

Chapter 279

Public Contracts and Purchasing

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279.032

NOTES OF DECISIONS

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279.046

NOTES OF DECISIONS

A council could provide that the street improvement shall be of a certain kind of patented material where the owner, not being the contractor, furnishes the material to all contractors on the same terms. *Johns v. City of Pendleton*, (1913) 66 Or 182, 133 P 817, 134 P 312, Ann Cas 1915B, 454, 46 LRA(NS) 990.

The adoption of an ordinance for the improvement of a street with a particular patented brand of material, the invitation for bids in such manner that only the company entitled to use such pavement would bid for the work, and letting the contract to him on his sole bid were void. *Terwilliger Land Co. v. Portland*, (1912) 62 Or 101, 123 P 57.

279.310

CASE CITATIONS: *Collins v. Post*, (1961) 227 Or 299, 362 P2d 325; *Union Pac. Ins. Co. v. First Nat. Bank*, (1963) 222 F Supp 243.

279.312

NOTES OF DECISIONS

1. In general

This statute is liberally construed to effectuate the purpose intended by the legislature. *Fitzgerald v. Neal*, (1924) 113 Or 103, 231 P 645.

This statute becomes a part of the contractor's contract whether expressly incorporated therein or not. *Id.*

This section does not require final payment of the contract price to be postponed, until sworn proof that all debts incurred by the contractor in prosecuting the contract work have been paid. *Oregon Sur. & Cas. Co. v. U.S. Nat. Bank*, (1931) 136 Or 573, 300 P 336.

The mechanic's lien statute construction rules do not apply exactly to construction of this statute. *State v. Feak*, (1933) 141 Or 481, 18 P2d 203.

Contract is construed to contain those conditions required by this section. *Wiley Co. v. Home Indem. Co.*, (1958) 213 Or 493, 326 P2d 123.

Performance bond covers unpaid materialman's bills. *Id.*

2. Subsection (1)

The surety's right to a fund reserved to secure the county against loss was superior to an assignment thereof to the bank by the contractor, where the surety paid the debts of the contractor. *Wasco County v. New England Equitable Ins. Co.*, (1918) 88 Or 465, 172 P 126, Ann Cas 1918E, 656, LRA 1918D, 732.

Where the surety assented to the assignment to the bank, the rule is otherwise. *First Nat. Bank v. U.S. Fid. & Guar. Co.*, (1928) 127 Or 147, 271 P 57.

Labor and material not supplied for the prosecution of the work undertaken are not required to be paid for by the contractor. *Fitzgerald v. Neal*, (1924) 113 Or 103, 231 P 645.

Those things necessary to carry on the work, although not actually incorporated in the improvement are included in the provision relating to the supplying of labor or materials for prosecution of the work provided for in such contract. *State v. Feak*, (1933) 141 Or 481, 18 P2d 203.

An original contractor and surety were not liable for powder furnished subcontractor on public road work which was not actually used in connection with the performance of the contract. *State v. Johnson Contract Co.*, (1927) 120 Or 633, 253 P 520.

Whether the obligation was to pay a stipulated price or to pay the reasonable value, the contractor and his surety were liable for the payment for labor or material furnished for the prosecution of the work. *State v. C. J. Montag Co.*, (1930) 132 Or 587, 286 P 995.

Unloading, dismantling and hauling of steam shovel for 90 miles and reassembling of the contractor's equipment constituted labor for the prosecution of the work. *State v. Feak*, (1933) 141 Or 481, 18 P2d 203.

FURTHER CITATIONS: *Goodspeed v. Duby*, (1929) 131 Or 275, 283 P 6.

ATTY. GEN. OPINIONS: Authority of public agency to retain amount sufficient to pay claims filed on contractor's bond, 1964-66, p 417.

LAW REVIEW CITATIONS: 37 OLR 104.

279.314

NOTES OF DECISIONS

The substitution of the word "services" for the word "materials" was inadvertent, as it was clearly the intent of the legislature to afford the same protection to persons furnishing materials as it was to those who perform labor. *Bank of Calif. Nat. Assn. v. Scott*, (1938) 159 Or 70, 78 P2d 342; *Oregon Willamette Lbr. Corp. v. Lincoln County*, (1962) 232 Or 540, 376 P2d 422.

Under this section the highway commission may upon default of a contractor pay claims not only for labor furnished but also for materials furnished. *Bank of Calif. Nat. Assn. v. Scott*, (1938) 159 Or 70, 78 P2d 342.

