

Secretary of State  
Certificate and Order for Filing  
**PERMANENT ADMINISTRATIVE RULES**

I certify that the attached copies\* are true, full and correct copies of the PERMANENT Rule(s) adopted on June 22, 2010 by the  
(Date prior to or same as filing date.)

<u>Construction Contractors Board</u> (Agency and Division)	<u>OAR 812</u> (Administrative Rules Chapter Number)
<u>Catherine Dixon</u> (Rules Coordinator)	<u>700 Summer Street NE Suite 300, Salem OR 97310</u> (Address)
	<u>378-4621 ext. 4077</u> (Telephone)

to become effective July 1, 2010 Rulemaking Notice was published in the June 2010 Oregon Bulletin.\*\*  
(Date upon filing or later) (Month and Year)

**RULE CAPTION**

Amends: refunds/NSF checks, definitions: complaint & substantial completion, attorney fees, correct cite references, shorten time, exception forms  
Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

**RULEMAKING ACTION**

List each rule number separately, 000-000-0000.

**ADOPT:** Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

**AMEND:**

812-001-0180      812-002-0140      812-002-0740      812-004-0250      812-004-0320      812-004-0550      812-009-0430

**REPEAL:**

**Renumber:** Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

**Amend & Renumber:** Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

ORS 293.445, 670.310, 701.124, 701.126, 701.235

Stat. Auth.

Other Authority

ORS 87.058, 87.058, 87.093, 183, 183.415, 813.460, 183.470, 293.445, 701, 701.068, 701.088, 701.124, 701.126, 701.131, 701.133, 701.139, 701.140, 701.143, 701.145, 701.146 & 701.260

Stats. Implemented

**RULE SUMMARY**

- 812-001-0180 is amended to delete the requirement that CCB only refunds overpayments: 1) when requested to do so; and 2) within three years of the overpayment. In addition, CCB proposes to eliminate the \$20 "threshold" in the rule below which it made no refunds." These amendments comply with Oregon law and simplify CCB's bookkeeping.
- 812-002-0140 is amended to clarify the definition of a construction lien complaint in section (1). The amendment clarifies that the CCB dispute resolution process does not include a lien filed by the prime against the owner.
- 812-0020740 is amended to clarify the definition of substantial completion and provide specific application of the rule for fact situations that frequently arise in complaints.
- 812-004-0250 is amended to allow CCB to order respondent to pay complainant's attorney fees, costs, interest and other fees anytime the agency orders complainant to file the complaint in court. Under existing law, we can only do this if we send the complainant to court because of the nature or complexity of the case. But there are a few cases where we require complainant to file in court where nature or complexity is not an issue. One is where the construction contract requires that the dispute be resolved in court. The complainant in these cases should be allowed to recover attorney fees and other costs.

- 812-004-0320 is amended to correct the cite reference conform section (4)(a)(B) to ORS 701.131(2)(c)(B) regarding who may file a complaint.
- 812-004-0400 is amended to shorten the time for payment of the complaint processing fee from 60 days to 30 days. The Board's streamlining program proposed reducing the time CCB allows a complainant to send in the processing fee.
- 812-004-0550 is amended to correct the cite references.
- 812-009-0430 is amended to require that the agency may provide forms to be used in filing exceptions and require the use of those forms.

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Authorized Signer

Catherine Dixon  
Printed Name

June 24, 2010  
Date

\*With this original, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules.

\*\*The *Oregon Bulletin* is published on the 1<sup>st</sup> of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15<sup>th</sup> day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday.

ARC 930-2005

**NOTE:** In order to save postage and printing costs in these difficult times, CCB is only providing a copy of the notice. To view the language of each individual rule change, please go to our web site at [http://www.oregon.gov/CCB/Laws\\_Rules.shtml#Administrative\\_Rule\\_Notices](http://www.oregon.gov/CCB/Laws_Rules.shtml#Administrative_Rule_Notices). If you don't have web access, contact Cathy Dixon at (503) 378-4621 ext. 4077 for assistance in receiving a copy.

