

CERTIFICATION OF ENROLLMENT

HOUSE BILL 1199

Chapter 219, Laws of 2009

61st Legislature
2009 Regular Session

PUBLIC WORKS PROJECTS--RETAINAGE OF FUNDS

EFFECTIVE DATE: 07/26/09

Passed by the House March 11, 2009
Yeas 96 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 15, 2009
Yeas 46 Nays 0

BRAD OWEN

President of the Senate

Approved April 25, 2009, 11:25 a.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **HOUSE BILL 1199** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

April 27, 2009

**Secretary of State
State of Washington**

HOUSE BILL 1199

Passed Legislature - 2009 Regular Session

State of Washington 61st Legislature 2009 Regular Session

By Representatives Haigh, Kristiansen, Hunt, and Armstrong; by request of Capital Projects Advisory Review Board

Read first time 01/15/09. Referred to Committee on State Government & Tribal Affairs.

1 AN ACT Relating to retainage of funds on public works projects;
2 amending RCW 39.04.901, 39.12.040, 39.12.050, 39.12.065, 39.76.020,
3 60.28.040, and 60.28.080; reenacting and amending RCW 60.28.011; and
4 repealing RCW 39.04.140, 39.76.010, 60.28.010, 60.28.020, and
5 60.28.050.

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

7 **Sec. 1.** RCW 39.04.901 and 1992 c 223 s 7 are each amended to read
8 as follows:

9 ((~~1~~)) RCW 39.76.011, 60.28.011, 60.28.021, 60.28.051, 39.04.250,
10 and 39.04.900 are applicable to all public works contracts entered into
11 on or after September 1, 1992, relating to the construction of any work
12 of improvement.

13 ((~~2~~)—RCW—39.76.010,—60.28.010,—60.28.020,—and—60.28.050—are
14 applicable—to—all—public—works—contracts—entered—into—prior—to
15 September—1,—1992,—relating—to—the—construction—of—any—work—of
16 improvement.))

17 **Sec. 2.** RCW 39.12.040 and 2007 c 210 s 4 are each amended to read
18 as follows:

1 (1) Except as provided in subsection (2) of this section, before
2 payment is made by or on behalf of the state, or any county,
3 municipality, or political subdivision created by its laws, of any sum
4 or sums due on account of a public works contract, it shall be the duty
5 of the officer or person charged with the custody and disbursement of
6 public funds to require the contractor and each and every subcontractor
7 from the contractor or a subcontractor to submit to such officer a
8 "Statement of Intent to Pay Prevailing Wages". For a contract in
9 excess of ten thousand dollars, the statement of intent to pay
10 prevailing wages shall include:

11 (a) The contractor's registration certificate number; and

12 (b) The prevailing rate of wage for each classification of workers
13 entitled to prevailing wages under RCW 39.12.020 and the estimated
14 number of workers in each classification.

15 Each statement of intent to pay prevailing wages must be approved
16 by the industrial statistician of the department of labor and
17 industries before it is submitted to said officer. Unless otherwise
18 authorized by the department of labor and industries, each voucher
19 claim submitted by a contractor for payment on a project estimate shall
20 state that the prevailing wages have been paid in accordance with the
21 prefiled statement or statements of intent to pay prevailing wages on
22 file with the public agency. Following the final acceptance of a
23 public works project, it shall be the duty of the officer charged with
24 the disbursement of public funds, to require the contractor and each
25 and every subcontractor from the contractor or a subcontractor to
26 submit to such officer an "Affidavit of Wages Paid" before the funds
27 retained according to the provisions of RCW (~~60.28.010~~) 60.28.011 are
28 released to the contractor. Each affidavit of wages paid must be
29 certified by the industrial statistician of the department of labor and
30 industries before it is submitted to said officer.

