

Construction Law Newsletter

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PRIVATE CONTRACTING LEGISLATIVE UPDATE

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Below is a brief summary of legislation related to private contracting. The outline is intended to provide a brief description of the particular law. All laws have an effective date of January 1, 2002 unless noted otherwise.

HB 2012 creates a new "master builder" program administered by the Department of Consumer and Business Services. If a local government opts into this program, it can waive certain plan review and building inspection requirements for those contractors holding a master builder certificate. *Effective date: June 18, 2001.*

HB 2127 converts the Oregon Landscape Contractors Board to a semi-independent state agency. The conversion will occur on July 1, 2002.

HB 2185 allows the CCB to require a new bond when payment is made from the contractor's surety bond.

HB 2186 exempts appraisers and home inspectors acting within the scope of their own certification or license from CCB certification or license. Requires a licensed business to maintain a Responsible Managing Individual who has passed the state licensing test and requires out-of-state contractors to pass Oregon's test. It allows an inactive license status at a contractor's request. Makes other changes related to contractor licenses.

HB 2188 changes CCB advisory committees and removes restrictions on the exercise of certain duties, powers and functions of the CCB. Amends ORS 670.304 to include the CCB.

HB 2189 reorganizes and clarifies CCB claims processing statutes. It allows claims involving small commercial structures to be filed and processed as residential or large commercial claims, at the claimant's option. It also removes certain environmental violations from review by the CCB.

HB 2191 authorizes landscape contractors to plan and construct ornamental water features. **HB 2192** allows the LCB to license contractors to install backflow prevention devices for irrigation systems and ornamental water features. **HB 2195** exempts persons from LCB licensing if they are engaged in making conceptual plans or drawings for site work that does not include sensitive natural areas such as wetlands or steep slopes.

HB 2201 allows the Landscape Contractors Board to require claims to be arbitrated, unless the parties elect otherwise. It also modifies procedural rules for claimants seeking to satisfy court judgments out of a contractor's deposit bond or letter of credit.

HB 2202 allows the CCB to require that hearings for certain claims to be arbitrated unless the parties elect otherwise.

HB 2254 allows partnerships, LLCs and LLPs to be represented in CCB proceedings by a related individual who is not an attorney.

HB 2322 clarifies effect of a lapse in a contractor's license. Prohibits a contract provision that limits the right of a person to file a claim with the CCB. Expands authority of CCB to suspend

or refuse to issue a contractor's license. *Effective date: July 27, 2002.*

HB 2728 authorizes payment of claim by a non-owner against a contractor's bond up to \$3,000.

HB 2759 allows the CCB to include information on professional credentials held by a contractor in releases of information to the public. Requires board to provide information on accredited training in lead-based paint activities.

HB 2976: This Bill makes significant changes in how that land supply is to be calculated for Urban Growth Boundary (UGB) expansion in the future.

HB 3007: The major portion of this Bill address regulation of mercury. A section of the Bill amends ORS 701.102 to allow the CCB to suspend or refuse to license a "person" (including a business entity) if the person or the owner or holder of a direct or indirect interest in the person is a business or owner or holder of a direct or indirect interest in a business that owes money pursuant to a CCB order, civil penalty or court judgment arising out of construction activities or has had a license to operate as a contractor in any state revoked. *Effective date of portions described here: August 8, 2001.*

HB 3557: This Bill sets up an interim Task Force to develop guidelines for cities to use in evaluating current supplies of commercial and industrial land inside the Urban Growth Boundary.

HB 3842: This bill requires sellers of real property to disclose potential construction lien claimants and related documents. An owner of record must provide to the purchaser: (a) a list of all persons described in ORS 87.010 (1), (2), (5) or (6) with whom the owner has entered into a contract within the previous two years if the owner has not fully paid the person or the person disputes that full payment was made; (b) a copy of a notice of right to a lien, claim of lien, pleadings to a foreclosure action, satisfaction of lien or waiver or release of a right to a lien received by the owner within the past two years; and (c) A cautionary notice described in ORS 701.250 (3) that is provided by the Construction Contractors Board. An owner who violates subsection (1) of this section commits a Class B misdemeanor.

