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SENATE BILL 5396

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State of Washington

61st Legislature

2009 Regular Session

By Senators Rockefeller and Shin; by request of Capital Projects  
Advisory Review Board

Read first time 01/21/09. Referred to Committee on Government  
Operations & Elections.

1 AN ACT Relating to retainage of funds on public works projects;  
2 amending RCW 39.04.901, 39.12.040, 39.12.050, 39.12.065, 39.76.020,  
3 60.28.040, and 60.28.080; reenacting and amending RCW 60.28.011; and  
4 repealing RCW 39.04.140, 39.76.010, 60.28.010, 60.28.020, and  
5 60.28.050.

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

7 **Sec. 1.** RCW 39.04.901 and 1992 c 223 s 7 are each amended to read  
8 as follows:

9 ((1)) RCW 39.76.011, 60.28.011, 60.28.021, 60.28.051, 39.04.250,  
10 and 39.04.900 are applicable to all public works contracts entered into  
11 on or after September 1, 1992, relating to the construction of any work  
12 of improvement.

13 ((2) RCW 39.76.010, 60.28.010, 60.28.020, and 60.28.050 are  
14 applicable to all public works contracts entered into prior to  
15 September 1, 1992, relating to the construction of any work of  
16 improvement.))

17 **Sec. 2.** RCW 39.12.040 and 2007 c 210 s 4 are each amended to read  
18 as follows:

1 (1) Except as provided in subsection (2) of this section, before  
2 payment is made by or on behalf of the state, or any county,  
3 municipality, or political subdivision created by its laws, of any sum  
4 or sums due on account of a public works contract, it shall be the duty  
5 of the officer or person charged with the custody and disbursement of  
6 public funds to require the contractor and each and every subcontractor  
7 from the contractor or a subcontractor to submit to such officer a  
8 "Statement of Intent to Pay Prevailing Wages". For a contract in  
9 excess of ten thousand dollars, the statement of intent to pay  
10 prevailing wages shall include:

- 11 (a) The contractor's registration certificate number; and
- 12 (b) The prevailing rate of wage for each classification of workers  
13 entitled to prevailing wages under RCW 39.12.020 and the estimated  
14 number of workers in each classification.

15 Each statement of intent to pay prevailing wages must be approved  
16 by the industrial statistician of the department of labor and  
17 industries before it is submitted to said officer. Unless otherwise  
18 authorized by the department of labor and industries, each voucher  
19 claim submitted by a contractor for payment on a project estimate shall  
20 state that the prevailing wages have been paid in accordance with the  
21 prefiled statement or statements of intent to pay prevailing wages on  
22 file with the public agency. Following the final acceptance of a  
23 public works project, it shall be the duty of the officer charged with  
24 the disbursement of public funds, to require the contractor and each  
25 and every subcontractor from the contractor or a subcontractor to  
26 submit to such officer an "Affidavit of Wages Paid" before the funds  
27 retained according to the provisions of RCW ((~~60.28.010~~)) 60.28.011 are  
28 released to the contractor. Each affidavit of wages paid must be  
29 certified by the industrial statistician of the department of labor and  
30 industries before it is submitted to said officer.

31 (2) As an alternate to the procedures provided for in subsection  
32 (1) of this section, for public works projects of two thousand five  
33 hundred dollars or less and for projects where the limited public works  
34 process under RCW 39.04.155(3) is followed:

- 35 (a) An awarding agency may authorize the contractor or  
36 subcontractor to submit the statement of intent to pay prevailing wages  
37 directly to the officer or person charged with the custody or  
38 disbursement of public funds in the awarding agency without approval by

1 the industrial statistician of the department of labor and industries.  
2 The awarding agency shall retain such statement of intent to pay  
3 prevailing wages for a period of not less than three years.

4 (b) Upon final acceptance of the public works project, the awarding  
5 agency shall require the contractor or subcontractor to submit an  
6 affidavit of wages paid. Upon receipt of the affidavit of wages paid,  
7 the awarding agency may pay the contractor or subcontractor in full,  
8 including funds that would otherwise be retained according to the  
9 provisions of RCW ((60.28.010)) 60.28.011. Within thirty days of  
10 receipt of the affidavit of wages paid, the awarding agency shall  
11 submit the affidavit of wages paid to the industrial statistician of  
12 the department of labor and industries for approval.