31 (2) As an alternate to the procedures provided for in subsection
32 (1) of this section, for public works projects of two thousand five
33 hundred dollars or less and for projects where the limited public works
34 process under RCW 39.04.155(3) is followed:

35 (a) An awarding agency may authorize the contractor or
36 subcontractor to submit the statement of intent to pay prevailing wages
37 directly to the officer or person charged with the custody or
38 disbursement of public funds in the awarding agency without approval by

1 the industrial statistician of the department of labor and industries.
2 The awarding agency shall retain such statement of intent to pay
3 prevailing wages for a period of not less than three years.

4 (b) Upon final acceptance of the public works project, the awarding
5 agency shall require the contractor or subcontractor to submit an
6 affidavit of wages paid. Upon receipt of the affidavit of wages paid,
7 the awarding agency may pay the contractor or subcontractor in full,
8 including funds that would otherwise be retained according to the
9 provisions of RCW (~~60.28.010~~) 60.28.011. Within thirty days of
10 receipt of the affidavit of wages paid, the awarding agency shall
11 submit the affidavit of wages paid to the industrial statistician of
12 the department of labor and industries for approval.

13 (c) A statement of intent to pay prevailing wages and an affidavit
14 of wages paid shall be on forms approved by the department of labor and
15 industries.

16 (d) In the event of a wage claim and a finding for the claimant by
17 the department of labor and industries where the awarding agency has
18 used the alternative process provided for in subsection (2) of this
19 section, the awarding agency shall pay the wages due directly to the
20 claimant. If the contractor or subcontractor did not pay the wages
21 stated in the affidavit of wages paid, the awarding agency may take
22 action at law to seek reimbursement from the contractor or
23 subcontractor of wages paid to the claimant, and may prohibit the
24 contractor or subcontractor from bidding on any public works contract
25 of the awarding agency for up to one year.

26 (e) Nothing in this section shall be interpreted to allow an
27 awarding agency to subdivide any public works project of more than two
28 thousand five hundred dollars for the purpose of circumventing the
29 procedures required by RCW 39.12.040(1).

30 **Sec. 3.** RCW 39.12.050 and 2001 c 219 s 1 are each amended to read
31 as follows:

32 (1) Any contractor or subcontractor who files a false statement or
33 fails to file any statement or record required to be filed under this
34 chapter and the rules adopted under this chapter, shall, after a
35 determination to that effect has been issued by the director after
36 hearing under chapter 34.05 RCW, forfeit as a civil penalty the sum of
37 five hundred dollars for each false filing or failure to file, and

1 shall not be permitted to bid, or have a bid considered, on any public
2 works contract until the penalty has been paid in full to the director.
3 The civil penalty under this subsection shall not apply to a violation
4 determined by the director to be an inadvertent filing or reporting
5 error. Civil penalties shall be deposited in the public works
6 administration account.

7 To the extent that a contractor or subcontractor has not paid wages
8 at the rate due pursuant to RCW 39.12.020, and a finding to that effect
9 has been made as provided by this subsection, such unpaid wages shall
10 constitute a lien against the bonds and retainage as provided in RCW
11 18.27.040, 19.28.041, 39.08.010, and (~~60.28.010~~) 60.28.011.

12 (2) If a contractor or subcontractor is found to have violated the
13 provisions of subsection (1) of this section for a second time within
14 a five year period, the contractor or subcontractor shall be subject to
15 the sanctions prescribed in subsection (1) of this section and shall
16 not be allowed to bid on any public works contract for one year. The
17 one year period shall run from the date of notice by the director of
18 the determination of noncompliance. When an appeal is taken from the
19 director's determination, the one year period shall commence from the
20 date of the final determination of the appeal.

21 The director shall issue his or her findings that a contractor or
22 subcontractor has violated the provisions of this subsection after a
23 hearing held subject to the provisions of chapter 34.05 RCW.