An assignee of labor claims against a highway contractor voluntarily electing to accept money, paid into court, and whose claims were thereby paid in full was not entitled to any judgment against the highway contractor's surety and could not claim attorney's fees against the latter. *Goodspeed v. Duby*, (1929) 131 Or 275, 283 P 6.

FURTHER CITATIONS: *School Dist. 1 v. Rushlight & Co.*, (1962) 232 Or 341, 375 P2d 411.

ATTY. GEN. OPINIONS: Authority of game commission to make partial payment to assignee of contractor when surety objects, 1938-40, p 716; authority of public agency to retain amount sufficient to pay claims filed on contractor's bond, 1964-66, p 417.

279.316

NOTES OF DECISIONS

The provisions of this statute limiting hours of laborers were not unconstitutional as abridging the privileges and immunities of citizens of the United States, depriving any

person of life, liberty or property without due process of law, or denying to any person the equal protection of the law under U.S. Const. Amend. 14 or as granting to any citizen or class of citizens privileges which upon the same terms shall not belong equally to all citizens under Ore. Const. Art. I, §20. *Ex parte Steiner*, (1913) 68 Or 218, 137 P 204.

The word "labor" includes all persons employed, whether skilled or unskilled. *Id.*

The state has power to prescribe for itself such rules of conduct as it deems best suited for particular work in which it is engaged, and may dictate rules for its own guidance, which might be intolerable if applied to private activities. *Turney v. J. H. Tillman Co.*, (1924) 112 Or 122, 228 P 933.

Firemen and policemen who were not in active service for more than eight hours a day, except in emergencies, were not required to labor in excess of the time allowed. *Albee v. Weinberger*, (1914) 69 Or 331, 138 P 859.

A policeman or fireman subject to civil service rules and required to take an oath of office was not a "laborer" within this statute. *Id.*

An emergency or public policy will be presumed where a contractor employed plaintiff more than eight hours a day, in the absence of a showing to the contrary. *Turney v. J. H. Tillman Co.*, (1924) 112 Or 122, 228 P 933.

A contract of employment for more than eight hours a day was not void insofar as the employe was concerned so as to prevent collection for labor in excess of the eight hours. *Id.*

ATTY. GEN. OPINIONS: Payment of prevailing wage rate, 1956-58, p 37.

279.318

ATTY. GEN. OPINIONS: Cancellation of a contract by the state, 1956-58, p 115.

279.334

NOTES OF DECISIONS

See also cases under ORS 279.316.

FURTHER CITATIONS: *Gamma Alpha Bldg. Assn. v. Eugene*, (1919) 94 Or 80, 184 P 973.

279.338

NOTES OF DECISIONS

See also cases under ORS 279.316.

FURTHER CITATIONS: *Pederson v. Portland*, (1933) 144 Or 437, 24 P2d 1031.

279.340

NOTES OF DECISIONS

See also cases under ORS 279.316.

FURTHER CITATIONS: *Pederson v. Portland*, (1933) 144 Or 437, 24 P2d 1031.

ATTY. GEN. OPINIONS: Legality of contract provision providing vacation in lieu of overtime pay, 1950-52, p 309; overtime for deputy sheriffs, 1962-64, p 142.

279.348 to 279.356

ATTY. GEN. OPINIONS: Applicability to drainage districts, irrigation districts and district improvement companies, 1958-60, p 317; state tax forms printed under contract as public works, 1966-68, p 436.

279.348

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279.352

ATTY. GEN. OPINIONS: Wage for lawn sprinkler installation in roadside, 1962-64, p 385.

279.360

ATTY. GEN. OPINIONS: Military Department engaging architectural firm when employe of firm is an officer of Oregon National Guard, 1954-56, p 169; authorized and prohibited contracts of state officers and employes, 1954-56, p 176; Department of Finance and Administration engaging architectural firm for armory construction services when employe of firm is an officer of Oregon National Guard, 1954-56, p 182; school director entering into subcontract with contractor for building contract awarded school board, 1956-58, p 317; commissioners of domestic water supply district contracting directly or indirectly with district, 1958-60, p 54; legislator bidding for surety bonds of state officers, 1960-62, p 339; contract of county hospital with freight line, 1960-62, p 393; conflict of interest of school-board member who is manager of depository bank, 1960-62, p 415; interest of legislator who is a member of a firm servicing mortgages for the Public Employes' Retirement System, 1962-64, p 42; conflict of interest in State Treasurer contract with mortgage service firm in which legislator has an interest, 1962-64, p 335; employment of conservation district supervisor as equipment operator, 1962-64, p 417; procuring official bond of justice of peace from company for which the justice is the agent, 1964-66, p 105; city councilman purchasing city land in relocation project, 1964-66, p 108; legislator-architect contracting to provide architectural services, (1970) Vol 35, p 258.