13 (c) A statement of intent to pay prevailing wages and an affidavit  
14 of wages paid shall be on forms approved by the department of labor and  
15 industries.

16 (d) In the event of a wage claim and a finding for the claimant by  
17 the department of labor and industries where the awarding agency has  
18 used the alternative process provided for in subsection (2) of this  
19 section, the awarding agency shall pay the wages due directly to the  
20 claimant. If the contractor or subcontractor did not pay the wages  
21 stated in the affidavit of wages paid, the awarding agency may take  
22 action at law to seek reimbursement from the contractor or  
23 subcontractor of wages paid to the claimant, and may prohibit the  
24 contractor or subcontractor from bidding on any public works contract  
25 of the awarding agency for up to one year.

26 (e) Nothing in this section shall be interpreted to allow an  
27 awarding agency to subdivide any public works project of more than two  
28 thousand five hundred dollars for the purpose of circumventing the  
29 procedures required by RCW 39.12.040(1).

30 **Sec. 3.** RCW 39.12.050 and 2001 c 219 s 1 are each amended to read  
31 as follows:

32 (1) Any contractor or subcontractor who files a false statement or  
33 fails to file any statement or record required to be filed under this  
34 chapter and the rules adopted under this chapter, shall, after a  
35 determination to that effect has been issued by the director after  
36 hearing under chapter 34.05 RCW, forfeit as a civil penalty the sum of  
37 five hundred dollars for each false filing or failure to file, and

1 shall not be permitted to bid, or have a bid considered, on any public  
2 works contract until the penalty has been paid in full to the director.  
3 The civil penalty under this subsection shall not apply to a violation  
4 determined by the director to be an inadvertent filing or reporting  
5 error. Civil penalties shall be deposited in the public works  
6 administration account.

7 To the extent that a contractor or subcontractor has not paid wages  
8 at the rate due pursuant to RCW 39.12.020, and a finding to that effect  
9 has been made as provided by this subsection, such unpaid wages shall  
10 constitute a lien against the bonds and retainage as provided in RCW  
11 18.27.040, 19.28.041, 39.08.010, and (~~60.28.010~~) 60.28.011.

12 (2) If a contractor or subcontractor is found to have violated the  
13 provisions of subsection (1) of this section for a second time within  
14 a five year period, the contractor or subcontractor shall be subject to  
15 the sanctions prescribed in subsection (1) of this section and shall  
16 not be allowed to bid on any public works contract for one year. The  
17 one year period shall run from the date of notice by the director of  
18 the determination of noncompliance. When an appeal is taken from the  
19 director's determination, the one year period shall commence from the  
20 date of the final determination of the appeal.

21 The director shall issue his or her findings that a contractor or  
22 subcontractor has violated the provisions of this subsection after a  
23 hearing held subject to the provisions of chapter 34.05 RCW.

24 **Sec. 4.** RCW 39.12.065 and 2001 c 219 s 2 are each amended to read  
25 as follows:

26 (1) Upon complaint by an interested party, the director of labor  
27 and industries shall cause an investigation to be made to determine  
28 whether there has been compliance with this chapter and the rules  
29 adopted hereunder, and if the investigation indicates that a violation  
30 may have occurred, a hearing shall be held in accordance with chapter  
31 34.05 RCW. The director shall issue a written determination including  
32 his or her findings after the hearing. A judicial appeal from the  
33 director's determination may be taken in accordance with chapter 34.05  
34 RCW, with the prevailing party entitled to recover reasonable costs and  
35 attorneys fees.

36 A complaint concerning nonpayment of the prevailing rate of wage  
37 shall be filed with the department of labor and industries no later

1 than thirty days from the acceptance date of the public works project.  
2 The failure to timely file such a complaint shall not prohibit a  
3 claimant from pursuing a private right of action against a contractor  
4 or subcontractor for unpaid prevailing wages. The remedy provided by  
5 this section is not exclusive and is concurrent with any other remedy  
6 provided by law.

