

HOUSE BILL REPORT

SHB 1736

As Amended by the Senate

Title: An act relating to payment for work of improvement on real property.

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

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

Brief History:

Reported by House Committee on:
Commerce & Labor, March 5, 1991, DPS;
Passed House, March 18, 1991, 98-0;
Passed House, February 11, 1992, 93-2;
Amended by Senate.

**HOUSE COMMITTEE ON
COMMERCE & LABOR**

Majority Report: *That Substitute House Bill No. 1736 be substituted therefor, and the substitute bill do pass.*
Signed by 11 members: Representatives Heavey, Chair; Cole, Vice Chair; Fuhrman, Ranking Minority Member; Lisk, Assistant Ranking Minority Member; Franklin; Jones; R. King; O'Brien; Prentice; Vance; and Wilson.

Staff: Chris Cordes (786-7117).

Background: There is no requirement in Washington that funds paid for a construction project to the person in charge of the project be used to pay for the materials or labor used in the project. One method to force payment to contractors, subcontractors, material suppliers, or persons providing labor or services for a project may be to place a lien against the property being improved.

Summary of Bill: Money released to or obtained by an owner, developer, prime contractor, subcontractor, or other person in charge of a public or private construction project is held in trust for the benefit of persons making the payment and persons who provided the labor or furnished materials, equipment, or professional services in connection with the project. Separate accounting of the funds is not required

and commingling the trust funds with other money is not a violation of the act.

The use of trust money for any purpose other than to pay the persons for whom it is held in trust is prima facie evidence in a civil law suit of a trust violation and an intent to defraud. The mishandling of these funds is a violation of the Consumer Protection Act.

Owners must pay prime contractors, and contractors must pay the amounts due to the other contractors and suppliers no later than 10 days after receipt of the money from which payment is to be made.

If there is a good faith dispute over any amount due, the person responsible for making payment may withhold up to 150 percent of the disputed amount.

The owner, contractor, or subcontractor may retain funds due to other contractors, suppliers, or professional services providers as security for completion of the work. Except with respect to retainage held for improvements made to single family residences, retainage is also held in trust and must be released no later than 60 days from the date of substantial completion of the project. If a good faith dispute arises over the release of the retainage, the retainer may withhold up to 150 percent of the estimated value of the issue in dispute.

In addition to other legal remedies, any person from whom funds have been withheld in violation of the act is entitled to 12 percent interest or the amount currently allowable under the state usury laws, whichever is greater, plus 1 1/2 percent per month. In a law suit to collect withheld funds, the prevailing party is entitled to costs and attorneys' fees.

It is against public policy for any party to require another party to waive the requirements of the act.

EFFECT OF SENATE AMENDMENT(S): The Senate amendment strikes the provisions of the substitute bill relating to timely payment and trust responsibilities on public and private construction projects and adds the following provisions for timely payment on public works projects:

(1) Payment of retainage on public works

School districts and commissions are added as public bodies subject to the public works retainage law. Public bodies may not, for any purpose, retain funds exceeding the 5

percent permitted as a trust fund for laborers, subcontractors, suppliers, and the state.

The time for filing notice of a lien against the public work retainage for persons performing labor and furnishing supplies is changed from 30 days to 45 days from completion of work other than landscaping.

Provisions are deleted that permit a contractor to request reduction of the required 5 percent retainage to 100 percent of the value of the remaining work on the project.

Provisions are deleted that permit a public agency to release retainage 30 days after completion and acceptance of the work. Instead, after completion of all contract work other than landscaping, the contractor may request release of the retainage, and within 60 days the agency must 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 body must release the full amount of the retainage.

The time limitations for the public body to hold retainage are removed. If an unreasonable delay results in termination of the project before completion, then retainage on the completed portion of the project must be held for 45 days, rather than 30 days, following the completion.

The requirements for retainage payments on the construction of ferry vessels are changed to require the release of retainage 60 days, rather than 30 days, after completion of the contract work, subject to prevailing wage requirements.

After the 45-day period has expired for filing liens 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.

(2) Requirements for timely payment - public agencies

The requirement for state agencies and units of local government to pay interest at 1 percent per month on written contracts for public works, personal services, goods and services, equipment, and travel is changed. If a state agency, county, city, town, school district, board, commission, or other public body does not make timely payments, then the agency is liable for interest at the highest rate allowed under the state usury laws.

For payment to be timely, the payment must be available as specified in the contract, or if no date is specified, then be available not later than 30 days after receipt of a

properly completed invoice or receipt of the goods or services. However, if a contract is funded by grant or federal money, the public body must make payment within 30 days of receiving the grant or federal money, if the money is received after the payment request.

The provision for making timely payment when retainage is required under state or federal law is deleted. New provisions require that if payment on written public works contracts 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. 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 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.

If the prime contractor discovers, before paying the subcontractor, that the subcontractor's performance is unsatisfactory, the prime contractor may withhold the amount 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 paid as required, the prime contractor must pay interest on the withheld amounts from the eighth working day.

(2) Requirements for timely payment - contractors

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 work. 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.

(3) 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.

The act takes effect September 1, 1992, and applies to all public works contracts entered into on or after September 1, 1992.

Fiscal Note: Not requested.

Effective Date: The act takes effect September 1, 1991, and applies to all construction contracts entered into on or after September 1, 1991.

Testimony For: A task force in the Senate has been working on this issue for several years. This proposal was reached after many hours of negotiation and compromise by the parties. The object of this proposal is preventive: to reduce the number of construction liens by requiring prompt pay on construction projects. With this legislation, the parties would have incentives to use the money for a project as the payors intended. However, one provision deleted in the substitute bill is important to protect subcontractors and should be retained. This provision would prohibit clauses in construction contracts that make the subcontractors payment conditioned on whether the general contractor is paid.

Testimony Against: None.

Witnesses: David Morgan (in favor); Doug Bohlke, Sheet Metal Contractors (in favor); Duke Schaub, Associated General Contractors (in favor of substitute bill); Irv Dellinger, Western Building Materials (in favor of substitute bill); Larry Stevens, National Electrical Contractors Association (in favor of original bill, with concerns about substitute bill); and Bob Dilger, Washington Building and Construction Trades Council (in favor).

VOTE ON FINAL PASSAGE:

Yeas 98