



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

February 26, 2004

Bruce A. Warner, Director
Oregon Department of Transportation
355 Capitol Street NE
Salem, OR 97301-3871

Re: Opinion Request OP-2004-2

Dear Mr. Warner:

You have asked us to address the following question relating to the method of computing the rate of interest to be paid by a public contracting agency, upon settlement or judgment in favor of the contractor regarding any dispute as to the compensation due the contractor.

1. Under ORS 279.435(9), as amended in 1999, is the interest rate to be computed as of the date of the settlement or judgment, or is the interest rate computed as of some other date, such as 30 days after the contractor's claim was made, or as of the due date of the progress payment?

The interest rate is to be determined as of 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) 30 days after the date on which the contractor's 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. Interest accrues from the same date.

Discussion

In interpreting statutes that define the duties of a public contracting agency, our goal is to discern the intent of the legislature. *See* ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993). We first look at the text and context of a statute, which includes other provisions of the same statute and related statutes. In so doing, we consider dictionary definitions, rules of grammar, and statutory and judicially developed rules of construction that bear directly on how to read the text, such as "words of common usage typically should be given their plain, natural, and ordinary meaning." *Id.* at 611. If the legislative intent is clear from the text and context, the search ends there. Only if the legislative intent is not clear from the text and context of the statute will we look to the legislative history to attempt to discern that intent. *Id.* at 611-612. If, after considering text, context and legislative history, the intent of the legislature remains unclear, we may resort to general maxims of statutory construction to resolve any remaining uncertainty as to the meaning of the statute. *Id.* at 612.

1. The plain meaning of ORS 279.435(9) is clear from its text and context.

In 1999, the statute describing the date used for establishing the rate of interest and the date from which interest accrues under circumstances where a public agency has disputed a request from a contractor for compensation was amended and moved to ORS 279.435(9). The statute now provides in relevant part:

- (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 the applicable provisions of the contract.
- (b) Such interest shall be added to and not made a part of the settlement or judgment. (Emphasis added.)

The starting point in every case involving construction of a statute is the language used by the legislature. Each word must be given its operative effect, and words of common usage typically should be given their plain, natural, and ordinary meaning. *Coast Sec. Mortg. Corp. v. Real Estate Agency*, 331 Or 348, 15 P3d 29 (2000). Applying these rules of construction, it is plain that ORS 279.435(9) provides that (1) the interest rate generally is two times the discount rate that existed for 90 day commercial paper on the due date of any progress payment, or 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, whichever is later; and (2) the interest also *accrues* from the due date of the progress payment or thirty days after the date on which the claim for payment was presented, whichever is later.

The words of the statute are to be given a literal interpretation, unless the literal interpretation is so at variance with the apparent policy of the statute as to bring about an unreasonable result. *Clackamas County v. Gay*, 146 Or App 706, 934 P2d 551, *rev den.* 325 Or 438, 939 P2d 621 (1997). The language used in the comparable subsection of ORS 279.435, as it existed prior to the 1999 amendment, may be easier to read and interpret for some. However, the legislature deliberately changed this subsection in 1999 to conform with other sections in the

same statute, and the plain meaning of the current subsection does not create an unreasonable result.

2. ORS 279.435(9)(a), interpreted in the context of other provisions of the same legislation, requires that interest be computed as of the date the payment was due.

In discerning the legislature's intent, the context of the statutory provision at issue should be considered. Context includes other provisions of the same statute and other related statutes. *City of Tualatin v. City-County Ins. Services Trust*, 321 Or 164, 894 P2d 1158 (1995). As a result of the 1999 legislation, several statutes concerning the method of interest rate computation were created or changed. See Or Laws 1999, ch 689 (HB 2895). The pertinent parts of those sections currently are codified as follows:

ORS 279.314(2). “* * * The rate of interest charged to the contractor or first tier subcontractor 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 the date when payment was received from the public contracting agency or from the contractor, but the rate of interest shall not exceed 30 percent.” (Emphasis added).

ORS 279.435(2). “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.” (Emphasis added).

ORS 279.435(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 the applicable provisions of the contract. (Emphasis added).

ORS 279.445(4)(b). “(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: * * * * *

- (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).”

The words used in ORS 279.435(9) and the related provisions point to the date the payment is due as being the date used for determining the discount rate of interest on commercial paper. The legislature used similar language to amend these provisions in 1999, thereby creating a uniform result.