7 (2) To the extent that a contractor or subcontractor has not paid  
8 the prevailing rate of wage under a determination issued as provided in  
9 subsection (1) of this section, the director shall notify the agency  
10 awarding the public works contract of the amount of the violation  
11 found, and the awarding agency shall withhold, or in the case of a  
12 bond, the director shall proceed against the bond in accordance with  
13 the applicable statute to recover, such amount from the following  
14 sources in the following order of priority until the total of such  
15 amount is withheld:

16 (a) The retainage or bond in lieu of retainage as provided in RCW  
17 (~~60.28.010~~) 60.28.011;

18 (b) If the claimant was employed by the contractor or subcontractor  
19 on the public works project, the bond filed by the contractor or  
20 subcontractor with the department of labor and industries as provided  
21 in RCW 18.27.040 and 19.28.041;

22 (c) A surety bond, or at the contractor's or subcontractor's option  
23 an escrow account, running to the director in the amount of the  
24 violation found; and

25 (d) That portion of the progress payments which is properly  
26 allocable to the contractor or subcontractor who is found to be in  
27 violation of this chapter. Under no circumstances shall any portion of  
28 the progress payments be withheld that are properly allocable to a  
29 contractor, subcontractor, or supplier, that is not found to be in  
30 violation of this chapter.

31 The amount withheld shall be released to the director to distribute  
32 in accordance with the director's determination.

33 (3) A contractor or subcontractor that is found, in accordance with  
34 subsection (1) of this section, to have violated the requirement to pay  
35 the prevailing rate of wage shall be subject to a civil penalty of not  
36 less than one thousand dollars or an amount equal to twenty percent of  
37 the total prevailing wage violation found on the contract, whichever is  
38 greater, and shall not be permitted to bid, or have a bid considered,

1 on any public works contract until such civil penalty has been paid in  
2 full to the director. If a contractor or subcontractor is found to  
3 have participated in a violation of the requirement to pay the  
4 prevailing rate of wage for a second time within a five-year period,  
5 the contractor or subcontractor shall be subject to the sanctions  
6 prescribed in this subsection and as an additional sanction shall not  
7 be allowed to bid on any public works contract for two years. Civil  
8 penalties shall be deposited in the public works administration  
9 account. If a previous or subsequent violation of a requirement to pay  
10 a prevailing rate of wage under federal or other state law is found  
11 against the contractor or subcontractor within five years from a  
12 violation under this section, the contractor or subcontractor shall not  
13 be allowed to bid on any public works contract for two years. A  
14 contractor or subcontractor shall not be barred from bidding on any  
15 public works contract if the contractor or subcontractor relied upon  
16 written information from the department to pay a prevailing rate of  
17 wage that is later determined to be in violation of this chapter. The  
18 civil penalty and sanctions under this subsection shall not apply to a  
19 violation determined by the director to be an inadvertent filing or  
20 reporting error. To the extent that a contractor or subcontractor has  
21 not paid the prevailing wage rate under a determination issued as  
22 provided in subsection (1) of this section, the unpaid wages shall  
23 constitute a lien against the bonds and retainage as provided herein  
24 and in RCW 18.27.040, 19.28.041, 39.08.010, and (~~60.28.010~~)  
25 60.28.011.

26 **Sec. 5.** RCW 39.76.020 and 1981 c 68 s 2 are each amended to read  
27 as follows:

- 28 RCW (~~39.76.010~~) 39.76.011 does not apply to the following:
- 29 (1) Interagency or intergovernmental transactions;
  - 30 (2) Amounts payable to employees or prospective employees of state  
31 agencies or local governmental units as reimbursement for expenses;
  - 32 (3) Belated claims for any time of delinquency after July 31  
33 following the second year of the fiscal biennium;
  - 34 (4) Claims subject to a good faith dispute, when before the date of  
35 timely payment, notice of the dispute is:
    - 36 (a) Sent by certified mail;
    - 37 (b) Personally delivered; or

1 (c) Sent in accordance with procedures in the contract;

2 (5) Delinquencies due to natural disasters, disruptions in postal  
3 or delivery service, work stoppages due to labor disputes, power  
4 failures, or any other cause resulting from circumstances clearly  
5 beyond the control of the unit of local government or state agency;

6 (6) Contracts entered before July 26, 1981; and

7 (7) Payment from any retirement system listed in RCW 41.50.030 and  
8 chapter 41.24 RCW.