## 812-001-0180

### **Refunds; NSF Check Charge**

(1) [~~The agency shall not refund fees or civil penalties overpaid by an amount of \$20 or less unless requested by the payer in writing within three years after the date payment is received by the agency, as provided by ORS 293.445.~~] **The agency shall refund a fee or civil penalty paid to it in excess of the amount legally due if the agency, within three years of the date of payment, determines that it received excessive payment.**

**(2) After three years, the agency may refund a fee or civil penalty paid to it in excess of the amount legally due, if requested to do so by the person who made the excessive payment.**

[~~(2)~~] (3) If the agency receives payment of any fees or penalty by check and the check is returned to the agency as an NSF check, the payer of the fees will be assessed an NSF charge of \$25 in addition to the required payment of the fees or penalty.

Stat. Auth.: ORS 293.445, 670, 310 & 701.235

Stats. Implemented: ORS 293.445 & 701

(5/06, 6/10)

(formerly 812-001-0160(7))

## 812-002-0140

### **Complaint**

“Complaint,” as used in ORS chapter 812, means a complaint filed and processed under ORS 701.131-701.180. Complaints are classified by type as follows:

(1) “Construction lien complaint” is a complaint filed by an owner against a primary contractor to discharge or to recoup funds expended in discharging a construction lien **filed by an employee, supplier or subcontractor because the primary contractor did not pay the employee, supplier or subcontractor.**

(2) “Employee complaint” is a complaint for unpaid wages or benefits filed by an employee of a licensee or by the State of Oregon Bureau of Labor and Industries to collect unpaid wages from a licensee for work done by the employee relating to the licensee’s operation as a contractor under ORS chapter 701.

(3) “Employee trust complaint” is a complaint for unpaid payments for employee benefits filed by a trustee with authority to manage and control a fund that receives the employee benefit payments.

(4) “Material complaint” is a complaint filed by a supplier who has not been paid for materials sold to a licensee to be used and installed in a specific structure located within the boundaries of the State of Oregon, or for the rental of equipment to a licensee to be used in the performance of the work of a contractor in connection with such a structure.

(5) “Owner complaint” is a complaint filed by an owner for breach of contract, or for negligent or improper work subject to ORS chapter 701, or a construction lien complaint.

(6) “Primary contractor complaint” is a complaint by a primary contractor against a licensed subcontractor.

(7) “Subcontractor complaint” is a complaint filed by a subcontractor arising out of a contract between the subcontractor and a primary contractor for unpaid labor or materials furnished under the contract.

Stat. Auth.: ORS 670.310 & 701.235

Stats. Implemented: ORS 87.058, 87.093 & ch. 701

(4/98, 6/00, 5/02, 10/04, 12/06, 12/07, 6/08, 6/10)

## 812-002-0740

### **Substantial Completion**

**(1) For purposes of ORS 701.143, "Substantial completion" occurs when a person in the position of the owner would reasonably conclude that the contractor had fulfilled its obligations under the contract and that final payment was due.**

**(2) In the absence of evidence to the contrary, the agency may find that substantial completion occurred** [~~“Substantial completion” may occur~~] at the time of [~~but not be limited to~~] the first occurring of any of the following events: final inspection is completed, certificate of occupancy is issued, the structure or portion of structure is in a habitable or usable condition, **or** most or all of payment is made **if all of the payment was not advanced before work was complete.**

**(3) Work under a warranty provision of a contract or repair to already completed work does not extend the date of substantial completion, except that removal and replacement of completed work may extend the date of substantial completion to the date the replacement work was substantially complete for purposes of a complaint arising from the replacement work only.**

Stat. Auth.: ORS 670.310 & 701.235

Stats. Implemented: ORS 701.143

(4/98, 4/01, 12/05, 6/10)

## **812-004-0250**

### **Award of Complaint Processing Fee, Attorney Fees, Interest and Other Costs**

(1) Except as provided in section (2) of this rule and subject to OAR 812-010-0420, an order or arbitration award of the board awarding monetary damages in a complaint that are payable from respondent's bond, letter of credit or cash deposit required under ORS 701.085 (2005), 701.068 or 701.088, including, but not limited to an order of the board arising from a judgment, award or decision by a court, arbitrator or other entity may not include an award for:

(a) Attorney fees;

(b) Court costs;

(c) Interest;

(d) Costs to pursue litigation or the complaint;

(e) Service charges or fees; or

(f) Other damages not directly related to negligent or improper work under the contract or breach of the contract that is the basis of the complaint.