The formula for each of these subsections is the same: the penalty for late payment shall be a higher rate of interest, computed at two or three times the current 90-day commercial paper rate *on* the date the payment was due (in most cases, 30 days after invoice was submitted to the public agency, or 30 days after contractor received payment from the public agency). The context of ORS 279.435(9) includes legislation that created or modified several statutes, all of which deal with computation of penalty interest on late payments at various levels from the public agency owner down through subcontractors. That context demonstrates that the legislature intended those statutes, including ORS 279.435(9), to have a uniform meaning regarding the data on which the interest rate is to be computed.

3. The intent of the 1999 Legislature to change the meaning of ORS 279.435(9) is shown by the history of HB 2895 and its various amendments.

If the text and context of a statute are plain, it is not necessary to consider legislative history in order to construe the statute. We have, however, reviewed the history of this

legislation to see if it is in any way inconsistent with text. We conclude that the history is consistent with the text.

Prior to 1999, the provision with which we are concerned was found in subsection (8) of ORS 279.435. That provision governed the method of computing the rate of interest owed by the public agency, and separately set forth the date from which interest was to accrue on progress payments and other payments under dispute. *Former* subsection (8) read:

- (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 federal discount rate as established by the Twelfth Federal Reserve Bank *at the time of the settlement or judgment* but not to exceed 18 percent, 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 the applicable provisions of the contract.
- (b) Such interest shall be added to and not made a part of the settlement or judgment. (Emphasis added.)

As a result of passage of HB 2895 in 1999, ORS 279.435(8) was renumbered to ORS 279.435(9), and the wording changed to that shown in part 2 above.

Former subsection (8) of ORS 279.435 required that the interest rate be computed as of the date of settlement or judgment. The original version of HB 2895 did not make comprehensive changes to all of the related penalty interest subsections, and did not even mention ORS 279.435(8). The comprehensive changes came as a result of numerous changes suggested by proponents, and debates in committee over the course of several months.

a. House Bill 2895 was proposed to add an interest penalty for general contractors that failed to promptly pay their subcontractors.

House Bill 2895, as introduced, contained only a single change to an interest computation subsection of Chapter 279, Oregon Revised Statutes. The change added a new subparagraph (b) of ORS 279.314(1) as follows:

If the contractor fails, neglects or refuses to make payment within 30 days after receipt of payment from the public contracting agency to a person furnishing labor or services in connection with the public contract, then the contractor shall

owe the person the amount due plus interest charges commencing at the end of the 30-day period and ending upon final payment. The rate of interest charged to the contractor on the amount due shall equal three times the discount rate, and any surcharge on 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 the date when payment was received from the public contracting agency*. The amount of interest may not be waived. (Emphasis added.)

Other language in House Bill 2895 was intended to disqualify a contractor from bidding, if it did not make payment to the subcontractor within 60 days after the date on which payment was received from the public contracting agency. This separate provision was to have been added as subsection (3) of ORS 279.314.

b. The first attempt to amend ORS 279.435 through House Bill 2895 resulted in conflicting wording.

HB 2895, as introduced, contained only a provision for penalty interest computation on the payment owed by a general contractor to its subcontractor (adding a new subparagraph (b) to ORS 279.314(1)). By March 15, 1999, proposed amendments had been drafted to change some of the original language of the bill and to add other provisions. Among other changes, the first amended version, HB 2895-1, contained language that would have changed ORS 279.435(8) to read:

8 (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:

- (A) Public Contract, the amount due plus interest at the rate of two times the federal discount interest rate as established by the Twelfth Federal Reserve Bank at the time of settlement or judgment but not to exceed 18 percent [,]; **or**
 - (B) **Public contract for a public improvement, the amount due plus interest at the rate specified in ORS 279.314 (2).**
- (b) **Interest shall accrue** [*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 day 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)] (c) Such interest shall be added to and not made a part of the settlement or judgment.

Minutes, House Committee on General Government (HB 2895), March 16, 1999, Exhibit B, pages 4 – 5, submitted by Paul Phillips. (Bold type denotes new language; bracketed, italicized language indicates deletions).