279.362

ATTY. GEN. OPINIONS: Gas and oil leases to state employes by State Land Board, 1954-56, p 113; authorized and prohibited contracts of state officers and employes, 1954-56, p 176; Department of Finance and Administration engaging architectural firm for armory construction services when employe of firm is an officer of Oregon National Guard, 1954-56, p 182; authorized and prohibited contracts of state officers and employes, 1956-58, p 142; legislator bidding for surety bonds of state officers, 1960-62, p 339; interest of legislator who is a member of a firm servicing mortgages for the Public Employes' Retirement System, 1962-64, p 42; conflict of interest in State Treasurer contract with mortgage service firm in which legislator has an interest, 1962-64, p 335; procuring official bond of justice of peace from company for which the justice is the agent, 1964-66, p 105; city councilman purchasing city land in relocation project, 1964-66, p 108; legislator-architect contracting to provide architectural services, (1970) Vol 35, p 258.

LAW REVIEW CITATIONS: 46 OLR 132.

279.502 to 279.544

CASE CITATIONS: United States ex rel. Western Steel Co. v. Travelers Indem. Co., (1965) 37 FRD 322.

LAW REVIEW CITATIONS: 37 OLR 103-105.

279.502

NOTES OF DECISIONS

A contract for "services rendered by the contractor" does not include a contract requiring substantial amounts of labor to be performed by laborers and requiring substantial amounts of material to be purchased from materialmen. Oregon Willamette Lbr. Corp. v. Lincoln County, (1963) 232 Or 540, 376 P2d 422.

The purpose of the public contract laws is to insure payment of every person who should supply labor or material for any public work. Id.

FURTHER CITATIONS: Union Pac. Ins. Co. v. First Nat. Bank, (1963) 222 F Supp 243.

279.510

NOTES OF DECISIONS

See also cases under ORS 279.310 to 279.316.

1. In general
2. Under former similar statute
 - (1) In general
 - (2) Construction of statute
 - (3) Construction of bond
 - (4) Coverage of bond
 - (a) Scope
 - (b) Provisions extending coverage
 - (c) Labor and materials
 - (d) Items furnished subcontractor
 - (e) Items furnished vendor
 - (f) Items furnished partner
 - (g) Equitable assignment
 - (5) Surety's rights

1. In general

A contractor's bond required by a county enlarging the conditions required by statute is valid as a common-law obligation if in harmony with the statute. Fitzgerald v. Neal, (1924) 113 Or 103, 231 P 645.

Plaintiff surety's right to an equitable lien on certain funds in bankruptcy proceedings had its inception at the time it became surety on contract required by statute. Union Pac. Ins. Co. v. First Nat. Bank, (1963) 222 F Supp 243.

This section has been construed liberally in favor of those furnishing labor or materials on bonded projects. State ex rel. Thuney Logging Inc. v. Fireman's Fund Ins. Co., (1969) 254 Or 145, 458 P2d 413.

A complaint to recover on a contractor's bond was sufficient, though the contract with the state was not produced or its terms alleged. Fitzgerald v. Neal, (1924) 113 Or 103, 231 P 645.

The liability under a bond required by a state commission, though broader than required by the statute, required a surety, upon default of the contractor, to pay only for labor and material furnished for the prosecution of the work. State v. Warren Constr. Co., (1929) 129 Or 58, 276 P 260.

2. Under former similar statute

(1) In general. Knowledge was imputed to a bank loaning money to one having a contract with the state that a bond had been given in accordance with the statute. Derby v. U.S. Fid. & Guar. Co., (1917) 87 Or 34, 169 P 500.

Sufficient consideration for the promise of a contractor and his surety to pay indebtedness incurred in performance of work resulted from the award of a contract for an improvement. Clatsop County v. Feldschau, (1921) 101 Or 369, 199 P 953, 18 ALR 1221.

The statute did not require final payment of the contract price to a contractor to be postponed until sworn proof that all debts incurred by him in the prosecution of his work

are paid. *Oregon Sur. & Cas. Co. v. U.S. Nat. Bank*, (1931) 136 Or 573, 300 P 336.