Measure 7 Rewrite: The Legislative effort to revise Measure 7, the landmark "compensation for regulatory taking" ballot measure from last November, involved meetings, negotiations and hearings, but resulted in no legislation. HB 3998, although printed and the recipient of 20 separate amendments, failed to generate enough support to warrant a final hearing.

SB 320 allows CCB to suspend or refuse to license a person if the person who owns or holds a direct or indirect interest in a business that owes money pursuant to a CCB order, civil penalty or court judgment arising out of construction activities or a person that has had a license to operate as a contractor in another state revoked. *Passed but repealed by HB 3007. The provisions in SB 320 were rewritten to correct an error in SB 320 and incorporated in HB 3307*

FIRST TIER SUBCONTRACTOR DISCLOSURE CHANGES

Dana A. Anderson
Assistant Attorney General

Clarification of First Tier Subcontractor Disclosure requirements was probably the most important new law in public improvement contracting in 2001, at least from a perspective of reducing bid protests. HB 2052 (Or Laws 2001, Ch 507) makes several changes to the first-tier subcontractor disclosure requirements first enacted as a part of ORS 279.027 in 1999. Further changes are being considered for administrative rules implementing HB 2052, as noted below. Section 1 of the Act provides that:

1. Disclosure will apply to subcontractors furnishing labor, or labor and materials, but not to subcontracts solely for materials.
2. Disclosure is limited to the subcontractor name and category of work, while the amount of the subcontract and Construction Contractor Board (CCB) license number are no longer required.

3. Disclosure requirements are clearly identified as being inapplicable to contracts exempted from competitive bidding requirements under ORS 279.015(2).

4. The public agency role is clarified as requiring the disclosure and making it publicly available, rather than determining its accuracy or completeness.¹

5. The process for a contractor substituting an undisclosed subcontractor requires submission to the contracting agency of the name of the new subcontractor and reason for the substitution. See HB 2052, Section 2.

6. The grounds for a contractor substituting undisclosed subcontractors under ORS 279.322 are expanded by adding "good cause" and when "reasonably based on the contract alternates" chosen by the agency. See HB 2052, Section 2.

7. The CCB is given authority to define substitution for "good cause" by rule.² Most importantly, the CCB is also empowered to investigate subcontractor complaints of unlawful substitution and to impose substantial civil penalties (up to 10% of the amount of the subcontract or \$15,000, whichever is less, as well as placing contractors on the CCB ineligible list under ORS 701.227 for repeated violations). See Section 4 of HB 2052 for details of that process.

HB 2052 first applies to public improvement contracts advertised on or after January 1, 2002 (Section 6). These changes will be reflected in a revision of the *Attorney General's Model Public Contracting Rules* at OAR 137-040-0017.

From discussion drafts now being circulated, it appears that the previous requirement for separate identification and submission of the disclosure form will be deleted. If that change is made, disclosure forms may be submitted either in

¹ **House Bill 3424 (Or Laws 2001, Ch 746)** also requires that the agency send the subcontractor disclosure information to BOLI.

² The new draft CCB rule is numbered OAR 812-002-0325.

the original bid packet (without separate identification on outside packaging) or within the four additional hours allowed by statute. All bids would be opened and examined for responsiveness, rather than rejecting bids for which a separate disclosure form has not been identified.

Under the draft model rule, all bidders are still required to return the disclosure form, bids are not opened until the four hour period expires, and only bidders returning the form are considered responsive and eligible for contract award. Also see the parallel ODOT rule at OAR 731-007-0050.

UPCOMING CLES

December 7, 2001: "Lessons Learned from Oregon Troubled Projects"

This CLE will look at several recent troubled projects in Oregon and attempt to extract some lessons to help avoid future troubled projects. Speakers include Karen Williams (Union Station Housing Development), Howard Carsman (City of Eugene Broadway Parking Garage project), Bob Carlton (Construction Lien Issues in Bankruptcy).

The CLE is scheduled to be held at the Greek Deli in downtown Portland from noon until 2:00. This will also be the section's Annual Meeting, with election of officers, etc. (thus, lunch is free to section members). For details, contact Reg Perry at (503) 691-2949.

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