

SENATE BILL REPORT

SB 5190

As of February 7, 2013

Title: An act relating to public contracts for transportation improvement projects.

Brief Description: Concerning public contracts for transportation improvement projects.

Sponsors: Senators Eide, King, Frockt, Shin and Schlicher.

Brief History:

Committee Activity: Transportation: 2/06/13.

SENATE COMMITTEE ON TRANSPORTATION

Staff: Hayley Gamble (786-7452)

Background: Contract Retainage. Current state law requires that public improvement contract provisions include a contract retainage of no more than 5 percent of the monies earned by the contractor. The retainage is to be set aside as a trust fund in the event that claims arise under the contract or taxes are not paid by the contractor. This provision applies to the state, as well as to counties, cities, towns, districts, boards, and other public bodies. State law also permits prime contractors to hold a contract retainage of no more than 5 percent of monies earned by subcontractors or suppliers.

State law requires that all retainage be paid to the contractor within 60 days of completion of all contract work other than landscaping. Entities receiving federal transportation funds must comply with federal disadvantaged business enterprise (DBE) regulations, which require prime contractors to pay subcontractors in full by no later than 30 days after the subcontractor's work is satisfactorily completed. This is referred to as the DBE prompt payment requirement.

In 2011 the Legislature passed SB 1384 that exempted road projects funded with federal transportation funds from retainage requirements, in order to comply with DBE prompt payment requirements. Instead, a contract bond is used in the event of claims or unpaid taxes.

A contractor bond is a bond that must be provided by a contractor which guarantees the performance of the terms and conditions of a written contract, and the work the contractor has agreed to perform.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Employers on public works projects must pay prevailing wages, and after all of the work is complete, employers must submit an affidavit of wages paid. The forms are filed with the Department of Labor and Industries (L&I) and, when approved, are submitted by the employer to the agency administering the contract. A complaint concerning nonpayment of prevailing wage must be filed with L&I within 30 days of the acceptance date of the public works project.

Waiving Overhead Costs. All state agencies must charge any other public agency the full cost of any services or materials that the state agency provides. Further, all services rendered or property transferred between public entities must be paid for at its true and full value. Since 1993 the Washington State Department of Transportation (WSDOT) has entered into agreements with local government entities to mutually waive indirect costs associated with projects that the WSDOT performs for the local government entity or vice versa.

Summary of Bill: All public improvement contracts that are funded in whole or in part by federal transportation funds are added to the types of contracts exempt from the contract retainage requirement. Instead of contract retainage, the contract bond is used in the event of claims, increases, penalties, or unpaid taxes. The contract bond must remain in full force and effect until, at a minimum, all claims filed in compliance with the contractor's bond requirements are resolved.

The state's specific authority to collect taxes imposed pursuant to RCW Titles 50 on unemployment compensation, 51 on industrial insurance, and 82 on excise taxes from the contract retainage for public improvement contracts is expanded to include increases and penalties.

Taxes, increases, and penalties incurred under RCW Titles 50, 51, and 82 are included in the items that can be recovered from the contract bond, and the state is exempt from the 30-day notice requirement that otherwise applies for claims on a contract bond. The Department of Revenue, the Employment Security Department, and L&I must be notified within 30 days of the completion of any public works contract with a value of more than \$35,000.

On a public works contract that is exempt from the contract retainage requirement, the affidavit of wages paid must be submitted to the public entity disbursing the contract funds prior to final acceptance of the public works contract. The restriction preventing prevailing wage filings by a subcontractor from being accepted sooner than 31 days after the acceptance of the public works project is removed.

The definition of an urban public transportation system is modified to include a public system operated by any public agency, and urban public transportation systems are added to the public entities that are granted the authority to enter into cooperative agreements related to various transportation projects.

Public agencies and WSDOT may enter into reciprocal agreements to mutually waive indirect costs associated with a project or work. The projects or work must be specified in the agreement, and may be for an initial term of no more ten years.

Appropriation: None.

Fiscal Note: Requested on February 4, 2013.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill is the product of a Governor Gregoire directed process to make local government processes more efficient. This will allow compliance with some audit findings. Other elements of the bill align contract retainage with performance bonds. The Attorney General's Office has stated that waiving indirect costs is not allowed under current law. Direct costs will always be charged. There are efficiencies for local government in this bill.

OTHER: The parts of this bill designed to comply with federal law are fine. We have concerns about the expansion of language allowing increases to be collected from the contract bonds and retainage. There are concerns about the state having a right of action; there is no procedure for resolving concerns about contract claims laid out in the bill. There are concerns about section eight of the bill, as it seems to indicate that the state may be in more competition with the private sector for work. There is no competition requirement. It is not clear what indirect costs means, and if it will make private bidders less competitive. Line three on page six which requires additional items to be paid from surety bonds, is a surety concern for Liberty Mutual.

Persons Testifying: PRO: Julie Murray, Office of Financial Management.

OTHER: Mike Ennis, Assn. of WA Business; Duke Schaub, Assn. of General Contractors; Cliff Webster, Architects & Engineers Legislative Council; Gary Strannigan, Liberty Mutual Insurance.