

HOUSE BILL REPORT

ESB 6404

*As Reported By House Committee on:
Commerce & Labor*

Title: An act relating to payment for work of improvement on public works projects.

Brief Description: Ensuring payment for work of improvement on real property.

Sponsor(s): Senators McMullen, Bluechel and McCaslin.

Brief History:

Reported by House Committee on:
Commerce & Labor, February 28, 1992, DPA.

**HOUSE COMMITTEE ON
COMMERCE & LABOR**

Majority Report: *Do pass as amended.* Signed by 8 members: Representatives Heavey, Chair; G. Cole, Vice Chair; Lisk, Assistant Ranking Minority Member; Jones; R. King; Prentice; Vance; and Wilson.

Minority Report: *Do not pass.* Signed by 2 members: Representatives Franklin and O'Brien.

Staff: Chris Cordes (786-7117).

Background: Public agencies are required to withhold up to 5 percent of the money earned by a contractor on a public works project as retainage. 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. Persons with claims against the retainage must file a notice of a lien within 30 days of completion and acceptance of the work. The agency is permitted to release the retainage after the 30-day period has expired.

If a public agency 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.

There are no statutory provisions regulating the timeliness of payments made between contractors on construction projects.

Summary of Amended Bill:

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, the agency must pay the full amount of the retainage 60 days after completion of the project, subject to payment of taxes and prevailing wages.

The contractor's options for holding retainage are changed to permit the public agency to retain the funds or deposit the funds in a bank account, or place the funds in escrow, until 45 days, rather than 30 days, following completion of the work. If an unreasonable delay results in termination of the project before completion, then retainage on the completed portion of the project must be paid 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.

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.

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.

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.

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.

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

Amended Bill Compared to Engrossed Bill: The striking amendment includes the provisions of the engrossed bill with technical changes, and makes the following substantive

changes: (1) a public body may not hold retainage for any purpose, other than the retainage of 5 percent that is permitted as a trust for laborers, subcontractors, suppliers, and the state; (2) in the case of a dispute over the amount due on a payment, the public body is authorized, in addition to the prime contractor or subcontractor, to withhold up to 150 percent of the disputed amount; and (3) the provision is deleted that makes a contract provision unenforceable if it requires the receipt of construction funds as a condition that must be fulfilled before the owner or contractor has any financial obligation to those who provided labor or materials for the project.

Fiscal Note: Requested February 3, 1992.

Effective Date of Amended Bill: The bill takes effect on September 1, 1992, and sections 1 through 6 of the bill apply to all contracts relating to the construction of works of improvement entered into on or after September 1, 1992.

Testimony For: The issue of ensuring prompt payment on construction projects has been in discussion for several years. Because it appears unlikely that a compromise on both private sector and public sector issues will be reached this session, the bill should be acted on with only the public sector sections. The bill provides needed procedures for prompt payment by public agencies. However, there are several amendments that are needed to correct technical problems in the language as drafted.

Testimony Against: It is a matter of fairness to provide prompt payment procedures in both the public and private sectors. The bill began as a private sector bill and the public sector issues were added to it because of the fairness argument. The bill should not be acted on until the parties negotiate in good faith over the private sector issues. There is room for compromise by excluding residential construction and by deleting the trust provisions.

Witnesses: (In favor): Senator Pat McMullen, prime sponsor; Mark Triplett, Building Industry Association of Washington; and Duke Schaub, Associated General Contractors. (Support with amendments): Jim Bush, Department of Transportation. (Opposed): Larry Stevens, United Subcontractors Association; Dave Morgan; and Doug Bohlke, Sheet Metal and Air Conditioning Contractors.