A bond of a company constructing a railway did not come within the statute. *Pankey v. Nat. Sur. Co.*, (1925) 115 Or 648, 239 P 808.

(2) Construction of statute. A liberal construction was given the statute in favor of the beneficiaries of the bond. *Portland v. O'Neill*, (1920) 98 Or 162, 192 P 909; *State v. U.S. Fid. & Guar. Co.*, (1928) 125 Or 13, 265 P 775; *State v. Am. Sur. Co.*, (1931) 137 Or 394, 300 P 511, 2 P2d 1116; *State v. Metropolitan Cas. Ins. Co.*, (1934) 145 Or 367, 26 P2d 1094.

The same protection to persons furnishing materials as to those who perform labor was the intention of the legislature expressed in the statute. *Bank of Calif. Nat. Assn. v. Scott*, (1938) 159 Or 70, 78 P2d 342.

(3) Construction of bond. The statute was read in and became a part of the bond. *Multnomah County v. U.S. Fid. & Guar. Co.*, (1919) 92 Or 146, 180 P 104; *State v. Am. Sur. Co.* (1935) 150 Or 236, 44 P2d 1079.

The rule of strictissimi juris did not apply to a surety company on a contractor's bond. *Columbia County v. Consol. Contract Co.*, (1917) 83 Or 251, 163 P 438.

A breach of a bond could be shown by looking at the contract, the fulfillment of which the bond was given to secure. *Bay City v. Sandberg*, (1917) 83 Or 268, 163 P 444.

Where, under the Federal Carey Act to reclaim desert land, a bond of one contracting for an irrigation system was given, the bond protected the state, laborers and materialmen, and was construed according to Oregon statutes. *American Sur. Co. v. Oregon*, (1924) 299 Fed 357.

(4) Coverage of bond

(a) Scope. The former statute was not limited to what is incorporated into the work, but concerns every approximate relation of the contractor to that which he has contracted to do. *Multnomah County v. U.S. Fid. & Guar. Co.*, (1918) 87 Or 198, 170 P 525, LRA 1918C, 685; *Portland v. O'Neill*, (1920) 98 Or 162, 192 P 909.

Labor and material not supplied for the prosecution of the work undertaken were not intended to be covered by the statutory bond. *Fitzgerald v. Neal*, (1922) 113 Or 103, 231 P 645.

Those things necessary to carry on the work, although not actually incorporated in the improvement were included in a provision relating to the supplying of labor or materials for any prosecution of the work provided for in such contract. *State v. Feak*, (1933) 141 Or 481, 18 P2d 203.

The materials furnished did not need to become a component part of the construction to warrant a recovery on a statutory contractor's bond. *State v. Metropolitan Cas. Ins. Co.*, (1934) 145 Or 367, 26 P2d 1094.

Liability on a statutory bond was established if the material furnished or the labor performed was necessary for the prosecution of the work. *Id.*

Where all the labor performed and materials furnished for a contractor's trucks were reasonably necessary for the prosecution of the work and were substantially consumed in the prosecution thereof, the surety on a statutory bond was liable therefor. *Id.*

(b) Provisions extending coverage. Though the use of an engine was not strictly "labor and material," a bond furnished to the county broad enough to cover compensation therefor was valid. *Multnomah County v. U.S. Fid. & Guar. Co.*, (1918) 87 Or 198, 170 P 525, LRA 1918C, 685.

As to counties, the former statute was not a grant of authority, but merely fixed a minimum as to the conditions which a bond should contain. *State v. U.S. Fid. & Guar. Co.*, (1928) 125 Or 13, 265 P 775.

As to state board or commission of special and limited powers, the former statute did not authorize it to exact from the contractor a bond other or different from that prescribed. *Id.*

The liability under a bond required by a state commission though broader than required by the former statute, required a surety, upon default of the contractor, to pay only for labor and material furnished for the prosecution of the work. *State v. Warren Const. Co.*, (1929) 129 Or 58, 276 P 260.

(c) Labor and materials. Feed for horses used in the improvement of a street was "material" within the meaning of a bond executed under this section. *Portland v. New England Cas. Co.*, (1920) 96 Or 48, 189 P 211; *Clatsop County v. Feldschau*, (1921) 99 Or 680, 196 P 379.

Payment to owner of horses for service of the horses in the prosecution of the work came within the terms of a bond, such services constituting "labor." *Multnomah County v. U.S. Fid. & Guar. Co.*, (1919) 92 Or 146, 180 P 104.

