

FINAL BILL REPORT

SHB 1736

C 223 L 92
Synopsis As Enacted

Brief Description: Establishing a system for payment for works of improvement on real property.

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

Senate Committee on Commerce & Labor

Background: Public agencies are required to withhold a retainage of up to 5 percent of the money earned by a contractor on a public works project. Retainage is held as a trust fund for the protection of persons, subcontractors, and material suppliers who perform labor or furnish materials for the public works project. Any of these persons, subcontractors, or suppliers with claims against the retainage must file a notice of a lien within 30 days of completion and acceptance of the work.

At any time after 50 percent of the public works project has been completed and satisfactory progress is being made, the agency may make partial payments of money that would otherwise subsequently be paid in full. The agency may not, however, reduce retainage to less than 5 percent of the amount earned by the contractor, except that at the contractor's request, the retainage may be reduced to 100 percent of the value of the work remaining on the project. The agency is permitted to release the full amount of the retainage 30 days after completion and acceptance of work other than landscaping, subject to the payment of taxes.

If a state agency or unit of local government fails to make timely payment under a written contract for public works, personal services, goods and services, equipment, and travel, the agency must pay interest at 1 percent per month. Payment is timely if the payment is mailed or available on the date specified in the applicable contract, or, if no date is specified, within 30 days of receipt of the invoice or the goods or services, whichever is later. If amounts are required to be withheld under state or federal law, payment is timely if mailed or made available on the date the amount may be released under the applicable law.

Contractors and subcontractors may withhold retainage of up to 5 percent from the money earned by other subcontractors. There are no statutory provisions, however, regulating the timeliness of payments made between contractors and subcontractors on construction projects.

Summary: New provisions are added governing retainage under, and timely payments on, public works contracts entered into on or after September 1, 1992. The old provisions enacted before September 1, 1992, continue to apply to contracts entered into before September 1, 1992.

The new provisions for contracts entered into on or after September 1, 1992, are similar to the old provisions with technical and clarifying changes and with the following major changes.

Payment of retainage on public works: The new provisions continue the requirement that public agencies retain up to 5 percent of the contractor's earnings on public works projects, but new language is added that prohibits a public agency from holding retainage for any purpose except for the payment of labor, materials, and taxes, from the moneys earned by a contractor by fulfilling his or her responsibilities under the contract.

In the new provisions, the various time periods for filing notices and for timely release of retainage all begin at completion of the work, and not at completion and acceptance of the work as required under the old law. The new provisions also allow a 45-day period for filing notice of liens against the retainage, rather than the 30-day filing period allowed in the old law. After the 45-day period has expired for filing a notice of a lien against the retainage, a public agency may withhold from retainage any amounts for claims that the agency may have against the contractor, with the balance to be paid to the contractor.

Under the old law, a public agency is authorized to release retainage 30 days after completion and acceptance of the work, other than landscaping, subject to the payment of taxes. Under the new provisions, after completion of all contract work other than landscaping, the contractor may request release of the retainage; after 60 days the agency is required to pay the full amount of the retainage, other than retainage for landscaping, subject to payment of taxes and prevailing wages. Sixty days after all contract work is completed, the public agency is required to release the full amount of the retainage, subject to payment of taxes and prevailing wages. The new provisions do not contain the old law's language that requires at least 50 percent of the original contract work to be completed before partial

payments may be made, and that prohibits reduction of the retainage to less than 5 percent of the amount earned by the contractor.

Under the old law, if an unreasonable delay results in termination of a public works project before it is entirely completed, retainage must be held for 30 days after acceptance of the portion of the project completed. The new provisions require the retainage to be held for 60 days following completion of that portion of the work.

Under the old law, for construction of two or more ferry vessels, the Department of Transportation is permitted to release retainage 30 days after completion and final acceptance of all contract work, subject to payment of taxes. The new provisions require the department to release the retainage 60 days after completion of the contract work, subject to payment of taxes and prevailing wages.

Requirements for timely payment - public agencies: Under the new provisions, school districts are specifically made subject to the requirements for timely payment by state agencies and units of local government on written contracts for public works, personal services, goods and services, equipment, and travel. The public agencies must mail the payment or make it available on the date specified in the contract, but not later than 30 days of receipt of a properly completed invoice or receipt of the goods or services, whichever is later, unless the provisions apply that govern withholding of payment for unsatisfactory performance. In the new provisions, if a contract is funded by grant or federal money, the public agency must make payment within 30 days of receiving the grant or federal money, if the money is received after a payment request that complies with the contract.

The new provisions do not include language addressing the timely payment of amounts required to be withheld under state or federal law. Instead, the new provisions require that if payment on a written public works contract is withheld for unsatisfactory performance or because the request fails to comply with the contract, the public agency must give written notice to the prime contractor within eight working days after receipt of the payment request. The notice must state why the payment is being withheld and what remedial actions must be taken. If the notice does not comply with these requirements, the agency must pay interest from the ninth working day after receipt of the payment request until the contractor receives notice that complies. Within 30 days after the prime contractor satisfactorily

completes these remedial actions, the withheld payment must be made, or interest accrues from the thirty-first day.

Requirements for timely payment - contractors: New provisions are added that govern timely payments between contractors and subcontractors. Contractors and subcontractors must pay the amounts due to other subcontractors no later than 10 days after money is received for work performed on a public works project. If there is a good faith dispute over any amount due, the state or municipality or the contractor may withhold up to 150 percent of the disputed amount. Persons not a party to the dispute are entitled to prompt payment of their portion of a draw, progress payment, final payment, or released retainage.

If the prime contractor discovers, after making a payment request to the public agency but before paying the subcontractor, that the subcontractor's performance is unsatisfactory, the prime contractor may withhold the amount allowed under the subcontract and must give notice to the subcontractor and the public agency. The subcontractor must then be paid within eight days after satisfactorily completing the remedial work. If the subcontractor is not notified or paid as required, the prime contractor must pay interest on the withheld amounts from the eighth working day.

Other provisions: In addition to other legal remedies, any person from whom funds have been withheld in violation of the act is entitled to interest at the highest rate allowable under the state usury laws. In a law suit to collect withheld funds, the prevailing party is entitled to costs and attorneys' fees.

The rights provided in the act may not be waived by the parties and a contract provision that provides for waiver is against public policy.

Votes on Final Passage:

House	93	2	
Senate	48	0	(Senate amended)
			(House refused to concur)
Senate	49	0	(Senate amended)
House	95	0	(House concurred)

Effective: September 1, 1992