
ENGROSSED SENATE BILL 6404

State of Washington 52nd Legislature 1992 Regular Session

By Senators McMullen, Bluechel and McCaslin

Read first time 01/29/92. Referred to Committee on Commerce & Labor.

1 AN ACT Relating to payment for work of improvement on public works
2 projects; amending RCW 39.76.010, 60.28.010, 60.28.020, and 60.28.050;
3 adding a new section to chapter 39.04 RCW; creating a new section;
4 prescribing penalties; and providing an effective date.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 **Sec. 1.** RCW 39.76.010 and 1981 c 68 s 1 are each amended to read
7 as follows:

8 (1) Except as provided in RCW 39.76.020, every state agency (~~and unit~~
9 ~~of local government~~) county, city, town, school district, board,
10 commission, or any other public body shall pay interest at the (~~rate~~
11 ~~of one percent per month, but at least one dollar per month~~) highest
12 rate allowed under RCW 19.52.025, on amounts due on written contracts
13 for public works, personal services, goods and services, equipment, and

1 travel, whenever the state agency or unit of local government fails to
2 make timely payment.

3 (2) For purposes of this section, payment shall be timely if:

4 (a) Except under (b), (c), or (d) of this subsection, a check or
5 warrant is mailed or is available on the date specified for the amount
6 specified in the applicable contract documents ((or, if no date is
7 specified, within)) but not later than thirty days of receipt of a
8 properly completed invoice or receipt of goods or services, whichever
9 is later.

10 (b) ~~((For any amount which is required to be withheld under state~~
11 ~~or federal law, a check or warrant is mailed or is available in the~~
12 ~~proper amount on the date the amount may be released under the~~
13 ~~applicable law)) On written contracts for public works, when part or
14 all of a payment is going to be withheld for unsatisfactory performance
15 or if the payment request made does not comply with the requirements of
16 the contract, the public body shall notify the prime contractor in
17 writing within eight working days after receipt of the payment request
18 stating specifically why part or all of the payment is being withheld
19 and what remedial actions must be taken by the prime contractor to
20 receive the withheld amount.~~

21 (c) If the notification by the public body required by (b) of this
22 subsection does not comply with (b) of this subsection, the public body
23 shall pay the interest and penalty under subsection (1) of this section
24 from the ninth working day after receipt of the initial payment request
25 until the contractor receives the notice that does comply with (b) of
26 this subsection.

27 (d) If part or all of a payment is withheld under (b) of this
28 subsection, the public body shall pay the withheld amount within thirty
29 calendar days after the prime contractor satisfactorily completes the
30 remedial actions identified in the notice. If the withheld amount is

1 not paid within the thirty calendar days, the public body shall pay
2 interest under subsection (1) of this section from the thirty-first
3 calendar day until the date paid.

4 **Sec. 2.** RCW 60.28.010 and 1986 c 181 s 6 are each amended to read
5 as follows:

6 (1) Contracts for public improvements or work, other than for
7 professional services, by the state, or any county, city, town, school
8 district, commission, district, board, or other public body, herein
9 referred to as "public body", shall provide, and there shall be
10 reserved by the public body from the moneys earned by the contractor on
11 estimates during the progress of the improvement or work, a sum not to
12 exceed five percent, ~~((said))~~ this sum to be retained by the state,
13 county, city, town, district, board, or other public body, as a trust
14 fund for the protection and payment of any person or persons, mechanic,
15 subcontractor or materialman who ~~((shall))~~ performs any labor upon such
16 a contract or the doing of ~~((said))~~ the work, and all persons who
17 ~~((shall))~~ supply such a person or persons or subcontractors with
18 provisions and supplies for the carrying on of ~~((such))~~ the work, and
19 the state with respect to taxes imposed pursuant to Title 82 RCW which
20 may be due from ~~((such))~~ the contractor. Every person performing labor
21 or furnishing supplies toward the completion of ~~((said))~~ the
22 improvement or work ~~((shall have))~~ has a lien upon ~~((said))~~ the moneys
23 so reserved: PROVIDED, That ~~((such))~~ the notice of the lien of
24 ~~((such))~~ the claimant ~~((shall be))~~ is given within forty-five days of
25 completion of all of the contract work other than landscaping, and in
26 the manner ((and within the time)) provided in RCW 39.08.030 ((as now
27 existing and in accordance with any amendments that may hereafter be
28 made thereto))): PROVIDED FURTHER, That if the board, council,

1 commission, trustees, officer, or body acting for the state, county, or
2 municipality or other public body(†):

3 (a) At any time after fifty percent of the original contract work
4 has been completed, (if it) finds that satisfactory progress is being
5 made, may make any of the partial payments which would otherwise be
6 subsequently made in full; but in no event (shall) may the amount to
7 be retained be reduced to less than five percent of the amount of the
8 moneys earned by the contractor(†—PROVIDED, That the contractor may
9 request that retainage be reduced to one hundred percent of the value
10 of the work remaining on the project)); and

11 (b) ((thirty)) Sixty days after completion ((and acceptance)) of
12 all contract work other than landscaping, ((may)) the public body must
13 release and pay in full the amounts retained during the performance of
14 the contract (other than continuing retention of five percent of the
15 moneys earned for landscaping) subject to the provisions of RCW
16 60.28.020, 60.28.050, and chapter 39.12 RCW.