24 **Sec. 4.** RCW 39.12.065 and 2001 c 219 s 2 are each amended to read
25 as follows:

26 (1) Upon complaint by an interested party, the director of labor
27 and industries shall cause an investigation to be made to determine
28 whether there has been compliance with this chapter and the rules
29 adopted hereunder, and if the investigation indicates that a violation
30 may have occurred, a hearing shall be held in accordance with chapter
31 34.05 RCW. The director shall issue a written determination including
32 his or her findings after the hearing. A judicial appeal from the
33 director's determination may be taken in accordance with chapter 34.05
34 RCW, with the prevailing party entitled to recover reasonable costs and
35 attorneys fees.

36 A complaint concerning nonpayment of the prevailing rate of wage
37 shall be filed with the department of labor and industries no later

1 than thirty days from the acceptance date of the public works project.
2 The failure to timely file such a complaint shall not prohibit a
3 claimant from pursuing a private right of action against a contractor
4 or subcontractor for unpaid prevailing wages. The remedy provided by
5 this section is not exclusive and is concurrent with any other remedy
6 provided by law.

7 (2) To the extent that a contractor or subcontractor has not paid
8 the prevailing rate of wage under a determination issued as provided in
9 subsection (1) of this section, the director shall notify the agency
10 awarding the public works contract of the amount of the violation
11 found, and the awarding agency shall withhold, or in the case of a
12 bond, the director shall proceed against the bond in accordance with
13 the applicable statute to recover, such amount from the following
14 sources in the following order of priority until the total of such
15 amount is withheld:

16 (a) The retainage or bond in lieu of retainage as provided in RCW
17 (~~60.28.010~~) 60.28.011;

18 (b) If the claimant was employed by the contractor or subcontractor
19 on the public works project, the bond filed by the contractor or
20 subcontractor with the department of labor and industries as provided
21 in RCW 18.27.040 and 19.28.041;

22 (c) A surety bond, or at the contractor's or subcontractor's option
23 an escrow account, running to the director in the amount of the
24 violation found; and

25 (d) That portion of the progress payments which is properly
26 allocable to the contractor or subcontractor who is found to be in
27 violation of this chapter. Under no circumstances shall any portion of
28 the progress payments be withheld that are properly allocable to a
29 contractor, subcontractor, or supplier, that is not found to be in
30 violation of this chapter.

31 The amount withheld shall be released to the director to distribute
32 in accordance with the director's determination.

33 (3) A contractor or subcontractor that is found, in accordance with
34 subsection (1) of this section, to have violated the requirement to pay
35 the prevailing rate of wage shall be subject to a civil penalty of not
36 less than one thousand dollars or an amount equal to twenty percent of
37 the total prevailing wage violation found on the contract, whichever is
38 greater, and shall not be permitted to bid, or have a bid considered,

1 on any public works contract until such civil penalty has been paid in
2 full to the director. If a contractor or subcontractor is found to
3 have participated in a violation of the requirement to pay the
4 prevailing rate of wage for a second time within a five-year period,
5 the contractor or subcontractor shall be subject to the sanctions
6 prescribed in this subsection and as an additional sanction shall not
7 be allowed to bid on any public works contract for two years. Civil
8 penalties shall be deposited in the public works administration
9 account. If a previous or subsequent violation of a requirement to pay
10 a prevailing rate of wage under federal or other state law is found
11 against the contractor or subcontractor within five years from a
12 violation under this section, the contractor or subcontractor shall not
13 be allowed to bid on any public works contract for two years. A
14 contractor or subcontractor shall not be barred from bidding on any
15 public works contract if the contractor or subcontractor relied upon
16 written information from the department to pay a prevailing rate of
17 wage that is later determined to be in violation of this chapter. The
18 civil penalty and sanctions under this subsection shall not apply to a
19 violation determined by the director to be an inadvertent filing or
20 reporting error. To the extent that a contractor or subcontractor has
21 not paid the prevailing wage rate under a determination issued as
22 provided in subsection (1) of this section, the unpaid wages shall
23 constitute a lien against the bonds and retainage as provided herein
24 and in RCW 18.27.040, 19.28.041, 39.08.010, and (~~60.28.010~~)
25 60.28.011.

