



CHAPTER 26

PROMPT PAYMENT / CLAIMS AGAINST CONTRACTOR'S BOND

Agency Contracts with federal-aid and state funding may include different ORS 279C.570 requires the Agency to pay the Contractor on a monthly basis for Work performed. The Agency must pay interest, as specified by the statute, if they fails to pay the Contractor within 30 Calendar Days after the end of the period covered by the progress payment, or within 15 Calendar Days after the progress payment is approved by the Contract Administration Engineer (CAE), whichever is earlier.

The Agency has adopted the policy that they will make progress payments on construction contracts by the 23rd of the month. If the Resident Engineer (RE) wishes to arrange a cutoff date different than the last day of the month, first contact the Contract Administration Unit (CAU) to obtain permission. If a different cutoff date for the pay period is agreed to by the CAE, the RE, and the Contractor, the 23rd date must be modified accordingly. [Refer to Chapter 25 - Payments to Contractors/Retainage.]

Even though the Agency has agreed to make progress payments before the time required by statute, they are not required to pay interest for late payment until they exceed the times stated in the statute. Contact the CAU if you have questions regarding late payment interest.

ORS 279C.580(3)(a) obligates the Contractor to pay their Subcontractors for their Work within 10 Calendar Days after they receive payment for such Work from the Agency. That provision must be included in each subcontract. ORS 279C.580(4) requires that the same prompt payment requirement be included in all lower-tier subcontracts as well.

ORS 279C.515 also states that, if the Contractor or a Subcontractor fails, neglects, or refuses to make payment to a person furnishing labor or Materials for a public improvement contract, that person may, among other things, file a complaint with the Construction Contractors Board. If the complaint is valid and proper, the Construction Contractors Board may disqualify the Contractor or the Subcontractor from holding or participating in a public improvement contract. This provision also must be included in subcontracts at all tiers.

26-1 ODOT Prompt Payment Policy

For claims of unpaid wages by an employee, contact the Labor Compliance Officer in the Office of Civil Rights for assistance. [Refer to Chapter 19 - Labor Compliance.]

If a Subcontractor or Supplier says that they have not been paid for their Work, follow these guidelines:

1. Do not order the Contractor to make payment unless the payment is shown to be justified. The RE should not be involved in analyzing whether or not the payment is justified.
2. The Agency will not make payment directly to a Subcontractor or Supplier unless ordered to do so by a Court Order.
3. ORS 279C.580(6) allows the Contractor to withhold payments, to a Subcontractor or Supplier, for cause. If that happens, ORS 279C.580(7) requires that the Contractor provide written notification prior to the due date for the payment to the Subcontractor or Supplier, with a copy to the Agency, specifying:
 - The amount to be withheld;
 - The specific cause(s) for the withholding; and
 - The remedial action(s) needed by the Subcontractor or Supplier in order to receive payment of the amounts withheld.
4. If a Subcontractor or Supplier says that they have not been paid, the RE response should comply with the following four progressive levels:

Level 1: Ask the Subcontractor or Supplier if they have talked to the Contractor to determine why the payment has not been made. Ask if they received the required notice about why payment was

being withheld. If they have not already done so, suggest that they ask the Contractor for this information. This information is very important. This may resolve the issue.

Remind the Subcontractor or Supplier of their ability to file a claim against the Contractor's payment bond, as described in Section 26-2 below. Offer to send them the information listed below. Also remind the Subcontractor or Supplier of the ability to file a complaint with the Construction Contractors Board, as discussed above.

Level 2: If Level 1 is unsuccessful, call the Contractor's Superintendent, state that you have heard that the Subcontractor or Supplier has not received their payment, and ask if there is a reason for withholding payment.