9 **Sec. 6.** RCW 60.28.011 and 2007 c 494 s 504 and 2007 c 218 s 92 are  
10 each reenacted and amended to read as follows:

11 (1) Public improvement contracts shall provide, and public bodies  
12 shall reserve, a contract retainage not to exceed five percent of the  
13 moneys earned by the contractor as a trust fund for the protection and  
14 payment of: (a) The claims of any person arising under the contract;  
15 and (b) the state with respect to taxes imposed pursuant to Title 82  
16 RCW which may be due from such contractor.

17 (2) Every person performing labor or furnishing supplies toward the  
18 completion of a public improvement contract shall have a lien upon  
19 moneys reserved by a public body under the provisions of a public  
20 improvement contract. However, the notice of the lien of the claimant  
21 shall be given within forty-five days of completion of the contract  
22 work, and in the manner provided in RCW 39.08.030.

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

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

33 (b) Sixty days after completion of all contract work the public  
34 body must release and pay in full the amounts retained during the  
35 performance of the contract subject to the provisions of chapters 39.12  
36 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) A contractor may submit a bond for all or any portion of the  
26 contract retainage in a form acceptable to the public body and from a  
27 bonding company meeting standards established by the public body. The  
28 public body shall accept a bond meeting these requirements unless the  
29 public body can demonstrate good cause for refusing to accept it. This  
30 bond and any proceeds therefrom are subject to all claims and liens and  
31 in the same manner and priority as set forth for retained percentages  
32 in this chapter. The public body shall release the bonded portion of  
33 the retained funds to the contractor within thirty days of accepting  
34 the bond from the contractor. Whenever a public body accepts a bond in  
35 lieu of retained funds from a contractor, the contractor shall accept  
36 like bonds from any subcontractors or suppliers from which the  
37 contractor has retained funds. The contractor shall then release the



1 funds retained from the subcontractor or supplier to the subcontractor  
2 or supplier within thirty days of accepting the bond from the  
3 subcontractor or supplier.

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

21 (8) Whenever the department of transportation has contracted for  
22 the construction of two or more ferry vessels, sixty days after  
23 completion of all contract work on each ferry vessel, the department  
24 must release and pay in full the amounts retained in connection with  
25 the construction of the vessel subject to the provisions of RCW  
26 (~~60.28.020~~) 60.28.021 and chapter 39.12 RCW. However, the department  
27 of transportation may at its discretion condition the release of funds  
28 retained in connection with the completed ferry upon the contractor  
29 delivering a good and sufficient bond with two or more sureties, or  
30 with a surety company, in the amount of the retained funds to be  
31 released to the contractor, conditioned that no taxes shall be  
32 certified or claims filed for work on the ferry after a period of sixty  
33 days following completion of the ferry; and if taxes are certified or  
34 claims filed, recovery may be had on the bond by the department of  
35 revenue and the material suppliers and laborers filing claims.

36 (9) Except as provided in subsection (1) of this section,  
37 reservation by a public body for any purpose from the moneys earned by

1 a contractor by fulfilling its responsibilities under public  
2 improvement contracts is prohibited.

3 (10) Contracts on projects funded in whole or in part by farmers  
4 home administration and subject to farmers home administration  
5 regulations are not subject to subsections (1) through (9) of this  
6 section.

7 (11) This subsection applies only to a public body that has  
8 contracted for the construction of a facility using the general  
9 contractor/construction manager procedure, as defined under RCW  
10 39.10.210. If the work performed by a subcontractor on the project has  
11 been completed within the first half of the time provided in the  
12 general contractor/construction manager contract for completing the  
13 work, the public body may accept the completion of the subcontract.  
14 The public body must give public notice of this acceptance. After a  
15 forty-five day period for giving notice of liens, and compliance with  
16 the retainage release procedures in RCW 60.28.021, the public body may  
17 release that portion of the retained funds associated with the  
18 subcontract. Claims against the retained funds after the forty-five  
19 day period are not valid.

20 (12) Unless the context clearly requires otherwise, the definitions  
21 in this subsection apply throughout this section.

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

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

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

31 (d) "Public improvement contract" means a contract for public  
32 improvements or work, other than for professional services, or a work  
33 order as defined in RCW 39.10.210.

