

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1736

52nd Legislature
1992 Regular Session

Passed by the House March 10, 1992
Yeas 95 Nays 0

**Speaker of the
House of Representatives**

Passed by the Senate March 10, 1992
Yeas 49 Nays 0

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Alan Thompson, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1736** as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 1736

AS AMENDED BY THE SENATE

Passed Legislature - 1992 Regular Session

State of Washington 52nd Legislature 1991 Regular Session

By House Committee on Commerce & Labor (originally sponsored by Representatives O'Brien, Fuhrman and R. King).

Read first time March 6, 1991.

1 AN ACT Relating to payment for work of improvement on real
2 property; adding a new section to chapter 39.76 RCW; adding new
3 sections to chapter 60.28 RCW; adding a new section to chapter 39.04
4 RCW; creating new sections; prescribing penalties; and providing an
5 effective date.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

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 a rate of one percent per month, but
12 at least one dollar per month, on amounts due on written contracts for
13 public works, personal services, goods and services, equipment, and
14 travel, whenever the public body fails to make timely payment.

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

1 (a) Except as provided otherwise in this subsection, a check or
2 warrant is mailed or is available on the date specified for the amount
3 specified in the applicable contract documents but not later than
4 thirty days of receipt of a properly completed invoice or receipt of
5 goods or services, whichever is later. If a contract is funded by
6 grant or federal money, the public body shall pay the prime contractor
7 for satisfactory performance within thirty calendar days of the date
8 the public body receives a payment request that complies with the
9 contract or within thirty calendar days of the date the public body
10 actually receives the grant or federal money, whichever is later.

11 (b) On written contracts for public works, when part or all of a
12 payment is going to be withheld for unsatisfactory performance or if
13 the payment request made does not comply with the requirements of the
14 contract, the public body shall notify the prime contractor in writing
15 within eight working days after receipt of the payment request stating
16 specifically why part or all of the payment is being withheld and what
17 remedial actions must be taken by the prime contractor to receive the
18 withheld amount.

19 (c) If the notification by the public body required by (b) of this
20 subsection does not comply with the notice contents required under (b)
21 of this subsection, the public body shall pay the interest under
22 subsection (1) of this section from the ninth working day after receipt
23 of the initial payment request until the contractor receives notice
24 that does comply with the notice contents required under (b) of this
25 subsection.

26 (d) If part or all of a payment is withheld under (b) of this
27 subsection, the public body shall pay the withheld amount within thirty
28 calendar days after the prime contractor satisfactorily completes the
29 remedial actions identified in the notice. If the withheld amount is
30 not paid within the thirty calendar days, the public body shall pay

1 interest under subsection (1) of this section from the thirty-first
2 calendar day until the date paid.

3 (e)(i) If the prime contractor on a public works contract, after
4 making a request for payment to the public body but before paying a
5 subcontractor for the subcontractor's performance covered by the
6 payment request, discovers that part or all of the payment otherwise
7 due to the subcontractor is subject to withholding from the
8 subcontractor under the subcontract for unsatisfactory performance, the
9 prime contractor may withhold the amount as allowed under the
10 subcontract. If the prime contractor withholds an amount under this
11 subsection, the prime contractor shall:

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

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

18 (C) Pay the subcontractor within eight working days after the
19 subcontractor satisfactorily completes the remedial action identified
20 in the notice.

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

26 (3) For the purposes of this section:

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

29 (b) An invoice is considered to be received when it is date-stamped
30 or otherwise marked as delivered. If the invoice is not date-stamped

1 or otherwise marked as delivered, the date of the invoice is considered
2 to be the date when the invoice is received.

3 NEW SECTION. **Sec. 2.** (1) Public improvement contracts shall
4 provide, and public bodies shall reserve, a contract retainage not to
5 exceed five percent of the moneys earned by the contractor as a trust
6 fund for the protection and payment of: (a) The claims of any person
7 arising under the contract; and (b) the state with respect to taxes
8 imposed pursuant to Title 82 RCW which may be due from such contractor.