17 (2) The moneys reserved under the provisions of subsection (1) of
18 this section, at the option of the contractor, shall be:

19 (a) Retained in a fund by the public body until ((thirty)) forty-
20 five days following ((the final acceptance of said improvement or work
21 as completed)) completion of all contract work;

22 (b) Deposited by the public body in an interest bearing account in
23 a bank, mutual savings bank, or savings and loan association, not
24 subject to withdrawal until ((after the final acceptance)) forty-five
25 days following completion of ((said)) the improvement or work as
26 completed, or until agreed to by both parties(†—PROVIDED, That)).
27 Interest on ((such)) the account shall be paid to the contractor; or

28 (c) Placed in escrow with a bank or trust company by the public
29 body until ((thirty)) sixty days following ((the final acceptance))
30 completion of ((said)) the improvement ((or work as completed)). When

1 the moneys reserved are (~~to be~~) placed in escrow, the public body
2 shall issue a check representing the sum of the moneys reserved payable
3 to the bank or trust company and the contractor jointly. (~~Such~~) This
4 check shall be converted into bonds and securities chosen by the
5 contractor and approved by the public body and (~~such~~) the bonds and
6 securities shall be held in escrow. Interest on (~~such~~) the bonds and
7 securities shall be paid to the contractor as the (~~said~~) interest
8 accrues.

9 (3) The contractor or subcontractor may withhold payment of not
10 more than five percent from the moneys earned by any subcontractor or
11 sub-subcontractor or supplier contracted with by the contractor to
12 provide labor, materials, or equipment to the public project. Whenever
13 the contractor or subcontractor reserves funds earned by a
14 subcontractor or sub-subcontractor or supplier, the contractor or
15 subcontractor shall pay interest to the subcontractor or sub-
16 subcontractor or supplier at a rate equal to that received by the
17 contractor or subcontractor from reserved funds.

18 (4) With the consent of the public body the contractor may submit
19 a bond for all or any portion of the amount of funds retained by the
20 public body in a form acceptable to the public body. (~~Such~~) This
21 bond and any proceeds therefrom (~~shall be made~~) are subject to all
22 claims and liens and in the same manner and priority as set forth for
23 retained percentages in this chapter. The public body shall release
24 the bonded portion of the retained funds to the contractor within
25 thirty days of accepting the bond from the contractor. Whenever a
26 public body accepts a bond in lieu of retained funds from a contractor,
27 the contractor shall accept like bonds from any subcontractors or
28 suppliers from which the contractor has retained funds. The contractor
29 shall then release the funds retained from the subcontractor or

1 supplier to the subcontractor or supplier within thirty days of
2 accepting the bond from the subcontractor or supplier.

3 (5) If the public body administering a contract, after a
4 substantial portion of the work has been completed, finds that an
5 unreasonable delay will occur in the completion of the remaining
6 portion of the contract for any reason not the result of a breach
7 thereof, it may, if the contractor agrees, delete from the contract the
8 remaining work and accept as final the improvement at the stage of
9 completion then attained and make payment in proportion to the amount
10 of the work accomplished and in ~~((such))~~ this case any amounts retained
11 and accumulated under this section shall be held for a period of
12 ~~((thirty))~~ forty-five days following ~~((such—acceptance))~~ the
13 completion. In the event that the work ~~((shall have been))~~ is
14 terminated before final completion as provided in this section, the
15 public body may thereafter enter into a new contract with the same
16 contractor to perform the remaining work or improvement for an amount
17 equal to or less than the cost of the remaining work as was provided
18 for in the original contract without advertisement or bid. The
19 provisions of this chapter ~~((60.28 RCW shall be deemed))~~ are exclusive
20 and ~~((shall))~~ supersede all provisions and regulations in conflict
21 herewith.

