

## **Chapter 26 - Prompt Payment/ Claims Against Contractor's Bond**

ORS 279C.570 requires ODOT to pay the Contractor on a monthly basis for work performed. ODOT must pay interest, as specified by the statute, if it fails to pay the Contractor within 30 days after the end of the period covered by the progress payment, or within 15 days after the progress payment is approved by the Contract Administration Engineer, whichever is earlier.

ODOT has adopted the policy that it will make progress payments on construction contracts by the 23<sup>rd</sup> of the month. If the Project Manager (PM) wishes to arrange a different cutoff date, first contact Contract Services to obtain permission. If a different cutoff date for the pay period is agreed to by the Contract Administration Engineer, the PM, and the Contractor, the 23<sup>rd</sup> date must be modified accordingly. Refer to **Chapter 25 - Payments to Contractors/Retainage**.

Even though ODOT has agreed to make progress payments before the time required by statute, it is not required to pay interest for late payment until it exceeds the times stated in the statute. Contact the Contract Administration Engineer if you have questions.

ORS 279C.580 (4) obligates the Contractor to pay its subcontractors for their work within 10 days after it receives payment for such work from ODOT. That provision must be included in each subcontract. The statute further 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.

### **ODOT's 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 it has not been paid for its work, follow these guidelines:

1. Do not order the Contractor to make payment unless the payment is shown to be justified. The PM should not be involved in analyzing whether or not the payment is justified.

2. ODOT 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 ODOT, specifying:
  - The amount to be withheld
  - The specific cause(s) for the withholding
  - 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 it has not been paid, the PM response should comply with the following four progressive levels:

**Level 1:** Ask the subcontractor or supplier if it has talked to the Contractor to determine why the payment has not been made. Ask if it received the required notice about why payment was being withheld. If it has not already done so, suggest that it ask the Contractor for this information. This information is very important. This may resolve the issue.

Remind the subcontractor or supplier of its ability to file a claim against the Contractor's bond, described below. Offer to send them the information listed below. Also remind them 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 its 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 it 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 its 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 its written notice to the subcontractor or

supplier as to why it is 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 nonpayment, ODOT will include this information in its periodic evaluation of the Contractor and may also consider imposing sanctions on the Contractor.

**Level 4:** If the Contractor has multiple times not made payment as required and the PM and Region is unable to improve the situation, contact the Contract Administration Engineer. ODOT 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 discussed in **Chapter 34 - Contractor Performance Evaluation** of this Manual.

### **Claims Against Contractor's Bond**

If a subcontractor or supplier has not been paid for labor or materials that it supplied to a project, it may file a claim against the Contractor's payment bond. In order to be binding on the surety, the claimant must file its claim against the Contractor's bond within 120 calendar days after the claimant last furnished labor or materials to the project.

A claim against the Contractor's 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 PM will furnish information needed to file a claim against the Contractor's bond. That information includes:

- Copy of the appropriate statutes and Oregon Administrative Rule (OAR) Copy of the Notice To Proceed letter for the contract, which shows 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 (refer to **Exhibit 26A**)  
The claimant can also draft its own letter based upon ORS 279C.605 (3).
- Have the subcontractor or supplier send ODOT's copy of the claim against the Contractor's bond to the Contract Administration Unit in the Construction Section

The Contract Administration Unit acknowledges receipt of each Notice of Claim Against the Contractor's Bond, with a copy to the PM. If the PM receives any such claims, send them to the Contract Administration Unit.

If ODOT notified the Contractor that it had received a claim against the Contractor's bond, the PM must include that information when completing the required Prime Contractor Performance Evaluation. Refer to **Chapter 34 - Contractor Performance Evaluation**.

**SAMPLE ONLY**

(date)

**NOTICE OF CLAIM AGAINST CONTRACTOR'S BOND**

TO: OREGON DEPT. OF TRANSPORTATION Attention: Contract Administration Engineer 800 Airport Rd SE Salem OR 97301-4798	CONTRACTOR Address City State ZIP
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RE: NON PAYMENT OF MATERIAL/SUPPLIES/LABOR  
SUBCONTRACTOR (if any)  
Address  
City State ZIP

Notice is hereby given that the undersigned, (claimant), has a claim for (material, 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 (material, supplies, and/or labor) was supplied to (contractor) through its (subcontractor, address, city, state, ZIP).

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)

SAMPLE  
12/16/98 8:24 AM

Updated 01/08  
Exhibit 26A

26 Exhibit A