

2 **SB 6404** - S COMM AMD
3 By Committee on Commerce & Labor

4 Adopted 2/18/92

5 Strike everything after the enacting clause and insert the
6 following:

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

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

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

18 (a) Except under (b), (c), or (d) of this subsection, a check or
19 warrant is mailed or is available on the date specified for the amount
20 specified in the applicable contract documents ((or, if no date is
21 specified, within)) but not later than thirty days of receipt of a
22 properly completed invoice or receipt of goods or services, whichever
23 is later.

24 (b) ((~~For any amount which is required to be withheld under state~~
25 ~~or federal law, a check or warrant is mailed or is available in the~~
26 ~~proper amount on the date the amount may be released under the~~
27 ~~applicable law~~) On written contracts for public works, when part or
28 all of a payment is going to be withheld for unsatisfactory performance

1 or if the payment request made does not comply with the requirements of
2 the contract, the public body shall notify the prime contractor in
3 writing within eight working days after receipt of the payment request
4 stating specifically why part or all of the payment is being withheld
5 and what remedial actions must be taken by the prime contractor to
6 receive the withheld amount.

7 (c) If the notification by the public body required by (b) of this
8 subsection does not comply with (b) of this subsection, the public body
9 shall pay the interest and penalty under subsection (1) of this section
10 from the ninth working day after receipt of the initial payment request
11 until the contractor receives the notice that does comply with (b) of
12 this subsection.

13 (d) If part or all of a payment is withheld under (b) of this
14 subsection, the public body shall pay the withheld amount within thirty
15 calendar days after the prime contractor satisfactorily completes the
16 remedial actions identified in the notice. If the withheld amount is
17 not paid within the thirty calendar days, the public body shall pay
18 interest under subsection (1) of this section from the thirty-first
19 calendar day until the date paid."

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

22 (1) Contracts for public improvements or work, other than for
23 professional services, by the state, or any county, city, town, school
24 district, commission, district, board, or other public body, herein
25 referred to as "public body", shall provide, and there shall be
26 reserved by the public body from the moneys earned by the contractor on
27 estimates during the progress of the improvement or work, a sum not to
28 exceed five percent, ((said)) this sum to be retained by the state,
29 county, city, town, district, board, or other public body, as a trust

1 fund for the protection and payment of any person or persons, mechanic,
2 subcontractor or materialman who ~~((shall))~~ performs any labor upon such
3 a contract or the doing of ~~((said))~~ the work, and all persons who
4 ~~((shall))~~ supply such a person or persons or subcontractors with
5 provisions and supplies for the carrying on of ~~((such))~~ the work, and
6 the state with respect to taxes imposed pursuant to Title 82 RCW which
7 may be due from ~~((such))~~ the contractor. Every person performing labor
8 or furnishing supplies toward the completion of ~~((said))~~ the
9 improvement or work ~~((shall have))~~ has a lien upon ~~((said))~~ the moneys
10 so reserved: PROVIDED, That ~~((such))~~ the notice of the lien of
11 ~~((such))~~ the claimant ~~((shall be))~~ is given within forty-five days of
12 completion of all of the contract work other than landscaping, and in
13 the manner ((and within the time)) provided in RCW 39.08.030 ~~((as now~~
14 ~~existing and in accordance with any amendments that may hereafter be~~
15 ~~made thereto))~~: PROVIDED FURTHER, That if the board, council,
16 commission, trustees, officer, or body acting for the state, county, or
17 municipality or other public body~~((+))~~:

18 (a) At any time after fifty percent of the original contract work
19 has been completed, ((if it)) finds that satisfactory progress is being
20 made, may make any of the partial payments which would otherwise be
21 subsequently made in full; but in no event ~~((shall))~~ may the amount to
22 be retained be reduced to less than five percent of the amount of the
23 moneys earned by the contractor~~((:—PROVIDED, That the contractor may~~
24 ~~request that retainage be reduced to one hundred percent of the value~~
25 ~~of the work remaining on the project))~~; and

26 (b) ~~((thirty))~~ Sixty days after completion ~~((and acceptance))~~ of
27 all contract work other than landscaping, ~~((may))~~ the public body must
28 release and pay in full the amounts retained during the performance of
29 the contract (other than continuing retention of five percent of the

1 moneys earned for landscaping) subject to the provisions of RCW
2 60.28.020, 60.28.050, and chapter 39.12 RCW.

