

2 **ESB 6404** - H AMD **0316**

3 By Representatives Heavey and Fuhrman

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5 Strike everything after the enacting clause and insert the
6 following:

7 "NEW SECTION. **Sec. 1.** A new section is added to chapter 39.76 RCW
8 to read as follows:

9 (1) Except as provided in RCW 39.76.020, every state agency,
10 county, city, town, school district, board, commission, or any other
11 public body shall pay interest at the highest rate allowed under RCW
12 19.52.025, on amounts due on written contracts for public works,
13 personal services, goods and services, equipment, and travel, whenever
14 the public body fails to make timely payment.

15 (2) For purposes of this section, payment shall be timely if:

16 (a) Except as provided otherwise in this subsection, a check or
17 warrant is mailed or is available on the date specified for the amount
18 specified in the applicable contract documents but not later than
19 thirty days of receipt of a properly completed invoice or receipt of
20 goods or services, whichever is later. If a contract is funded by
21 grant or federal money, the public body shall pay the prime contractor
22 for satisfactory performance within thirty calendar days of the date
23 the public body receives a payment request that complies with the
24 contract or within thirty calendar days of the date the public body
25 actually receives the grant or federal money, whichever is later.

26 (b) On written contracts for public works, when part or all of a
27 payment is going to be withheld for unsatisfactory performance or if
28 the payment request made does not comply with the requirements of the

1 contract, the public body shall notify the prime contractor in writing
2 within eight working days after receipt of the payment request stating
3 specifically why part or all of the payment is being withheld and what
4 remedial actions must be taken by the prime contractor to receive the
5 withheld amount.

6 (c) If the notification by the public body required by (b) of this
7 subsection does not comply with the notice contents required under (b)
8 of this subsection, the public body shall pay the interest under
9 subsection (1) of this section from the ninth working day after receipt
10 of the initial payment request until the contractor receives notice
11 that does comply with the notice contents required under (b) of this
12 subsection.

13 (d) If part or all of a payment is withheld under (b) of this
14 subsection, the public body shall pay the withheld amount within thirty
15 calendar days after the prime contractor satisfactorily completes the
16 remedial actions identified in the notice. If the withheld amount is
17 not paid within the thirty calendar days, the public body shall pay
18 interest under subsection (1) of this section from the thirty-first
19 calendar day until the date paid.

20 (e)(i) If the prime contractor on a public works contract, after
21 making a request for payment to the public body but before paying a
22 subcontractor for the subcontractor's performance covered by the
23 payment request, discovers that part or all of the payment otherwise
24 due to the subcontractor is subject to withholding from the
25 subcontractor under the subcontract for unsatisfactory performance, the
26 prime contractor may withhold the amount as allowed under the
27 subcontract. If the prime contractor withholds an amount under this
28 subsection, the prime contractor shall:

1 (A) Give the subcontractor notice of the remedial actions that must
2 be taken as soon as practicable after determining the cause for the
3 withholding but before the due date for the subcontractor payment;

4 (B) Give the contracting officer of the public body a copy of the
5 notice furnished to the subcontractor under (e)(i)(A) of this
6 subsection; and

7 (C) Pay the subcontractor within eight working days after the
8 subcontractor satisfactorily completes the remedial action identified
9 in the notice.

10 (ii) If the prime contractor does not comply with the notice and
11 payment requirements of (e)(i) of this subsection, the contractor shall
12 pay the subcontractor interest on the withheld amount from the eighth
13 working day at an interest rate that is equal to the amount set forth
14 in subsection (1) of this section.

15 (3) For the purposes of this section:

16 (a) A payment is considered to be made when mailed or personally
17 delivered to the party being paid.

18 (b) An invoice is considered to be received when it is date-stamped
19 or otherwise marked as delivered. If the invoice is not date-stamped
20 or otherwise marked as delivered, the date of the invoice is considered
21 to be the date when the invoice is received."

22 "NEW SECTION. Sec. 2. (1) Contracts for public improvements or
23 work, other than for professional services, by the state, or any
24 county, city, town, school district, commission, district, board, or
25 other public body, herein referred to as "public body", shall provide,
26 and there shall be reserved by the public body from the moneys earned
27 by the contractor on estimates during the progress of the improvement
28 or work, a sum not to exceed five percent of the moneys earned, this
29 sum to be retained by the state, county, city, town, district, board,

1 or other public body, as a trust fund for the protection and payment of
2 any person or persons, mechanic, subcontractor or materialman who
3 performs any labor upon such a contract or the doing of the work, and
4 all persons who supply such a person or persons or subcontractors with
5 provisions and supplies for the carrying on of the work, and the state
6 with respect to taxes imposed pursuant to Title 82 RCW which may be due
7 from the contractor. A public body may not, for any purpose, reserve
8 or retain from the moneys earned by a contractor under a public
9 improvement contract any sum exceeding the five percent amount
10 permitted in this subsection. Every person performing labor or
11 furnishing supplies toward the completion of the improvement or work
12 has a lien upon the moneys so reserved: PROVIDED, That the notice of
13 the lien of the claimant is given within forty-five days of completion
14 of all of the contract work other than landscaping, and in the manner
15 provided in RCW 39.08.030: PROVIDED FURTHER, That if the board,
16 council, commission, trustees, officer, or body acting for the state,
17 county, or municipality or other public body:

18 (a) At any time after fifty percent of the original contract work
19 has been completed, finds that satisfactory progress is being made, may
20 make any of the partial payments which would otherwise be subsequently
21 made in full; but in no event may the amount to be retained be reduced
22 to less than five percent of the amount of the moneys earned by the
23 contractor;

24 (b) After completion of all contract work other than landscaping,
25 the contractor may request that the public body release and pay in full
26 the amounts retained during the performance of the contract, and sixty
27 days thereafter the public body must release and pay in full the
28 amounts retained (other than continuing retention of five percent of
29 the moneys earned for landscaping) subject to the provisions of
30 chapters 39.12 and 60.28 RCW; and

1 (c) Sixty days after completion of all contract work the public
2 body must release and pay in full the amounts retained during the
3 performance of the contract subject to the provisions of chapters 39.12
4 and 60.28 RCW.

5 (2) The moneys reserved under the provisions of subsection (1) of
6 this section, at the option of the contractor, shall be:

7 (a) Retained in a fund by the public body;

8 (b) Deposited by the public body in an interest bearing account in
9 a bank, mutual savings bank, or savings and loan association. Interest
10 on the account shall be paid to the contractor; or

11 (c) Placed in escrow with a bank or trust company by the public
12 body. When the moneys reserved are placed in escrow, the public body
13 shall issue a check representing the sum of the moneys reserved payable
14 to the bank or trust company and the contractor jointly. This check
15 shall be converted into bonds and securities chosen by the contractor
16 and approved by the public body and the bonds and securities shall be
17 held in escrow. Interest on the bonds and securities shall be paid to
18 the contractor as the interest accrues.

19 (3) The contractor or subcontractor may withhold payment of not
20 more than five percent from the moneys earned by any subcontractor or
21 sub-subcontractor or supplier contracted with by the contractor to
22 provide labor, materials, or equipment to the public project. Whenever
23 the contractor or subcontractor reserves funds earned by a
24 subcontractor or sub-subcontractor or supplier, the contractor or
25 subcontractor shall pay interest to the subcontractor or sub-
26 subcontractor or supplier at a rate equal to that received by the
27 contractor or subcontractor from reserved funds.

28 (4) With the consent of the public body the contractor may submit
29 a bond for all or any portion of the amount of funds retained by the
30 public body in a form acceptable to the public body. This bond and any

1 proceeds therefrom are subject to all claims and liens and in the same
2 manner and priority as set forth for retained percentages in this
3 chapter. The public body shall release the bonded portion of the
4 retained funds to the contractor within thirty days of accepting the
5 bond from the contractor. Whenever a public body accepts a bond in
6 lieu of retained funds from a contractor, the contractor shall accept
7 like bonds from any subcontractors or suppliers from which the
8 contractor has retained funds. The contractor shall then release the
9 funds retained from the subcontractor or supplier to the subcontractor
10 or supplier within thirty days of accepting the bond from the
11 subcontractor or supplier.

12 (5) If the public body administering a contract, after a
13 substantial portion of the work has been completed, finds that an
14 unreasonable delay will occur in the completion of the remaining
15 portion of the contract for any reason not the result of a breach
16 thereof, it may, if the contractor agrees, delete from the contract the
17 remaining work and accept as final the improvement at the stage of
18 completion then attained and make payment in proportion to the amount
19 of the work accomplished and in this case any amounts retained and
20 accumulated under this section shall be held for a period of forty-five
21 days following the completion. In the event that the work is
22 terminated before final completion as provided in this section, the
23 public body may thereafter enter into a new contract with the same
24 contractor to perform the remaining work or improvement for an amount
25 equal to or less than the cost of the remaining work as was provided
26 for in the original contract without advertisement or bid. The
27 provisions of this chapter are exclusive and supersede all provisions
28 and regulations in conflict herewith.

29 (6) Whenever the department of transportation has contracted for
30 the construction of two or more ferry vessels, sixty days after

1 completion of all contract work on each ferry vessel, the department
2 must release and pay in full the amounts retained in connection with
3 the construction of the vessel subject to the provisions of this
4 chapter and chapter 39.12 RCW: PROVIDED, That the department of
5 transportation may at its discretion condition the release of funds
6 retained in connection with the completed ferry upon the contractor
7 delivering a good and sufficient bond with two or more sureties, or
8 with a surety company, in the amount of the retained funds to be
9 released to the contractor, conditioned that no taxes shall be
10 certified or claims filed for work on the ferry after a period of
11 forty-five days following completion of the ferry; and if taxes are
12 certified or claims filed, recovery may be had on the bond by the
13 department of revenue and the materialmen and laborers filing claims.