22 (6) Whenever the department of transportation has contracted for
23 the construction of two or more ferry vessels, ~~((thirty))~~ sixty days
24 after completion ~~((and final acceptance))~~ of all contract work on each
25 ferry vessel, the department ~~((may))~~ must release and pay in full the
26 amounts retained in connection with the construction of ~~((such))~~ the
27 vessel subject to the provisions of RCW 60.28.020 and chapter 39.12
28 RCW: PROVIDED, That the department of transportation may at its
29 discretion condition the release of funds retained in connection with
30 the completed ferry upon the contractor delivering a good and

1 sufficient bond with two or more sureties, or with a surety company, in
2 the amount of the retained funds to be released to the contractor,
3 conditioned that no taxes shall be certified or claims filed for work
4 on ((such)) the ferry after a period of ((thirty)) forty-five days
5 following ((final acceptance)) completion of ((such)) the ferry; and if
6 ((such)) taxes are certified or claims filed, recovery may be had on
7 ((such)) the bond by the department of revenue and the materialmen and
8 laborers filing claims.

9 (7) Contracts on projects funded in whole or in part by farmers
10 home administration and subject to farmers home administration
11 regulations ((shall)) are not ((be)) subject to subsections (1) through
12 (6) of this section.

13 **Sec. 3.** RCW 60.28.020 and 1975 1st ex.s. c 104 s 2 are each
14 amended to read as follows:

15 After the expiration of the ((thirty)) forty-five day period, and after
16 receipt of the department of revenue's certificate, and the public body
17 is satisfied that the taxes certified as due or to become due by the
18 department of revenue are discharged, and the claims of materialmen and
19 laborers who have filed their claims, together with a sum sufficient to
20 defray the cost of foreclosing the liens of such claims, and to pay
21 attorneys' fees, have been paid, the public body may withhold from the
22 remaining retained amounts for claims the public body may have against
23 the contractor and shall pay the balance, if any, to the contractor the
24 fund retained by it or release to the contractor the securities and
25 bonds held in escrow.

26 If such taxes have not been discharged or the claims, expenses, and
27 fees have not been paid, the public body shall either retain in its
28 fund, or in an interest bearing account, or retain in escrow, at the
29 option of the contractor, an amount equal to such unpaid taxes and

1 unpaid claims together with a sum sufficient to defray the costs and
2 attorney fees incurred in foreclosing the lien of such claims, and
3 shall pay, or release from escrow, the remainder to the contractor.

4 **Sec. 4.** RCW 60.28.050 and 1982 c 170 s 2 are each amended to read
5 as follows:

6 Upon (~~final acceptance~~) completion of a contract, the state, county
7 or other municipal officer charged with the duty of disbursing or
8 authorizing disbursement or payment of such contracts shall forthwith
9 notify the department of revenue of the completion of contracts over
10 twenty thousand dollars. Such officer shall not make any payment from
11 the retained percentage fund or release any retained percentage escrow
12 account to any person, until he has received from the department of
13 revenue a certificate that all taxes, increases and penalties due from
14 the contractor, and all taxes due and to become due with respect to
15 such contract have been paid in full or that they are, in the
16 department's opinion, readily collectible without recourse to the
17 state's lien on the retained percentage.

18 NEW SECTION. **Sec. 5.** A new section is added to chapter 39.04 RCW
19 to read as follows:

20 (1) When payment is received by a contractor or subcontractor for work
21 performed on a public work, the contractor or subcontractor shall pay
22 to any subcontractor not later than ten days after the receipt of the
23 payment, amounts allowed the contractor on account of the work
24 performed by the subcontractor, to the extent of each subcontractor's
25 interest therein.

26 (2) In the event of a good faith dispute over all or any portion of
27 the amount due on a payment from the prime contractor or subcontractor
28 to a subcontractor, then the prime contractor or subcontractor may

1 withhold no more than one hundred fifty percent of the disputed amount.
2 Those not a party to a dispute are entitled to full and prompt payment
3 of their portion of a draw, progress payment, final payment, or
4 released retainage.

5 (3) In addition to all other remedies, any person from whom funds
6 have been withheld in violation of this section shall be entitled to
7 receive from the person wrongfully withholding the funds, for every
8 month and portion thereof that payment including retainage is not made,
9 interest at the highest rate allowed under RCW 19.52.025. In any
10 action for the collection of funds wrongfully withheld, the prevailing
11 party shall be entitled to costs of suit and reasonable attorneys'
12 fees.

13 NEW SECTION. **Sec. 6.** (1) It is against public policy for any
14 party to require any other party to waive any provision of this act.

15 (2) It is against public policy to enforce a contract provision
16 which requires the receipt of construction funds by the owner, prime
17 contractor, or subcontractor, as a condition that must be fulfilled
18 before the owner, prime contractor, or subcontractor has any financial
19 obligation to those who provided labor and/or material for the
20 improvement of real property.

21 (3) This act is to be liberally construed to provide security for
22 all parties intended to be protected by its provisions.

23 NEW SECTION. **Sec. 7.** This act shall take effect September 1,
24 1992, and is applicable to all contracts entered into on or after
25 September 1, 1992, relating to the construction of any work of
26 improvement.