

HOUSE BILL REPORT

HB 2852

As Reported by House Committee On: Capital Budget

Title: An act relating to attorneys' fees on public works contracts.

Brief Description: Concerning attorneys' fees on public works contracts.

Sponsors: Representatives Graves and Haler.

Brief History:

Committee Activity:

Capital Budget: 1/30/18, 2/5/18 [DPS].

Brief Summary of Substitute Bill

- Makes statutory provisions relating to attorneys' fees the exclusive remedy for the recovery of attorneys' fees in cases arising from public works contracts.

HOUSE COMMITTEE ON CAPITAL BUDGET

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 17 members: Representatives Tharinger, Chair; Doglio, Vice Chair; Peterson, Vice Chair; DeBolt, Ranking Minority Member; Smith, Assistant Ranking Minority Member; Dye, Eslick, MacEwen, Macri, Morris, Reeves, Riccelli, Ryu, Sells, Steele, Stonier and Walsh.

Staff: Steve Masse (786-7115).

Background:

Public Works Contract Bond.

"Public works" means all work, construction, alteration, repair, or improvement other than ordinary maintenance, executed at the cost of the state or of any municipality, or which is by law a lien or charge on any property in the jurisdiction. A bond is required for public works contracts over \$150,000. For public works contracts of \$150,000 or less the public body may accept 10 percent retainage in lieu of the bond.

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.

A performance bond is a guarantee that a contract for public works will be carried out according to the drawings and specification. A performance bond is typically for the full value of the contract and provided by a surety. It also protects the state or municipality from a contractor default, bankruptcy, or failure to perform. Payment from the performance bond is available only to the project owner and there cannot be other claims against it.

A payment bond is a guarantee that the contractor pays the subcontractors and the material supplier will be paid for work or materials provided for a public works project.

Attorneys' Fees.

A. Statutory Attorneys' Fees.

In an action arising out of a public works contract, the prevailing party is entitled to reasonable attorneys' fees. To be eligible for attorneys' fees, the prevailing party must first make an offer of settlement to the other party. The plaintiff is the prevailing party if the recovery is greater than or equal to the amount offered in settlement by the plaintiff. The defendant is the prevailing party if the recovery is less than or equal to the amount offered in settlement by the defendant.

A claimant making a claim under a performance bond or payment bond must file written notice of the claim. In a suit under the bond made after 30 days of the notice, the claimant is statutorily entitled to reasonable attorneys' fees.

B. Common Law Attorneys' Fees.

In *Olympic Steamship Co. v. Centennial Ins. Co.*, the Washington Supreme Court (Court) ruled that a plaintiff has an equitable right to attorneys' fees if an insurer compels the plaintiff to assume the burden of legal action to obtain the full benefit of his or her insurance contract. In *King County v. Vinci Construction Grands Projects/Parsons RCI/Frontier-Kemper*, the Court ruled that: (1) the ruling in *Olympic Steamship* applies to suretyships and performance bonds; and (2) the statutory provisions relating to attorneys' fees in actions arising from public works contracts are not the exclusive remedy for the award of attorneys' fees in cases involving public works.

Summary of Substitute Bill:

Actions arising from public works contracts where the prevailing party is entitled to reasonable attorneys' fees include actions under performance bonds or payment bonds. The right to statutory attorneys' fees in such actions is the exclusive remedy for the recovery of attorneys' fees and other costs in actions arising from public works contracts, except as provided in the statute regarding attorneys' fees in claims under a performance or payment bond, by the terms of a performance or payment bond, or by contract or other statute.

Substitute Bill Compared to Original Bill:

The substitute bill:

- makes the provisions regarding attorneys' fees in actions arising from public works contracts the exclusive remedy for recovery of attorneys' fees and costs in such actions, instead of the exclusive remedy in all disputes; and
 - allows the provisions regarding attorneys' fees in such actions to be superseded by contract or statute.
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Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) It is not good public policy to award attorneys' fees when a settlement is agreed to. This restores the incentive to having a settlement and no attorneys' fees awarded.

(Opposed) None.

(Other) Prior to the court case in a dispute involving performance and payment bonds, the parties were incentivized to settle, the incentive was the possible award of attorney fees. The recent Supreme Court case expanded from just insurance contract to a surety, which involves a third party, and expanded the decision to public works contracts. A home insurer has only one agreement with the insurer, in public works there are several parties involved. The Supreme Court case makes it possible to award attorney fees without attempting to settle. This is not good public policy, there should be incentives to settle.

Persons Testifying: (In support) Representative Graves, prime sponsor.

(Other) Cliff Webster and Lindsay Watkins, American Insurance Association; and Jerry VanderWood, Associated General Contractors.

Persons Signed In To Testify But Not Testifying: None.