- If the payment has been knowingly held, ask the reason. Remind the Contractor of the statutory requirement that they give written notice to the Subcontractor or Supplier of the reason, amount, and remedial action involved in the withholding of payment, and that the Contractor is required to furnish a copy of that written notice to the Agency. Remember that the Contractor can withhold payment due to a good faith dispute. **DO NOT ORDER THE CONTRACTOR TO MAKE PAYMENTS.** Remind the Contractor of the interest penalty clause in ORS 279C.580.
- If the Contractor is just not making the payment, remind the Contractor of their obligations under ORS 279C.580 for the prompt payment and interest obligations if prompt payment is not made. Also remind them of the possible penalties of ORS 279C.515, discussed above.

Level 3: If you do not get satisfaction under Level 2, direct the Contractor's Superintendent to provide you a copy of their written notice to the Subcontractor or Supplier as to why they are not making payment as required by ORS 279C.580. You may wish to provide a copy of ORS 279C.580 to the Superintendent and remind the Superintendent of the possible penalties of ORS 279C.515. Again, **DO NOT ORDER THE CONTRACTOR TO MAKE PAYMENTS.**

If the Contractor cannot furnish an acceptable reason for the non-payment, the Agency will include this information in their periodic evaluation of the Contractor and may also consider imposing sanctions on the Contractor.

Level 4: If the Contractor has not made payment as required multiple times and the RE and Region is unable to improve the

situation, contact the CAE. The Agency may impose sanctions after consultation with legal counsel and others, as well as any action that may be warranted under the Contractor Performance Evaluation process. [Refer to Chapter 34 - Contractor Performance Evaluation.]

26-2 Claims against Contractors Payment Bond

If a Subcontractor or Supplier has not been paid for work or Materials that they supplied to a Project, they may file a claim against the Contractor's payment bond. In order to be binding on the surety, the claimant must file the claim against the Contractor's payment bond within 120 Calendar Days after the claimant last furnished labor or Materials to the Project.

A claim against the Contractor's payment bond attaches the surety to the claim. The Subcontractor or Supplier still must pursue payment through negotiation with the Contractor or through legal or other action.

If requested by the Subcontractor or Supplier, the RE will furnish information needed to file a claim against the Contractor's payment bond. That information includes:

- Copy of the appropriate statutes and Oregon Administrative Rule (OAR), copy of the Notice to Proceed letter for the Contract showing the Contractor's proper name and address, as well as the Project title, name and address of the surety, and the bond number (bottom of page).
- Copy of draft letter. The claimant can also draft their own letter based upon ORS 279C.605(3).
- Have the Subcontractor or Supplier send the Agency's copy of the claim against the Contractor's payment bond to the CAE.

The CAU will acknowledge receipt of each Notice of Claim against the Contractor's payment bond with a copy to the RE. If the RE receives any such claims, send them directly to the CAU.

If the Agency has notified the Contractor of receipt of a claim against the Contractor's payment bond, the RE must include that information when completing the required Prime Contractor Performance Evaluation. [Refer to Chapter 34 - Contractor Performance Evaluation.]

EXAMPLE ONLY

(date)

NOTICE OF CLAIM AGAINST CONTRACTOR'S BOND

TO: OREGON DEPARTMENT OF TRANSPORTATION CONTRACTOR
Attention: Contract Administration Engineer Address
800 Airport Road, SE City, State, Zip Code
Salem OR 97301-4798

RE: NON-PAYMENT OF MATERIALS/SUPPLIER/LABOR
Subcontractor (if any)
Address
City, State, Zip Code

Notice is hereby given that the undersigned, (claimant), has a claim for (materials, supplies, and/or labor) furnished by (claimant) in the sum of (dollar amount of claim) through (end date of claim period) against the bond taken from (Contractor) and (bonding company) for the project known as (project name), ODOT Contract No. (contract number). Such (materials, supplies, and/or labor) was supplied to (Contractor) through (subcontractor name and address).

This notice covers only the dollar amount of the (material, supplies, and/or labor) supplied through (end date of claim period). Any subsequent collection costs including attorney fees, court costs, interest, and late charges may be added to this amount.

CLAIMANT

(claimant representative name)

(title)