(2) An order or arbitration award by the board awarding monetary damages that are payable from respondent's bond, letter of credit or cash deposit required under ORS 701.085 (2005), 701.068 or 701.088 may include an award for attorney fees, costs, interest or other costs as follows:

(a) An order in a construction lien complaint may include attorney fees, court costs, interest and service charges allowed under OAR 812-004-0530(5).

(b) An order or arbitration award in an owner complaint may include interest expressly allowed as damages under a contract that is the basis of the complaint.

(c) An order or arbitration award awarding monetary damages or issued under OAR 812-004-0540(6) may include an award of a complaint processing fee paid by the complainant under OAR 812-004-0110.

(d) An order or arbitration award may include attorney fees, court costs, other costs and interest included in an order or award of a court, arbitrator or other entity that are related to the portion of the order or award of the court, arbitrator or other entity that is within the jurisdiction of the board if the order or award of the court, arbitrator or other entity arises from litigation, arbitration or other proceedings authorized by law or the parties to effect a resolution to the dispute:

(A) That was initiated by the respondent; or

(B) That the agency required the complainant to initiate under ORS 701.145 [~~because of the nature or complexity of the complaint~~].

(3) This rule does not apply to a complaint filed and processed under ORS 701.146.

Stat. Auth.: ORS 670.310 & 701.235

Stats. Implemented: ORS 183.415, 183.460, 701.068, 701.088, 701.145, 701.146

(10/98, 4/01, 12/01, 8/03, temp. 12/03, 2/04, 10/04, 8/05, 12/05, 12/06, 12/07, 6/08, 6/10)

## 812-004-0320

### Jurisdictional Requirements

- (1) A complaint must be of a type described under ORS 701.140.
- (2) A complaint must be filed with the agency within the time allowed under ORS 701.143.
- (3) A complaint will be processed only against a licensed entity. Whether a respondent is licensed for purposes of this section must be determined as follows:
  - (a) For an owner, primary contractor or subcontractor complaint, the respondent will be considered licensed if the respondent was licensed during all or part of the work period.
  - (b) For a material complaint, the respondent will be considered licensed if one or more invoices involve material delivered while the respondent was licensed. Damages will be awarded only for material delivered within the period of time that the respondent was licensed.
  - (c) For an employee or employee trust complaint, the respondent will be considered licensed if the respondent was licensed on one or more days that the complainant or the employee that is the subject of the trust performed work that was not paid for. Damages will be awarded only for unpaid wages or benefits provided on days on which the respondent was licensed.
- (4)(a) The complainant must have been properly licensed at the time the bid was made or the contract was entered into and must have remained licensed continuously throughout the work period if:
  - (A) The work at issue in the complaint requires that the complainant be licensed under ORS 701.026 in order to perform the work; and
  - (B) The ~~[complainant files a] complaint [arising out of a contract to construct the work at issue and the complaint is for unpaid labor or materials furnished under the contract]~~ **does not arise from defects, deficiencies or inadequate performance of construction work.**
- (b) As used in section (4) of this rule, “properly licensed” means the complainant:
  - (A) Had a current valid license issued by the agency and was not on inactive status;
  - (B) Was licensed for the type of work at issue in the complaint;
  - (C) Complied with the requirements of ORS 701.035 and OAR 812-003-0250 as they applied to the complainant’s license status as an “exempt” or “nonexempt” contractor; and
  - (D) Complied with any other requirements and restrictions on the complainant’s license.
- (5) Complaints will be accepted only when one or more of the following relationships exist between the complainant and the respondent:
  - (a) A direct contractual relationship based on a contract entered into by the complainant and the respondent, or their agents;
  - (b) An employment relationship or assigned relationship arising from a Bureau of Labor and Industries employee claim;
  - (c) A contract between the complainant and the respondent providing that the complainant is a trustee authorized to receive employee benefit payments from the respondent for employees of the respondent; or
  - (d) A real estate purchase conditioned upon repairs made by the respondent.
- (6) Complaints will be accepted only for work performed within the boundaries of the State of Oregon or for materials or equipment supplied or rented for fabrication into or use upon structures located within the boundaries of the State of Oregon.
- (7) The agency may refuse to process a complaint or any portion of a complaint that includes an allegation of a breach of contract, negligent or improper work or any other act or omission within the scope of ORS 701.140 that is the same as an allegation contained in a complaint previously filed by the same complainant against the same respondent, except that the agency may process a complaint that would otherwise be dismissed under this section (7) if the previously filed complaint was:
  - (a) Withdrawn before the on-site meeting;
  - (b) Closed without a determination on the merits before the on-site meeting;
  - (c) Closed because the complainant failed to pay the complaint processing fee required under OAR 812-004-0110.
  - (d) Closed or dismissed with an explicit provision allowing the subsequent filing of a complaint containing the same allegations as the closed or dismissed complaint; or