Meats used in a necessary boarding camp for laborers employed on a public highway in a sparsely settled region were included within the terms "labor and materials." *Clatsop County v. Fid. & Deposit Co.*, (1920) 96 Or 2, 189 P 207.

Claims for rental for equipment for the period of time such equipment was not used was not within the protection of the contractor's bond. *Portland v. O'Neill*, (1920) 98 Or 162, 192 P 909.

Expenses for procuring knives, forks and dishes were properly disallowed, such articles not necessarily being consumed or destroyed in the prosecution of the work. *Clatsop County v. Feldschau*, (1921) 99 Or 680, 196 P 379.

An amount due for feeding the contractor's employes were proper charges against the surety, but an amount due for tobacco, cigars and cigarettes furnished the men did not constitute a proper charge. *Id.*

Costs of loading, transporting, unloading and returning equipment used on a public contract were included in the contractor's bond. *Oregon v. Sec. Constr. Co.*, (1925) 3 F2d 274.

Unloading, dismantling and hauling of steam shovel for 90 miles and reassembling of the contractor's equipment constituted labor for any prosecution of the work provided for in such contract within the statute. *State v. Feak*, (1933) 141 Or 481, 18 P2d 203.

Labor and material furnished by a railroad company to protect its property from blasting operations were covered by the bond of the highway contractor, where his contract imposed upon him the duty of protecting the property of the railroad so that its trains could be operated with safety. *State v. Am. Sur. Co.*, (1935) 150 Or 236, 44 P2d 1079.

(d) Items furnished subcontractor. One hauling materials under a contract with a subcontractor had the benefit of the former statute. *Portland v. New England Cas. Co.*, (1915) 78 Or 195, 152 P 253.

That labor and materials were supplied to the contractor through a subcontractor did not permit the contractor to escape liability therefor. *Columbia County v. Consol. Contract Co.*, (1917) 83 Or 251, 163 P 438.

The rental value of equipment paid to a subcontractor used on a public contract was included in the amount to be paid by a surety. *Oregon v. Sec. Const. Co.*, (1925) 3 F2d 274.

Cost of equipment that subcontractor was bound to furnish and which was not consumed in work was not included in the contractor's bond. *Id.*

Powder furnished subcontractor which was never actually used in connection with the performance of the contract was not covered by the bond. *State v. Johnson Constr. Co.*, (1927) 120 Or 633, 253 P 520.

(e) Items furnished vendor. Where one furnishing meals to the contractor's employes, under a contract to do so, has been paid by the contractor, the bond was not liable to the one furnishing materials to the caterer. *State v. Warren Const. Co.*, (1929) 129 Or 58, 276 P 260.

(f) **Items furnished partner.** Materials furnished to the contractor's partner and charged to the partner, although used in the construction of the building, were not a liability of the sureties who bonded the contractor as an individual only. *School Dist. 6 v. Smith*, (1913) 63 Or 586, 127 P 797, 43 LRA(NS) 65.

(g) **Equitable assignment.** In an agreement between an employe and the contractor for a deduction from wages to pay a third party, when the contractor was under no obligation to pay such third party, and the deduction thereof constituted an assignment, the surety was liable for the sum deducted. *Portland v. Heller*, (1932) 139 Or 179, 9 P2d 115, 81 ALR 1048.

(5) **Surety's rights.** Upon the principal's default the surety had a right to fulfill the contract and to be subrogated to all the rights of the contractor. *Derby v. U.S. Fid. & Guar. Co.*, (1917) 87 Or 34, 169 P 500.

Before paying the outstanding labor and material claims, a surety was not entitled to be subrogated to the contractor's rights to deferred payments due from the city. *New Amsterdam Cas. Co. v. Astoria*, (1919) 256 Fed 560.

The surety had a right to indemnify itself from deferred payments due from the city to the contractor, which was superior to the claims of the contractor's assignees. *Id.*

A surety may, before paying laborers and materialmen, require that enough of the deferred payments due from the city to the contractor to indemnify the surety be held by the city pending adjustment of the surety's liabilities, and that it not be paid to the contractor's assignees. *Id.*

When a cause of action on a bond was barred, the right of action against the surety on the bond ceased to exist. *State v. Am. Sur. Co.*, (1931) 137 Or 394, 300 P 511, 2 P2d 1116.

