicial remedies otherwise available to the Contractor or a subcontractor in the event of a dispute involving late

payment or nonpayment by the Contractor or deficient subcontract performance or nonperformance by a subcontractor.

(k) *Non-recourse for prime contractor interest penalty.* The Contractor's obligation to pay an interest penalty to a subcontractor pursuant to the clauses included in a subcontract under paragraph (c) of this clause shall not be construed to be an obligation of the United States for such interest penalty. A cost-reimbursement claim may not include any amount for reimbursement of such interest penalty.

OREGON PUBLIC IMPROVEMENT CONTRACT PAYMENT CYCLE & PENALTIES

REFERENCE: ORS 279 AND ORS 701



FEDERAL CONSTRUCTION CONTRACT PAYMENT CYCLE

REFERENCE: FAR 52