34 **Sec. 7.** RCW 60.28.040 and 1985 c 80 s 1 are each amended to read  
35 as follows:

36 The amount of all taxes, increases and penalties due or to become  
37 due under Title 82 RCW, from a contractor or the contractor's

1 successors or assignees with respect to a public improvement contract  
2 wherein the contract price is (~~twenty~~) thirty-five thousand dollars  
3 or more shall be a lien prior to all other liens upon the amount of the  
4 retained percentage withheld by the disbursing officer under such  
5 contract, except that the employees of a contractor or the contractor's  
6 successors or assignees who have not been paid the prevailing wage  
7 under such a public improvement contract shall have a first priority  
8 lien against the bond or retainage prior to all other liens. The  
9 amount of all other taxes, increases and penalties due and owing from  
10 the contractor shall be a lien upon the balance of such retained  
11 percentage remaining in the possession of the disbursing officer after  
12 all other statutory lien claims have been paid.

13 **Sec. 8.** RCW 60.28.080 and 1982 c 170 s 3 are each amended to read  
14 as follows:

15 (1) If any delay in issuance of notice to proceed or in  
16 construction following an award of any public construction contract is  
17 primarily caused by acts or omissions of persons or agencies other than  
18 the contractor and a preliminary, special or permanent restraining  
19 order of a court of competent jurisdiction is issued pursuant to  
20 litigation and the appropriate public contracting body does not elect  
21 to delete the completion of the contract as provided by RCW  
22 (~~60.28.010(3)~~) 60.28.011(7), the appropriate contracting body will  
23 issue a change order or force account directive to cover reasonable  
24 costs incurred by the contractor as a result of such delay. These  
25 costs shall include but not be limited to contractor's costs for wages,  
26 labor costs other than wages, wage taxes, materials, equipment rentals,  
27 insurance, bonds, professional fees, and subcontracts, attributable to  
28 such delay plus a reasonable sum for overhead and profit.

29 In the event of a dispute between the contracting body and the  
30 contractor, arbitration procedures may be commenced under the  
31 applicable terms of the construction contract, or, if the contract  
32 contains no such provision for arbitration, under the then obtaining  
33 rules of the American Arbitration Association.

34 If the delay caused by litigation exceeds six months, the  
35 contractor may then elect to terminate the contract and to delete the  
36 completion of the contract and receive payment in proportion to the  
37 amount of the work completed plus the cost of the delay. Amounts

1 retained and accumulated under RCW ((~~60.28.010~~)) 60.28.011 shall be  
2 held for a period of ((~~thirty~~)) forty-five days following the election  
3 of the contractor to terminate. Election not to terminate the contract  
4 by the contractor shall not affect the accumulation of costs incurred  
5 as a result of the delay provided above.

6 (2) This section shall not apply to any contract awarded pursuant  
7 to an invitation for bid issued on or before July 16, 1973.

8 NEW SECTION. Sec. 9. The following acts or parts of acts are each  
9 repealed:

10 (1) RCW 39.04.140 (Contracts affected by increase in price of  
11 petroleum products--Termination--Continuation with contracting agency  
12 sharing increased costs--Conditions) and 1974 ex.s. c 194 s 1;

13 (2) RCW 39.76.010 (Interest on unpaid public contracts--Timely  
14 payment) and 1981 c 68 s 1;

15 (3) RCW 60.28.010 (Retained percentage--Labor and material lien  
16 created--Bond in lieu of retained funds--Termination before  
17 completion--Chapter deemed exclusive--Release of ferry contract  
18 payments--Projects of farmers home administration) and 2007 c 218 s 91,  
19 1986 c 181 s 6, 1984 c 146 s 1, 1982 c 170 s 1, & 1981 c 260 s 14;

20 (4) RCW 60.28.020 (Excess over lien claims to contractor) and 2007  
21 c 218 s 93, 1975 1st ex.s. c 104 s 2, 1970 ex.s. c 38 s 2, 1967 ex.s.  
22 c 26 s 23, 1955 c 236 s 2, & 1921 c 166 s 2; and

23 (5) RCW 60.28.050 (Duties of disbursing officer upon final  
24 acceptance of contract) and 1982 c 170 s 2, 1970 ex.s. c 38 s 3, 1967  
25 ex.s. c 26 s 24, & 1955 c 236 s 5.

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