- c. **House Bill 2895 was amended on April 6, 1999 to change several provisions in ORS 279.314, ORS 279.345 and ORS 279.445 that governed computation of penalty interest.**

On April 6, 1999, the Committee on General Government issued a subsequent and more comprehensive amended version of HB 2895. This version of the amended bill made statutes in Chapter 279 governing interest computations and payments more uniform. From the text, it can be seen that the same interest computation provisions were applied to payments owed at the public agency level and general contractor level.

One change made by the April 6 version of House Bill 2895 was to ORS 279.314. The language used in the amendment carried over the formulation in the original bill that the interest would be calculated using the discount rate that existed on commercial paper *on the date that is 30 days after the date* when payment was received from the public contracting agency or the contractor.

Three other changes addressed interest rate accrual and computation. The first of these in the April 6 House Committee Amendments to House Bill 2895 was to change the method of computation of interest for ORS 279.435(2) to read:

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 [*at the rate of one and one-half percent per month*] 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.**

(Bold type denotes new language; bracketed, italicized language indicates deletions).

The next change that dealt with computation of penalty interest renumbered former ORS 279.435(8) to ORS 279.435(9), and modified the language as follows:

[(8)(a)] (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 *[federal discount interest rate as established by the Twelfth Federal Reserve Bank at the time of settlement or judgment but not to exceed 18 percent,]* **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 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.

The final change to House Bill 2895 that dealt with computation of penalty interest affected ORS 279.445, and also caused the interest computation method to be changed. The change read:

279.445 * * * * (4) (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 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) For the period beginning [*on the day after the required payment date*] **at the end of the 30-day period** and ending on the date on which payment of the amount due is made; and
- (B) Computed at the rate specified in ORS [279.435] **279.314(2)**.

(Bold type denotes new language; bracketed, italicized language indicates deletions).

These changes to ORS 279.314, 279.345 and 279.445 in the April 6, 1999, amendments to HB 2895 resolved conflicts present in the original version of the bill. They also began to formulate how the interest rate would be determined and when it would be set for payments owed by public agencies and contractors.

Some of the remaining changes to House Bill 2895 that were introduced on April 6 were designed to require the bidders on a public works contract to disclose a list of all subcontractors that would be furnishing labor or materials (making changes to ORS 279.027; ORS 279.029); and others were designed to provide a means to determine whether a contractor who failed to make timely payments to subcontractors should be considered not qualified to hold a public contract for a public improvement (to be added to ORS chapter 701).

d. Further House and Senate amendments were made in May.

Proposed amendments to House Bill 2895 were made by the House on May 17 and 21 and by the Senate on May 21. For example, in the B-Engrossed House Bill, ORS 279.314(2) was changed to read:

Every public contract for a public improvement shall contain a clause or condition that, if the contractor **or a first-tier** subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public contract for a public improvement within 30 days after receipt of payment from the public contracting agency or a contractor, then the contractor **or first-tier** subcontractor shall owe the person the amount due plus interest charges commencing at the end of the 10-day period that payment is due under ORS 279.445(4) and ending upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279.445. The rate of interest charged to the contractor or **first-tier** subcontractor 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 the date when payment was received from the public contracting agency or from the contractor, **but the rate of interest shall not exceed 30 percent**. The amount of interest may not be waived.

(Bold type denotes new language that did not appear in preceding printed version of the bill).

ORS 279.314(3) was also amended, so that it would read:

Every public contract for a public improvement and every contract related to the public contract shall contain a clause or condition that, if the contractor or a subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public contract, the person may file a complaint with the Construction Contractors Board, **unless payment is subject to a good faith dispute as defined in ORS 279.445**.

(Bold type denotes new language that was not in preceding printed version of the bill).

ORS 279.435(2) was further changed, so that the last sentence of ORS 279.435(2) would read:

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.**

(Bold type denotes new language that was not in preceding printed version of the bill).

ORS 279.435(9) was further amended, so that (9)(a) would read:

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 worked performed under the terms of a public contract, the amount due plus interest at the rate of two times the [*federal discount interest rate as established by the Twelfth Federal Reserve Bank at the time of settlement or judgment but not to exceed 18 percent,*] 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 * * *.

(Bold type denotes new language that was not in preceding printed version of the bill).