FURTHER CITATIONS: *Baker City Mercantile Co. v. Idaho Cement Pipe Co.*, (1913) 67 Or 372, 136 P 23; *Clatsop County v. Feldschau*, (1921) 101 Or 369, 199 P 953, 18 ALR 1221; *Goodspeed v. Duby*, (1929) 131 Or 275, 283 P 6; *State v. Feak*, (1933) 141 Or 481, 18 P2d 203; *State v. E. H. White Co., Inc.*, (1960) 224 Or 483, 356 P2d 942; *School Dist. 1 v. Rushlight & Co.*, (1962) 232 Or 341, 375 P2d 411; *State ex rel. Kronen Constr. Co. v. U.S. Fid. & Guar. Co.*, (1963) 234 Or 554, 380 P2d 795; *State ex rel. Nilsen v. Whited*, (1964) 239 Or 149, 396 P2d 758; *Wilson v. Clark*, (1970) 255 Or 116, 464 P2d 683.

LAW REVIEW CITATIONS: 12 OLR 251; 13 OLR 170; 37 OLR 103; 3 WLJ 131.

279.512

NOTES OF DECISIONS

A contract to construct an irrigation system under the Carey Act is a contract with the State of Oregon, not the Federal Government, and its terms are to be construed with reference to Oregon statutes. *American Sur. Co. v. Oregon*, (1924) 299 Fed 357.

Where the bond given restricted the obligation to the municipality or state, the laborers and materialmen were protected by the obligations of the state or municipality and its officers and the statutory provisions as to their right to sue upon the contractor's bond could not be read into the bond given. *Royal Indem. Co. v. Independence Indem. Co.*, (1928) 29 F2d 43.

When a cause of action on a bond was barred, the right of action against surety on the bond ceased to exist. *State v. Am. Sur. Co.*, (1931) 137 Or 394, 300 P 511, 2 P2d 1116.

FURTHER CITATIONS: *State v. E. H. White Co., Inc.*, (1960) 224 Or 483, 356 P2d 942.

LAW REVIEW CITATIONS: 37 OLR 103.

279.514

LAW REVIEW CITATIONS: 37 OLR 105.

279.526

NOTES OF DECISIONS

A final and unconditional acceptance is required to start the time for notice of claim running. *Oak Lodge Sanitary Dist. v. General Ins. Co.*, (1965) 240 Or 103, 399 P2d 351; *State ex rel. Virginia Glass Prod. Corp. v. Glen Falls Ins. Co.*, (1969) 254 Or 340, 460 P2d 858.

The general statute of limitation governs an action on the bond, not the one-year limitation provided for in the statute, before the 1931 amendment, pertaining to the filing of the notice of claim with the Secretary of State. *State v. Am. Sur. Co. of New York*, (1935) 150 Or 236, 44 P2d 1079.

The amount of the claim filed pursuant to this section cannot be increased after time for filing claims has expired. *State ex rel. Kronen Constr. Co. v. U.S. Fid. & Guar. Co.*, (1963) 234 Or 554, 380 P2d 795.

Notice of claim filed by a subcontractor before acceptance of the general contractor's work by the governmental body complies with this section. *Id.*

A surety on a public works bond is liable for interest to unpaid laborers or materialmen from the date their charges become due. *Id.*

A public body may not retroactively start the time running. *State ex rel. Virginia Glass Prod. Corp. v. Glen Falls Ins. Co.*, (1969) 254 Or 340, 460 P2d 858.

Loaning money to contractor to pay for labor and to purchase material to be used thereon did not ipso facto become a furnishing of labor or material within this section. *State v. U.S. Fid. & Guar. Co.*, (1928) 125 Or 13, 265 P 775.

FURTHER CITATIONS: *State v. E. H. White Co., Inc.*, (1960) 224 Or 483, 356 P2d 942; *State ex rel. Kronen Constr. Co. v. U.S. Fid. & Guar. Co.*, (1965) 240 Or 295, 401 P2d 48.

LAW REVIEW CITATIONS: 37 OLR 105.

279.528

NOTES OF DECISIONS

Notice substantially complies with subsection (2) when the notice given adequately performs the function intended by statute. *School Dist. 1 v. Rushlight & Co.*, (1962) 232 Or 341, 375 P2d 411; *School Dist. 4 v. Settergren*, (1965) 240 Or 146, 400 P2d 559.

LAW REVIEW CITATIONS: 37 OLR 105.