9 (2) Every person performing labor or furnishing supplies toward the
10 completion of a public improvement contract shall have a lien upon
11 moneys reserved by a public body under the provisions of a public
12 improvement contract: PROVIDED, That the notice of the lien of the
13 claimant shall be given within forty-five days of completion of the
14 contract work, and in the manner provided in RCW 39.08.030.

15 (3) The contractor at any time may request the contract retainage
16 be reduced to one hundred percent of the value of the work remaining on
17 the project.

18 (a) After completion of all contract work other than landscaping,
19 the contractor may request that the public body release and pay in full
20 the amounts retained during the performance of the contract, and sixty
21 days thereafter the public body must release and pay in full the
22 amounts retained (other than continuing retention of five percent of
23 the moneys earned for landscaping) subject to the provisions of
24 chapters 39.12 and 60.28 RCW.

25 (b) Sixty days after completion of all contract work the public
26 body must release and pay in full the amounts retained during the
27 performance of the contract subject to the provisions of chapters 39.12
28 and 60.28 RCW.

1 (4) The moneys reserved by a public body under the provisions of a
2 public improvement contract, at the option of the contractor, shall be:

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

4 (b) Deposited by the public body in an interest bearing account in
5 a bank, mutual savings bank, or savings and loan association. Interest
6 on moneys reserved by a public body under the provision of a public
7 improvement contract shall be paid to the contractor;

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

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

25 (6) With the consent of the public body the contractor may submit
26 a bond for all or any portion of the contract retainage in a form
27 acceptable to the public body. This bond and any proceeds therefrom
28 are subject to all claims and liens and in the same manner and priority
29 as set forth for retained percentages in this chapter. The public body
30 shall release the bonded portion of the retained funds to the

1 contractor within thirty days of accepting the bond from the
2 contractor. Whenever a public body accepts a bond in lieu of retained
3 funds from a contractor, the contractor shall accept like bonds from
4 any subcontractors or suppliers from which the contractor has retained
5 funds. The contractor shall then release the funds retained from the
6 subcontractor or supplier to the subcontractor or supplier within
7 thirty days of accepting the bond from the subcontractor or supplier.

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

25 (8) Whenever the department of transportation has contracted for
26 the construction of two or more ferry vessels, sixty days after
27 completion of all contract work on each ferry vessel, the department
28 must release and pay in full the amounts retained in connection with
29 the construction of the vessel subject to the provisions of RCW
30 60.28.020 and chapter 39.12 RCW: PROVIDED, That the department of

1 transportation may at its discretion condition the release of funds
2 retained in connection with the completed ferry upon the contractor
3 delivering a good and sufficient bond with two or more sureties, or
4 with a surety company, in the amount of the retained funds to be
5 released to the contractor, conditioned that no taxes shall be
6 certified or claims filed for work on the ferry after a period of sixty
7 days following completion of the ferry; and if taxes are certified or
8 claims filed, recovery may be had on the bond by the department of
9 revenue and the materialmen and laborers filing claims.

10 (9) Except as provided in subsection (1) of this section,
11 reservation by a public body for any purpose from the moneys earned by
12 a contractor by fulfilling its responsibilities under public
13 improvement contracts is prohibited.

14 (10) 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 (9) of this
17 section.

18 (11) Unless the context clearly requires otherwise, the definitions
19 in this subsection apply throughout this section.

20 (a) "Contract retainage" means an amount reserved by a public body
21 from the moneys earned by a person under a public improvement contract.

22 (b) "Person" means a person or persons, mechanic, subcontractor, or
23 materialperson who performs labor or provides materials for a public
24 improvement contract, and any other person who supplies the person with
25 provisions or supplies for the carrying on of a public improvement
26 contract.

27 (c) "Public body" means the state, or a county, city, town,
28 district, board, or other public body.