These changes applied the same interest rate computation provisions to first-tier subcontractors, and capped the interest rate.

e. **The effect of HB 2895, as finally passed, was to conform the various sections on method of interest rate computation so as to be uniform.**

The provisions from the final version of HB 2895 concerning method of interest rate computation were placed in subsections of ORS 279.314, ORS 279.435, and ORS 279.445. The language and methodology is essentially the same in all sections (see the subsections quoted in part 1 of this opinion). The methodology involves:

- (1) A penalty for nonpayment that is either two times or three times the discount rate on 90-day commercial paper.
- (2) The discounted rate on commercial paper is the rate that existed on the date when the payment should have been made.
- (3) The penalty rate of interest shall not exceed 30 percent.
- (4) The accrual date for interest follows a logical pattern from the public agency level to general contractor and on to the various levels of subcontractors.

f. The declarations of the HB 2895 sponsors supported the concept of changing all the penalty interest provisions to make the rate calculation as of the first date the payment was due.

The intent of the legislature to make the interest penalty provisions consistent in the method of determining the interest rate is clear from the history of the various amendments to HB 2895, as discussed above. The language used in the various related statutes was made similar; and the pattern of drafting amendments to HB 2895 inevitably moved the bill from applying only to the general contractor's interest penalty and payment obligations, to also applying to the public agency's obligations and the first-tier subcontractor's obligations.

The comments made by proponents of the legislation at the April 6, 1999 discussion before the House Committee on General Government demonstrate that the purpose of the bill as amended was to make the method of computing penalty interest on delayed payments the same for the general contractor, first-tier subcontractor, and the public agency. At the public hearing on the bill on March 16, 1999, Paul Phillips (who was one of the most active proponents and represented the Plumbing and Mechanical Contractors Association) testified before the House Committee that when a general contractor receives payment for work done by a subcontractor, the general contractor should pay the subcontractors promptly. Mr. Phillips went on to suggest that all state agencies should comply with the prompt pay requirement (Minutes, House Committee on General Government (HB 2895) March 16, 1999, Exhibit B, Tape 41 A, at 058). Mr. Phillips' written submission for the hearing in support of the -1 amendments to HB 2895 listed the key concepts of the amendments as including "Require public agencies to also comply with the concepts of prompt pay," and "Create prompt payment trail that moves from the public agency to the prime to the subs or subs sub." Later in the legislative process, Mr. Phillips, identified one of the provisions of the amended bill as being "Ties all interest penalties to the same standard (2 x Federal Reserve Discount Rate-cost of money) including the interest public agencies have on progress payments to contractors that are late." (Minutes, House Committee on General Government, (HB 2895), April 1, 1999, Exhibit A, submitted by Paul Phillips).

The staff summary of the bill as amended through the meeting date of April 1, 1999, also suggests that uniform treatment of interest rate computations was intended by stating that the bill "Requires all public improvement contracts to include a clause specifying the amount of interest to be charged if a contractor or subcontractor does not make payment within a certain time to persons supplying labor or materials in connection with the contract. Modifies interest rate penalties contained in contractor/subcontractor contracts. Specifies interest charge may not be waived. *Modifies* interest rate penalty relating to progress payments on public improvement contracts and settlement of payment disputes between agency and contractor." (emphasis added)

The meaning of ORS 279.435(9) is clear from the plain and ordinary usage of the language that appears in the statute. The interest rate to be used is the discount rate that existed on 90-day commercial paper on the date the payment was due, and not on the date a settlement is made or a judgment is entered.

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House Bill 2895, as ultimately enacted in 1999, was a comprehensive plan for creating an escalating series of penalties for late payment, and for providing an enforcement process to levy the penalties. The prompt payment requirement moves from the public agency to the primary contractor to the subcontractor and to sub-subcontractors. The language used to describe the method of computing the penalty interest rate is as close to being uniform as possible, given the variables that are being described.

The 1999 legislation changed ORS 279.435(2) to require the public agency to pay a floating rate of interest on progress payments, instead of a fixed rate of one and one-half percent per month. Interest is calculated at three times the discount rate on 90-day commercial paper “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.” ORS 279.435(9) was changed to require a public agency to pay interest at a floating rate of two times the discount rate on 90-day commercial paper, on the later of (1) the due date of any progress payment to be made under the contract, or (2) 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 the contract. The date of the settlement or judgment that resolves any dispute between public agency and contractor over withheld payments is no longer relevant to the computation of the penalty on the floating interest rate.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

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