(e) Closed or withdrawn because the respondent filed bankruptcy.

(8) Nothing in section (7) of this rule extends the time limitation for filing a complaint under ORS 701.143.

(9) A complaint by a person furnishing material, or renting or supplying equipment to a contractor may not include a complaint for non-payment for tools sold to a licensee, for equipment sold to a licensee and not fabricated into a structure, for interest or service charges on an account, or for materials purchased as stock items.

(10) Complaints by a contractor or by persons furnishing material, or renting or supplying equipment to a contractor will not be processed unless they are at least \$150 in amount, not including the processing fee required by 812-004-0110.

(11) The agency may process a complaint against a licensed contractor whose license was inactive under OAR 812-003-0330, 812-003-0340, 812-003-0350, 812-003-0360 and 812-003-0370 during the work period.

Stat. Auth.: ORS 670.310 & 701.235

Stats. Implemented: ORS 701.131, 701.133, 701.139, 701.140, 701.143, 701.145 & 701.146

(10/98, 6/00, 12/01, 5/02, 3/03, 8/03, 12/03, 10/04, 12/04, 12/05, 12/06, 6/08, 11/09 (eff. 1/1/10), 6/10)

### **812-004-0400**

#### **Initial Administrative Processing of Complaints; Collection of Fee**

(1) Upon receipt of a complaint, the agency must:

(a) Send a copy of the complaint to the respondent;

(b) Verify that the complainant has provided information required under OAR 812-004-0340 and request additional information from the complainant if necessary;

(c) Make a preliminary determination that the board has or lacks jurisdiction over the complaint based on the information provided by the complainant;

(d) If the agency makes a preliminary determination that it has jurisdiction over the complaint and the agency does not waive the complaint processing fee required under OAR 812-004-0110, the agency must request payment of the complaint processing fee. Except as provided in section (2) of this rule, the agency may suspend processing of the complaint until complainant pays this fee.

(e) If the agency determines that the complaint should be dismissed based on the information submitted by complainant, the agency must issue a proposed order to dismiss under OAR 812-004-0550. If the complainant requests a hearing on the dismissal and the agency does not waive the complaint processing fee required under OAR 812-004-0110, the agency must request payment of the complaint processing fee and may not transmit the complaint to the Office of Administrative Hearings for a hearing until the fee is paid.

(f) If the complainant does not pay the fee required under OAR 812-004-0110 within [~~60~~] **30** days of written notification that the fee is due, the agency may close the complaint. The request for payment and closure must comply with OAR 812-004-0260. **The agency may extend the time for payment of the fee upon a showing of good cause by the complainant.**

(2) The agency may initiate an investigation to determine the validity of the complaint. The investigation may include an investigation conducted at an on-site meeting. At the agency's discretion, the agency may investigate a complaint even though the fee required under OAR 812-004-0110 has not been paid if the agency believes the public will benefit from continuing to investigate the complaint.

Stat. Auth.: ORS 670.310 & 701.235

Stats. Implemented: ORS 183.415, 183.460, 701.133, 701.140, 701.145 & 701.146

(10/98, 6/00, 12/01, 6/03, 12/03, 12/06, 6/08, 6/10)

## **812-004-0550**

### **Proposed Default Order to Dismiss, Other Resolution of Complaint by Proposed Default Order**

(1) The agency may issue a proposed default order proposing dismissal of a complaint if the evidence in the complaint record persuades the agency that one of the following grounds for dismissal exists:

(a) The complaint is not the type of complaint that the agency has jurisdiction to determine under ORS 701.140.

(b) The complaint was not filed within the time limit specified under ORS 701.143.