26 **Sec. 5.** RCW 39.76.020 and 1981 c 68 s 2 are each amended to read
27 as follows:

28 RCW (~~39.76.010~~) 39.76.011 does not apply to the following:

- 29 (1) Interagency or intergovernmental transactions;
30 (2) Amounts payable to employees or prospective employees of state
31 agencies or local governmental units as reimbursement for expenses;
32 (3) Belated claims for any time of delinquency after July 31
33 following the second year of the fiscal biennium;
34 (4) Claims subject to a good faith dispute, when before the date of
35 timely payment, notice of the dispute is:
36 (a) Sent by certified mail;
37 (b) Personally delivered; or

- 1 (c) Sent in accordance with procedures in the contract;
- 2 (5) Delinquencies due to natural disasters, disruptions in postal
3 or delivery service, work stoppages due to labor disputes, power
4 failures, or any other cause resulting from circumstances clearly
5 beyond the control of the unit of local government or state agency;
- 6 (6) Contracts entered before July 26, 1981; and
- 7 (7) Payment from any retirement system listed in RCW 41.50.030 and
8 chapter 41.24 RCW.

9 **Sec. 6.** RCW 60.28.011 and 2007 c 494 s 504 and 2007 c 218 s 92 are
10 each reenacted and amended to read as follows:

11 (1) Public improvement contracts shall provide, and public bodies
12 shall reserve, a contract retainage not to exceed five percent of the
13 moneys earned by the contractor as a trust fund for the protection and
14 payment of: (a) The claims of any person arising under the contract;
15 and (b) the state with respect to taxes imposed pursuant to Title 82
16 RCW which may be due from such contractor.

17 (2) Every person performing labor or furnishing supplies toward the
18 completion of a public improvement contract shall have a lien upon
19 moneys reserved by a public body under the provisions of a public
20 improvement contract. However, the notice of the lien of the claimant
21 shall be given within forty-five days of completion of the contract
22 work, and in the manner provided in RCW 39.08.030.

23 (3) The contractor at any time may request the contract retainage
24 be reduced to one hundred percent of the value of the work remaining on
25 the project.

26 (a) After completion of all contract work other than landscaping,
27 the contractor may request that the public body release and pay in full
28 the amounts retained during the performance of the contract, and sixty
29 days thereafter the public body must release and pay in full the
30 amounts retained (other than continuing retention of five percent of
31 the moneys earned for landscaping) subject to the provisions of
32 chapters 39.12 and 60.28 RCW.

33 (b) Sixty days after completion of all contract work the public
34 body must release and pay in full the amounts retained during the
35 performance of the contract subject to the provisions of chapters 39.12
36 and 60.28 RCW.

1 (4) The moneys reserved by a public body under the provisions of a
2 public improvement contract, at the option of the contractor, shall be:

3 (a) Retained in a fund by the public body;

4 (b) Deposited by the public body in an interest bearing account in
5 a bank, mutual savings bank, or savings and loan association. Interest
6 on moneys reserved by a public body under the provision of a public
7 improvement contract shall be paid to the contractor;

8 (c) Placed in escrow with a bank or trust company by the public
9 body. When the moneys reserved are placed in escrow, the public body
10 shall issue a check representing the sum of the moneys reserved payable
11 to the bank or trust company and the contractor jointly. This check
12 shall be converted into bonds and securities chosen by the contractor
13 and approved by the public body and the bonds and securities shall be
14 held in escrow. Interest on the bonds and securities shall be paid to
15 the contractor as the interest accrues.

16 (5) The contractor or subcontractor may withhold payment of not
17 more than five percent from the moneys earned by any subcontractor or
18 sub-subcontractor or supplier contracted with by the contractor to
19 provide labor, materials, or equipment to the public project. Whenever
20 the contractor or subcontractor reserves funds earned by a
21 subcontractor or sub-subcontractor or supplier, the contractor or
22 subcontractor shall pay interest to the subcontractor or sub-
23 subcontractor or supplier at a rate equal to that received by the
24 contractor or subcontractor from reserved funds.