29 (d) "Public improvement contract" means a contract for public
30 improvements or work, other than for professional services.

1 NEW SECTION. **Sec. 3.** After the expiration of the forty-five
2 day period for giving notice of lien provided in section 2(2) of this
3 act, and after receipt of the department of revenue's certificate, and
4 the public body is satisfied that the taxes certified as due or to
5 become due by the department of revenue are discharged, and the claims
6 of materialmen and laborers who have filed their claims, together with
7 a sum sufficient to defray the cost of foreclosing the liens of such
8 claims, and to pay attorneys' fees, have been paid, the public body may
9 withhold from the remaining retained amounts for claims the public body
10 may have against the contractor and shall pay the balance, if any, to
11 the contractor the fund retained by it or release to the contractor the
12 securities and bonds held in escrow.

13 If such taxes have not been discharged or the claims, expenses, and
14 fees have not been paid, the public body shall either retain in its
15 fund, or in an interest bearing account, or retain in escrow, at the
16 option of the contractor, an amount equal to such unpaid taxes and
17 unpaid claims together with a sum sufficient to defray the costs and
18 attorney fees incurred in foreclosing the lien of such claims, and
19 shall pay, or release from escrow, the remainder to the contractor.

20 NEW SECTION. **Sec. 4.** Upon completion of a contract, the
21 state, county or other municipal officer charged with the duty of
22 disbursing or authorizing disbursement or payment of such contracts
23 shall forthwith notify the department of revenue of the completion of
24 contracts over twenty thousand dollars. Such officer shall not make
25 any payment from the retained percentage fund or release any retained
26 percentage escrow account to any person, until he has received from the
27 department of revenue a certificate that all taxes, increases and
28 penalties due from the contractor, and all taxes due and to become due
29 with respect to such contract have been paid in full or that they are,

1 in the department's opinion, readily collectible without recourse to
2 the state's lien on the retained percentage.

3 NEW SECTION. **Sec. 5.** A new section is added to chapter 39.04 RCW
4 to read as follows:

5 (1) When payment is received by a contractor or subcontractor for
6 work performed on a public work, the contractor or subcontractor shall
7 pay to any subcontractor not later than ten days after the receipt of
8 the payment, amounts allowed the contractor on account of the work
9 performed by the subcontractor, to the extent of each subcontractor's
10 interest therein.

11 (2) In the event of a good faith dispute over all or any portion of
12 the amount due on a payment from the state or a municipality to the
13 prime contractor, or from the prime contractor or subcontractor to a
14 subcontractor, then the state or the municipality, or the prime
15 contractor or subcontractor, may withhold no more than one hundred
16 fifty percent of the disputed amount. Those not a party to a dispute
17 are entitled to full and prompt payment of their portion of a draw,
18 progress payment, final payment, or released retainage.

19 (3) In addition to all other remedies, any person from whom funds
20 have been withheld in violation of this section shall be entitled to
21 receive from the person wrongfully withholding the funds, for every
22 month and portion thereof that payment including retainage is not made,
23 interest at the highest rate allowed under RCW 19.52.025. In any
24 action for the collection of funds wrongfully withheld, the prevailing
25 party shall be entitled to costs of suit and reasonable attorneys'
26 fees.

27 NEW SECTION. **Sec. 6.** (1) The rights provided in this act may
28 not be waived by the parties and a contract provision that provides for

1 waiver of the rights provided in this act is void as against public
2 policy.

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

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

9 (2) RCW 39.76.010, 60.28.010, 60.28.020, and 60.28.050 are
10 applicable to all public works contracts entered into prior to
11 September 1, 1992, relating to the construction of any work of
12 improvement.

13 NEW SECTION. **Sec. 8.** Sections 2 through 4 of this act are
14 each added to chapter 60.28 RCW.

15 NEW SECTION. **Sec. 9.** This act shall take effect September 1,
16 1992.