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

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

8 (b) Deposited by the public body in an interest bearing account in
9 a bank, mutual savings bank, or savings and loan association, not
10 subject to withdrawal until ~~((after the final acceptance))~~ forty-five
11 days following completion of ~~((said))~~ the improvement or work as
12 completed, or until agreed to by both parties~~((:—PROVIDED, That))~~.
13 Interest on ((such)) the account shall be paid to the contractor; or

14 (c) Placed in escrow with a bank or trust company by the public
15 body until ~~((thirty))~~ sixty days following ~~((the final acceptance))~~
16 completion of ~~((said))~~ the improvement ~~((or work as completed))~~. When
17 the moneys reserved are ~~((to be))~~ placed in escrow, the public body
18 shall issue a check representing the sum of the moneys reserved payable
19 to the bank or trust company and the contractor jointly. ~~((Such))~~ This
20 check shall be converted into bonds and securities chosen by the
21 contractor and approved by the public body and ~~((such))~~ the bonds and
22 securities shall be held in escrow. Interest on ~~((such))~~ the bonds and
23 securities shall be paid to the contractor as the ~~((said))~~ interest
24 accrues.

25 (3) The contractor or subcontractor may withhold payment of not
26 more than five percent from the moneys earned by any subcontractor or
27 sub-subcontractor or supplier contracted with by the contractor to
28 provide labor, materials, or equipment to the public project. Whenever
29 the contractor or subcontractor reserves funds earned by a
30 subcontractor or sub-subcontractor or supplier, the contractor or

1 subcontractor shall pay interest to the subcontractor or sub-
2 subcontractor or supplier at a rate equal to that received by the
3 contractor or subcontractor from reserved funds.

4 (4) With the consent of the public body the contractor may submit
5 a bond for all or any portion of the amount of funds retained by the
6 public body in a form acceptable to the public body. ((Such)) This
7 bond and any proceeds therefrom ((shall be made)) are subject to all
8 claims and liens and in the same manner and priority as set forth for
9 retained percentages in this chapter. The public body shall release
10 the bonded portion of the retained funds to the contractor within
11 thirty days of accepting the bond from the contractor. Whenever a
12 public body accepts a bond in lieu of retained funds from a contractor,
13 the contractor shall accept like bonds from any subcontractors or
14 suppliers from which the contractor has retained funds. The contractor
15 shall then release the funds retained from the subcontractor or
16 supplier to the subcontractor or supplier within thirty days of
17 accepting the bond from the subcontractor or supplier.

18 (5) If the public body administering a contract, after a
19 substantial portion of the work has been completed, finds that an
20 unreasonable delay will occur in the completion of the remaining
21 portion of the contract for any reason not the result of a breach
22 thereof, it may, if the contractor agrees, delete from the contract the
23 remaining work and accept as final the improvement at the stage of
24 completion then attained and make payment in proportion to the amount
25 of the work accomplished and in ((such)) this case any amounts retained
26 and accumulated under this section shall be held for a period of
27 ((thirty)) forty-five days following ((such—acceptance)) the
28 completion. In the event that the work ((shall have been)) is
29 terminated before final completion as provided in this section, the
30 public body may thereafter enter into a new contract with the same

1 contractor to perform the remaining work or improvement for an amount
2 equal to or less than the cost of the remaining work as was provided
3 for in the original contract without advertisement or bid. The
4 provisions of this chapter (~~((60.28 RCW shall be deemed))~~) are exclusive
5 and (~~((shall))~~) supersede all provisions and regulations in conflict
6 herewith.

7 (6) Whenever the department of transportation has contracted for
8 the construction of two or more ferry vessels, (~~((thirty))~~) sixty days
9 after completion (~~((and final acceptance))~~) of all contract work on each
10 ferry vessel, the department (~~((may))~~) must release and pay in full the
11 amounts retained in connection with the construction of (~~((such))~~) the
12 vessel subject to the provisions of RCW 60.28.020 and chapter 39.12
13 RCW: PROVIDED, That the department of transportation may at its
14 discretion condition the release of funds retained in connection with
15 the completed ferry upon the contractor delivering a good and
16 sufficient bond with two or more sureties, or with a surety company, in
17 the amount of the retained funds to be released to the contractor,
18 conditioned that no taxes shall be certified or claims filed for work
19 on (~~((such))~~) the ferry after a period of (~~((thirty))~~) forty-five days
20 following (~~((final acceptance))~~) completion of (~~((such))~~) the ferry; and if
21 (~~((such))~~) taxes are certified or claims filed, recovery may be had on
22 (~~((such))~~) the bond by the department of revenue and the materialmen and
23 laborers filing claims.