279.536

NOTES OF DECISIONS

1. In general
2. Under former similar statute
 - (1) In general
 - (2) Pleading and proof
 - (3) Liabilities of surety

1. In general

A general contractor's partial payment of one subcontractor's debt to another is consideration for the promise of the party so paid not to file a lien, or the public-contract equivalent of a lien. *School Dist. 1 v. A. G. Rushlight & Co.*, (1964) 236 Or 463, 389 P2d 338.

Conditional acceptance does not meet the requirements of this section; acceptance must be final and unconditional.

State ex rel. Union Iron Works v. P. S. Lord Mechanical Contractors, (1968) 250 Or 508, 443 P2d 638.

2. Under former similar statute

(1) **In general.** The failure of teamsters employed by a subcontractor to file an affidavit to procure copies of contract and bond before assigning their claim, did not preclude a suit on the claims. Columbia County v. Consol. Contract Co., (1917) 83 Or 251, 163 P 438.

Those furnishing credit or supplies to a contractor for whose benefit the bond was given, could ordinarily sue on the bond. Clatsop County v. Feldschau, (1921) 101 Or 369, 199 P 953, 18 ALR 1221.

Where the statutory bond was not given, a bond given restricting the obligation to the municipality or state protected the laborers and materialmen; but the statutory provisions as to their right to sue upon the contractor's bond could not be read into the bond given. Royal Indem. Co. v. Independence Indem. Co., (1928) 29 F2d 43.

A cause of action was not given to the state upon the bond by the former statute although it permitted any one having a cause against the contractor for labor and materials to use the name of the state as plaintiff. State v. Kuckenberg-Wittman Co., Inc., (1933) 145 Or 33, 25 P2d 383, 26 P2d 568.

(2) **Pleading and proof.** The relator need not show that labor or materials were supplied directly to the original contractor or any one. School Dist. 45 v. Hallock, (1917) 86 Or 687, 169 P 130.

Where the surety's answer admitted the execution of the bond, but denied it agreed to pay any one except the school district, such denial was sham in effect. School Dist. 30 v. Alameda Constr. Co., (1918) 87 Or 132, 169 P 507, 788.

The fact that complaint alleged an account stated between the contractor and materialman was not objectionable, where such account was merely an agreement as to the amount due for materials. City of Pendleton v. Jeffery & Bufton, (1920) 95 Or 447, 188 P 176.

Where the complaint alleged that the materials were furnished the contractor individually and the proof showed that such contractor had a partner who also became liable for materials, the variance was not material. Clatsop County v. Feldschau, (1921) 99 Or 680, 196 P 379.

A good cause of action was stated when it was alleged that the lumber had been purchased by the contractor for the prosecution of its work, regardless of whether the contractor had agreed to pay a stipulated price therefor or the reasonable value thereof. State v. C. J. Montag Co., (1930) 132 Or 587, 286 P 995.

(3) **Liabilities of surety.** For an assignment of the secured contract to release a surety, it was necessary that both contracting parties assent to the assignment. School Dist. 45 v. Hallock, (1917) 86 Or 687, 169 P 130.

Changes in the contract after its execution and delivery not attributable to laborers or materialmen could not affect the surety's liability to such persons, as the bond had a double obligatory aspect. School Dist. 30 v. Alameda Constr. Co., (1918) 87 Or 132, 169 P 507, 788.

A materialman's efforts to collect the amount due from the contractor did not release the surety from liability for the remaining balance, where he had been kept informed of the materialman's efforts to collect the debt. City of Pendleton v. Jeffery & Bufton, (1920) 95 Or 447, 188 P 176.

A surety was liable for interest on amounts due the materialmen from the date the materialmen and contractor agreed upon the balance due. *Id.*

Whether a promise to pay a stipulated price or to pay the reasonable value gave rise to the obligation to pay for labor or materials furnished, the contractor and his surety were liable for the payment. State v. C. J. Montag Co., (1930) 132 Or 587, 286 P 995.

Where notice is not given to the Secretary of State as

required by statute, there could be no recovery against the surety upon the bond, by claimant for labor or materials. State v. Kuckenberg-Wittman Co., (1933) 145 Or 33, 25 P2d 383, 26 P2d 568.

The surety was liable in the aggregate under the statute only to the extent of the penalty named in the bond. United States Fid. & Guar. Co. v. Zidell-Steinberg Co., (1935) 151 Or 538, 50 P2d 584, 51 P2d 687.