25 (6) A contractor may submit a bond for all or any portion of the
26 contract retainage in a form acceptable to the public body and from a
27 bonding company meeting standards established by the public body. The
28 public body shall accept a bond meeting these requirements unless the
29 public body can demonstrate good cause for refusing to accept it. This
30 bond and any proceeds therefrom are subject to all claims and liens and
31 in the same manner and priority as set forth for retained percentages
32 in this chapter. The public body shall release the bonded portion of
33 the retained funds to the contractor within thirty days of accepting
34 the bond from the contractor. Whenever a public body accepts a bond in
35 lieu of retained funds from a contractor, the contractor shall accept
36 like bonds from any subcontractors or suppliers from which the
37 contractor has retained funds. The contractor shall then release the

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

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

21 (8) Whenever the department of transportation has contracted for
22 the construction of two or more ferry vessels, sixty days after
23 completion of all contract work on each ferry vessel, the department
24 must release and pay in full the amounts retained in connection with
25 the construction of the vessel subject to the provisions of RCW
26 (~~(60.28.020)~~) 60.28.021 and chapter 39.12 RCW. However, the department
27 of transportation may at its discretion condition the release of funds
28 retained in connection with the completed ferry upon the contractor
29 delivering a good and sufficient bond with two or more sureties, or
30 with a surety company, in the amount of the retained funds to be
31 released to the contractor, conditioned that no taxes shall be
32 certified or claims filed for work on the ferry after a period of sixty
33 days following completion of the ferry; and if taxes are certified or
34 claims filed, recovery may be had on the bond by the department of
35 revenue and the material suppliers and laborers filing claims.

36 (9) Except as provided in subsection (1) of this section,
37 reservation by a public body for any purpose from the moneys earned by

1 a contractor by fulfilling its responsibilities under public
2 improvement contracts is prohibited.

3 (10) Contracts on projects funded in whole or in part by farmers
4 home administration and subject to farmers home administration
5 regulations are not subject to subsections (1) through (9) of this
6 section.

7 (11) This subsection applies only to a public body that has
8 contracted for the construction of a facility using the general
9 contractor/construction manager procedure, as defined under RCW
10 39.10.210. If the work performed by a subcontractor on the project has
11 been completed within the first half of the time provided in the
12 general contractor/construction manager contract for completing the
13 work, the public body may accept the completion of the subcontract.
14 The public body must give public notice of this acceptance. After a
15 forty-five day period for giving notice of liens, and compliance with
16 the retainage release procedures in RCW 60.28.021, the public body may
17 release that portion of the retained funds associated with the
18 subcontract. Claims against the retained funds after the forty-five
19 day period are not valid.

20 (12) Unless the context clearly requires otherwise, the definitions
21 in this subsection apply throughout this section.

22 (a) "Contract retainage" means an amount reserved by a public body
23 from the moneys earned by a person under a public improvement contract.

24 (b) "Person" means a person or persons, mechanic, subcontractor, or
25 materialperson who performs labor or provides materials for a public
26 improvement contract, and any other person who supplies the person with
27 provisions or supplies for the carrying on of a public improvement
28 contract.

29 (c) "Public body" means the state, or a county, city, town,
30 district, board, or other public body.

31 (d) "Public improvement contract" means a contract for public
32 improvements or work, other than for professional services, or a work
33 order as defined in RCW 39.10.210.