24 (7) Contracts on projects funded in whole or in part by farmers
25 home administration and subject to farmers home administration
26 regulations (~~((shall))~~) are not (~~((be))~~) subject to subsections (1) through
27 (6) of this section."

28 "Sec. 3. RCW 60.28.020 and 1975 1st ex.s. c 104 s 2 are each
29 amended to read as follows:

1 After the expiration of the ((~~thirty~~)) forty-five day period, and
2 after receipt of the department of revenue's certificate, and the
3 public body is satisfied that the taxes certified as due or to become
4 due by the department of revenue are discharged, and the claims of
5 materialmen and laborers who have filed their claims, together with a
6 sum sufficient to defray the cost of foreclosing the liens of such
7 claims, and to pay attorneys' fees, have been paid, the public body may
8 withhold from the remaining retained amounts for claims the public body
9 may have against the contractor and shall pay the balance, if any, to
10 the contractor the fund retained by it or release to the contractor the
11 securities and bonds held in escrow.

12 If such taxes have not been discharged or the claims, expenses, and
13 fees have not been paid, the public body shall either retain in its
14 fund, or in an interest bearing account, or retain in escrow, at the
15 option of the contractor, an amount equal to such unpaid taxes and
16 unpaid claims together with a sum sufficient to defray the costs and
17 attorney fees incurred in foreclosing the lien of such claims, and
18 shall pay, or release from escrow, the remainder to the contractor."

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

21 Upon ((~~final acceptance~~)) completion of a contract, the state,
22 county or other municipal officer charged with the duty of disbursing
23 or authorizing disbursement or payment of such contracts shall
24 forthwith notify the department of revenue of the completion of
25 contracts over twenty thousand dollars. Such officer shall not make
26 any payment from the retained percentage fund or release any retained
27 percentage escrow account to any person, until he has received from the
28 department of revenue a certificate that all taxes, increases and
29 penalties due from the contractor, and all taxes due and to become due

1 with respect to such contract have been paid in full or that they are,
2 in the department's opinion, readily collectible without recourse to
3 the state's lien on the retained percentage."

4 "NEW SECTION. Sec. 5. A new section is added to chapter 39.04 RCW
5 to read as follows:

6 (1) When payment is received by a contractor or subcontractor for
7 work performed on a public work, the contractor or subcontractor shall
8 pay to any subcontractor not later than ten days after the receipt of
9 the payment, amounts allowed the contractor on account of the work
10 performed by the subcontractor, to the extent of each subcontractor's
11 interest therein.

12 (2) In the event of a good faith dispute over all or any portion of
13 the amount due on a payment from the prime contractor or subcontractor
14 to a subcontractor, then the prime contractor or subcontractor may
15 withhold no more than one hundred fifty percent of the disputed amount.
16 Those not a party to a dispute are entitled to full and prompt payment
17 of their portion of a draw, progress payment, final payment, or
18 released retainage.

19 (3) In addition to all other remedies, any person from whom funds
20 have been withheld in violation of this section shall be entitled to
21 receive from the person wrongfully withholding the funds, for every
22 month and portion thereof that payment including retainage is not made,
23 interest at the highest rate allowed under RCW 19.52.025. In any
24 action for the collection of funds wrongfully withheld, the prevailing
25 party shall be entitled to costs of suit and reasonable attorneys'
26 fees."

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

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

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

9 "NEW SECTION. Sec. 7. This act shall take effect September 1,
10 1992, and is applicable to all contracts entered into on or after
11 September 1, 1992, relating to the construction of any work of
12 improvement."

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14 By Committee on Commerce & Labor

15 Adopted 2/18/92

16 On page 1, line 1 of the title, after "improvement" strike the
17 remainder of the title and insert "on public works projects; amending
18 RCW 39.76.010, 60.28.010, 60.28.020, and 60.28.050; adding a new
19 section to chapter 39.04 RCW; creating a new section; prescribing
20 penalties; and providing an effective date."