FURTHER CITATIONS: Oregon v. Sec. Constr. Co., (1925) 3 F2d 274; State v. Amer. Sur. Co., (1931) 137 Or 394, 300 P 511, 2 P2d 1116; United States ex rel. Western Steel Co. v. Travelers Indem. Co., (1965) 37 FRD 322.

279.542

NOTES OF DECISIONS

Contract was one for which a bond was required. Oregon Willamette Lbr. Corp. v. Lincoln County, (1962) 232 Or 540, 376 P2d 422.

FURTHER CITATIONS: Northwest Steel Co. v. Sch. Dist. 16, (1915) 76 Or 321, 148 P 1134, Ann Cas 1917B, 1086, LRA 1915F, 629.

ATTY. GEN. OPINIONS: Liability of the state or the World War Veterans' State Aid Commission for payment of claim of workmen who furnished labor and were not paid by contractor, 1936-38, p 533.

279.575

ATTY. GEN. OPINIONS: Payment of retainages under pre-1969 contracts, (1969) Vol 34, p 839.

279.612

ATTY. GEN. OPINIONS: Competitive bidding on contracts to make repairs and alterations on a county courthouse in a county of less than 100,000 population, 1944-46, p 253; validity of this section, 1952-54, p 8; application to purchases of equipment, 1958-60, p 219; application of subsections (2) and (3) to jail construction, 1958-60, p 219; contracts with private carriers for group insurance pursuant to ORS 203.122, 1960-62, p 56; application of ORS 279.620 to contracts for supplies and material, 1966-68, p 397; bidding on contract to make municipal audits, (1968) Vol 34, p 59.

279.618

ATTY. GEN. OPINIONS: Validity of bidder submitting a surety bond in lieu of certified check for 10 percent of the amount bid per ORS 279.030, 1952-54, p 8.

279.620

ATTY. GEN. OPINIONS: Application of "prevailing wage" provision to supplies and material, 1966-68, p 397.

279.710

ATTY. GEN. OPINIONS: Soil conservation districts as "state agencies" for state liability insurance coverage purposes, 1956-58, p 273.

279.712

ATTY. GEN. OPINIONS: Application to other than "state agencies," 1950-52, p 323; Federal Government property used by fish commission as subject to Restoration Fund or being insured against fire loss, 1950-52, p 419; contracts for inde-

pendent studies and investigations, 1956-58, p 90; approval of agreements between trustees of state library and local governments, 1956-58, p 178; agency's authority to make purchase contracts, 1958-60 p 85; state tax forms as public works, 1966-68, p 436.

279.714

CASE CITATIONS: *Hanson v. Mosser*, (1967) 247 Or 1, 427 P2d 97; *Oregon Printing Ind. v. Chamberlain*, (1970) 2 Or App 401, 467 P2d 657, Sup Ct review denied.

ATTY. GEN. OPINIONS: Leasing office space for state agencies, 1958-60, p 27; determination of excessive bids, 1962-64, p 207.

279.726**NOTES OF DECISIONS**

The awarding of a public contract to the "lowest responsible bidder" is not a mere ministerial duty, but involves the exercise of broad discretion. *Hanson v. Mosser*, (1967) 247 Or 1, 427 P2d 97.

FURTHER CITATIONS: *Oregon Printing Ind. v. Chamberlain*, (1970) 2 Or App 401, 467 P2d 657, Sup Ct review denied.

ATTY. GEN. OPINIONS: Effect of invitation to bid, 1958-60, p 169.

279.738

ATTY. GEN. OPINIONS: Selling or trading used motor vehicles of other agencies in order to obtain new ones, 1950-52, p 290; agency's authority to make purchase con-

tracts, 1958-60, p 85; authority to approve or disapprove claims, 1958-60, p 85.

279.744

ATTY. GEN. OPINIONS: Authority to approve or disapprove claims, 1958-60, p 85.

279.810 to 279.824

ATTY. GEN. OPINIONS: Acquisition of federal surplus real property for school districts, 1962-64, p 462.

279.816

ATTY. GEN. OPINIONS: Power of Department of Finance to sell surplus equipment, 1950-52, p 231.

279.820

ATTY. GEN. OPINIONS: Acquisition of federal surplus real property for school districts, 1962-64, p 462.

279.822

ATTY. GEN. OPINIONS: Distribution of excess working capital from Surplus Property Revolving Account, 1956-58, p 260.

279.990**NOTES OF DECISIONS**

The superintendent of the Oregon State Hospital is included among those criminally responsible for the violation of subsection (2). *Ex parte Steiner*, (1913) 68 Or 218, 137 P 204.