14 (7) Contracts on projects funded in whole or in part by farmers
15 home administration and subject to farmers home administration
16 regulations are not subject to subsections (1) through (6) of this
17 section."

18 NEW SECTION. **Sec. 3.** After the expiration of the forty-five
19 day period for filing a lien provided in section 2(1) of this act, and
20 after receipt of the department of revenue's certificate, and the
21 public body is satisfied that the taxes certified as due or to become
22 due by the department of revenue are discharged, and the claims of
23 materialmen and laborers who have filed their claims, together with a
24 sum sufficient to defray the cost of foreclosing the liens of such
25 claims, and to pay attorneys' fees, have been paid, the public body may
26 withhold from the remaining retained amounts for claims the public body
27 may have against the contractor and shall pay the balance, if any, to
28 the contractor the fund retained by it or release to the contractor the
29 securities and bonds held in escrow.

1 If such taxes have not been discharged or the claims, expenses, and
2 fees have not been paid, the public body shall either retain in its
3 fund, or in an interest bearing account, or retain in escrow, at the
4 option of the contractor, an amount equal to such unpaid taxes and
5 unpaid claims together with a sum sufficient to defray the costs and
6 attorney fees incurred in foreclosing the lien of such claims, and
7 shall pay, or release from escrow, the remainder to the contractor."

8 "NEW SECTION. **Sec. 4.** Upon completion of a contract, the
9 state, county or other municipal officer charged with the duty of
10 disbursing or authorizing disbursement or payment of such contracts
11 shall forthwith notify the department of revenue of the completion of
12 contracts over twenty thousand dollars. Such officer shall not make
13 any payment from the retained percentage fund or release any retained
14 percentage escrow account to any person, until he has received from the
15 department of revenue a certificate that all taxes, increases and
16 penalties due from the contractor, and all taxes due and to become due
17 with respect to such contract have been paid in full or that they are,
18 in the department's opinion, readily collectible without recourse to
19 the state's lien on the retained percentage."

20 "NEW SECTION. **Sec. 5.** A new section is added to chapter 39.04 RCW
21 to read as follows:

22 (1) When payment is received by a contractor or subcontractor for
23 work performed on a public work, the contractor or subcontractor shall
24 pay to any subcontractor not later than ten days after the receipt of
25 the payment, amounts allowed the contractor on account of the work
26 performed by the subcontractor, to the extent of each subcontractor's
27 interest therein.

1 (2) In the event of a good faith dispute over all or any portion of
2 the amount due on a payment from the state or a municipality to the
3 prime contractor, or from the prime contractor or subcontractor to a
4 subcontractor, then the state or the municipality, or the prime
5 contractor or subcontractor, may withhold no more than one hundred
6 fifty percent of the disputed amount. Those not a party to a dispute
7 are entitled to full and prompt payment of their portion of a draw,
8 progress payment, final payment, or released retainage.

9 (3) In addition to all other remedies, any person from whom funds
10 have been withheld in violation of this section shall be entitled to
11 receive from the person wrongfully withholding the funds, for every
12 month and portion thereof that payment including retainage is not made,
13 interest at the highest rate allowed under RCW 19.52.025. In any
14 action for the collection of funds wrongfully withheld, the prevailing
15 party shall be entitled to costs of suit and reasonable attorneys'
16 fees."

17 "NEW SECTION. Sec. 6. (1) The rights provided in this act may
18 not be waived by the parties and a contract provision that provides for
19 waiver of the rights provided in this act is void as against public
20 policy.

21 (2) This act is to be liberally construed to provide security for
22 all parties intended to be protected by its provisions."

23 "NEW SECTION. Sec. 7. (1) Sections 1 through 6 of this act are
24 applicable to all public works contracts entered into on or after
25 September 1, 1992, relating to the construction of any work of
26 improvement.

27 (2) RCW 39.76.010, 60.28.010, 60.28.020, and 60.28.050 are
28 applicable to all public works contracts entered into prior to

1 September 1, 1992, relating to the construction of any work of
2 improvement."

3 "NEW SECTION. Sec. 8. Sections 2 through 4 of this act are
4 each added to chapter 60.28 RCW."

5 "NEW SECTION. Sec. 9. This act shall take effect September 1,
6 1992."

7 **ESB 6404** - H AMD
8 By Representative

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10 On page 1, line 2 of the title, after "projects;" strike the
11 remainder of the title and insert "adding a new section to chapter
12 39.76 RCW; adding new sections to chapter 60.28 RCW; adding a new
13 section to chapter 39.04 RCW; creating new sections; prescribing
14 penalties; and providing an effective date."