(c) The complainant did not permit the respondent to comply with agency recommendations under ORS ~~[701.145(3)(b)]~~ **701.145(3)(d)**.

(d) The complaint must be dismissed for lack of jurisdiction under OAR 812-004-0320(4) or (5).

(e) The respondent breached a contract or performed work negligently or improperly, but the monetary value of damages sustained by the complainant is less than an amount due to the respondent from the complainant under the terms of the contract.

(f) The complainant contends that the respondent did not fulfill the terms of a settlement that resolved the complaint but the agency finds that the respondent fulfilled the respondent's obligation under the settlement agreement.

(2) The agency may issue a proposed default order proposing dismissal of a complaint if the agency investigates the complaint and finds that the record of the complaint supports dismissal under OAR 812-004-0535.

(3) If the complainant makes a timely request for a hearing after the agency issued a proposed default order under section (1) or (2) of this rule, the agency may:

(a) Refer the complaint for an arbitration or contested case hearing solely to determine whether the dismissal was proper; or

(b) Require that the complainant file a statement of damages stating an amount the complainant alleges the respondent owes the complainant and refer the complaint for arbitration or a contested case hearing to determine if the complaint should be dismissed and if not, the validity of the complaint and whether the amount alleged, or some lesser amount is proper.

(4) The provisions of OAR 812-004-0560 apply to a proposed default order or a referral to the Office of Administrative Hearings issued under this rule.

Stat. Auth.: ORS 670.310 & 701.235

Stats. Implemented: ORS 183.415, 183.460, 183.470, 701.133 & 701.145

(temp. 1/00, temp. 3/00, 5/00, 4/01, 5/02, 3/03, 8/03, 2/04, 12/06, 6/08, 6/10)

## **812-009-0430**

### **Form of Exceptions to Agency Order in a Complaint**

(1) Exceptions to an agency order filed by a party to a complaint under OAR 812-009-0400 or a respondent under 812-009-0420 must conform to the following requirements:

(a) Exceptions must be typed or legibly printed on 8-1/2 by 11" sheets of paper.

(b) The first page of the exceptions must be titled "Exceptions to Proposed Order." If the exceptions are filed in a complaint, the first page must show the file number, the names of the parties to the complaint and the party submitting the exceptions at the top of the page. If the exceptions are filed in an enforcement action, the first page must show the name of the respondent at the top of the page.

(c) Each page of the exceptions must be numbered at the bottom of the page.

(d) For each finding of fact in the proposed order that the party alleges is not supported by the evidence in the record the following information must be included in the exceptions:

(A) The pages on which the finding of fact appear and the number, if any, of the finding of fact;

(B) The text of the finding of fact; and

(C) An explanation or argument supporting the party's contention that the finding of fact is not supported by the evidence in the record.

(e) For each conclusion in the proposed order that the party alleges is based on an erroneous interpretation or application of a statute or administrative rule or is contrary to an appellate court decision the following information must be included in the exceptions:

(A) The pages on which the conclusion and the opinion that supports it appear;

(B) The text of the conclusion; and

(C) An explanation or argument supporting the party's contention that the conclusion is based on an erroneous interpretation or application of a statute or administrative rule or is contrary to an appellate court decision.

(f) For each procedural error committed by the administrative law judge that the party contends directly affected the decision in the proposed order in a manner prejudicial to the party the following information must be included in the exceptions:

(A) A description of the procedural error; and

(B) An explanation or argument supporting the party's contention that the procedural error affected the decision and was prejudicial to the party filing the exceptions.

(g) If the party intends to rely on oral testimony at the hearing, a notification that the party intends to rely on oral testimony must be included in the exceptions.

(h) The party submitting the exceptions must sign and date the exceptions.

**(2) If the agency provides forms to a party that comply with the requirements of section (1) of this rule, the agency may require that the party use the forms provided or forms that substantially match the forms provided if the party submits exceptions.**

~~(2)~~ **(3)** The Appeal Committee may refuse to consider exceptions that do not substantially meet the requirements of ~~[section]~~ **sections (1) and (2)** of this rule.

Stat. Auth.: ORS 670.310 & 701.235

Stats. Implemented: ORS ch. 183, 701.145 & 701.260

(4/01, 8/03, 12/05, 12/06, 6/08, 6/10)