34 **Sec. 7.** RCW 60.28.040 and 1985 c 80 s 1 are each amended to read
35 as follows:

36 The amount of all taxes, increases and penalties due or to become
37 due under Title 82 RCW, from a contractor or the contractor's

1 successors or assignees with respect to a public improvement contract
2 wherein the contract price is (~~twenty~~) thirty-five thousand dollars
3 or more shall be a lien prior to all other liens upon the amount of the
4 retained percentage withheld by the disbursing officer under such
5 contract, except that the employees of a contractor or the contractor's
6 successors or assignees who have not been paid the prevailing wage
7 under such a public improvement contract shall have a first priority
8 lien against the bond or retainage prior to all other liens. The
9 amount of all other taxes, increases and penalties due and owing from
10 the contractor shall be a lien upon the balance of such retained
11 percentage remaining in the possession of the disbursing officer after
12 all other statutory lien claims have been paid.

13 **Sec. 8.** RCW 60.28.080 and 1982 c 170 s 3 are each amended to read
14 as follows:

15 (1) If any delay in issuance of notice to proceed or in
16 construction following an award of any public construction contract is
17 primarily caused by acts or omissions of persons or agencies other than
18 the contractor and a preliminary, special or permanent restraining
19 order of a court of competent jurisdiction is issued pursuant to
20 litigation and the appropriate public contracting body does not elect
21 to delete the completion of the contract as provided by RCW
22 (~~60.28.010(3)~~) 60.28.011(7), the appropriate contracting body will
23 issue a change order or force account directive to cover reasonable
24 costs incurred by the contractor as a result of such delay. These
25 costs shall include but not be limited to contractor's costs for wages,
26 labor costs other than wages, wage taxes, materials, equipment rentals,
27 insurance, bonds, professional fees, and subcontracts, attributable to
28 such delay plus a reasonable sum for overhead and profit.

29 In the event of a dispute between the contracting body and the
30 contractor, arbitration procedures may be commenced under the
31 applicable terms of the construction contract, or, if the contract
32 contains no such provision for arbitration, under the then obtaining
33 rules of the American Arbitration Association.

34 If the delay caused by litigation exceeds six months, the
35 contractor may then elect to terminate the contract and to delete the
36 completion of the contract and receive payment in proportion to the
37 amount of the work completed plus the cost of the delay. Amounts

1 retained and accumulated under RCW (~~60.28.010~~) 60.28.011 shall be
2 held for a period of (~~thirty~~) forty-five days following the election
3 of the contractor to terminate. Election not to terminate the contract
4 by the contractor shall not affect the accumulation of costs incurred
5 as a result of the delay provided above.

6 (2) This section shall not apply to any contract awarded pursuant
7 to an invitation for bid issued on or before July 16, 1973.

8 NEW SECTION. Sec. 9. The following acts or parts of acts are each
9 repealed:

10 (1) RCW 39.04.140 (Contracts affected by increase in price of
11 petroleum products--Termination--Continuation with contracting agency
12 sharing increased costs--Conditions) and 1974 ex.s. c 194 s 1;

13 (2) RCW 39.76.010 (Interest on unpaid public contracts--Timely
14 payment) and 1981 c 68 s 1;

15 (3) RCW 60.28.010 (Retained percentage--Labor and material lien
16 created--Bond in lieu of retained funds--Termination before
17 completion--Chapter deemed exclusive--Release of ferry contract
18 payments--Projects of farmers home administration) and 2007 c 218 s 91,
19 1986 c 181 s 6, 1984 c 146 s 1, 1982 c 170 s 1, & 1981 c 260 s 14;

20 (4) RCW 60.28.020 (Excess over lien claims to contractor) and 2007
21 c 218 s 93, 1975 1st ex.s. c 104 s 2, 1970 ex.s. c 38 s 2, 1967 ex.s.
22 c 26 s 23, 1955 c 236 s 2, & 1921 c 166 s 2; and

23 (5) RCW 60.28.050 (Duties of disbursing officer upon final
24 acceptance of contract) and 1982 c 170 s 2, 1970 ex.s. c 38 s 3, 1967
25 ex.s. c 26 s 24, & 1955 c 236 s 5.

Passed by the House March 11, 2009.

Passed by the Senate April 15, 2009.

Approved by the Governor April 25, 2009.

Filed in Office of Secretary of State April 27, 2009.