
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 real
2 property; amending RCW 39.76.010, 60.28.010, 60.28.020, and 60.28.050;
3 adding a new chapter to Title 60 RCW; prescribing penalties; and
4 providing an effective date.

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

6 NEW SECTION. **Sec. 1.** DEFINITIONS. (1) "Retainage" means a
7 portion of any payment which is due a retainee but is being withheld or
8 retained by an owner, contractor, or subcontractor as security for, or
9 conditioned upon, completion of the work of improvement. The retainage
10 is considered conditionally earned by and owed to the retainee.

11 (2) "Retainee" means a contractor, subcontractor, material
12 supplier, equipment, or professional services provider who has
13 performed all or part of a work of improvement and who has had some
14 portion of sums due under a contract withheld by the retainor.

1 (3) "Retainor" means any person or entity that has possession of
2 and withholds retainage, including those persons loaning or advancing
3 funds pursuant to interim or construction financing as defined by RCW
4 60.04.200.

5 (4) "Completion" occurs on the earliest of any of the following
6 events: (i) The date upon which the work of improvement has been
7 completed in accordance with the terms and conditions of the contract;
8 (ii) the date upon which the improvement becomes usable or fit for the
9 purposes for which it was intended; (iii) the date of issuance of a
10 certificate of occupancy; or (iv) the date of occupation or use of the
11 improvement by the owner or an agent of the owner.

12 (5) "Work of improvement" means work performed or provided,
13 including labor, materials, equipment, and professional services, which
14 has led to the improvement of real property for a private owner. Work
15 of improvement includes incremental improvements which are in
16 themselves complete in accordance with the terms and conditions of the
17 contract but do not necessarily bring a property improvement to a state
18 of completion.

19 NEW SECTION. **Sec. 2.** MONEYS TO BE HELD IN TRUST--COMMINGLING.

20 (1) Any moneys released to an owner, developer, prime contractor,
21 subcontractor, or person in charge of a construction project in
22 connection with a work of improvement shall be regarded and held in
23 trust for the benefit of those persons making the payment and those who
24 provided the labor or furnished materials, equipment, or professional
25 services in connection with the work of improvement giving rise to the
26 release of the moneys.

27 (2) This section does not require moneys held in trust by an owner,
28 contractor, or subcontractor under subsection (1) of this section to be
29 placed in a separate account. If an owner, contractor, or

1 subcontractor commingles moneys held in trust under this section with
2 other moneys, the mere commingling of the moneys does not constitute a
3 violation of this chapter.

4 (3) The use of trust moneys for any other purpose than to first pay
5 when due those persons for whom the funds are held in trust, is prima
6 facie evidence of a trust violation and an intent to defraud in a civil
7 action.

8 (4) The mishandling of work of improvement trust moneys is a matter
9 affecting the public interest for the purpose of applying chapter 19.86
10 RCW to violations of this chapter. The failure to use the money as
11 intended is not reasonable in relation to the development and
12 preservation of business. A violation of this section constitutes an
13 unfair or deceptive act or practice in trade or commerce for the
14 purpose of applying chapter 19.86 RCW.

15 NEW SECTION. **Sec. 3.** PROMPT PAY. (1) Except under subsection (2)
16 of this section, the owner shall pay amounts due the prime contractor
17 for a work of improvement in accordance with the terms and conditions
18 of the contract but not later than ten calendar days after receipt of
19 a draw of interim or construction financing as defined by RCW
20 60.04.200. For the purposes of this section "draw" means a
21 disbursement of interim or construction financing which is made from
22 time to time as the work of improvement progresses. The prime
23 contractor shall pay amounts due subcontractors and suppliers for a
24 work of improvement, and the subcontractor shall pay amounts due their
25 suppliers and lower tier subcontractors for a work of improvement, no
26 later than ten calendar days after receipt of draws, progress payments,
27 final payment, or retainage for that work of improvement.

28 (2) In the event there is a good faith dispute over all or any
29 portion of the amount due from the owner to the prime contractor, prime

1 contractor to a subcontractor, subcontractor to a subcontractor, or
2 contractor to a supplier, then the owner, prime contractor, or
3 subcontractor may withhold no more than one hundred fifty percent of
4 the disputed amount. Others not a party to a dispute are entitled to
5 full and prompt payment of their portion of a draw, progress payment,
6 final payment, or released retainage.

7 NEW SECTION. **Sec. 4.** PORTION OF CONTRACT PRICE RETAINED. (1)

8 Except for improvements made on an existing owner-occupied single
9 family residential property, retainage shall be regarded and treated as
10 the property of the retainee. Retainage may not exceed ten percent and
11 will be subject to the following provisions at the option of the
12 retainee;

13 (a) Deposited by the retainor in an interest bearing account in a
14 bank, mutual savings bank, or savings and loan association, not subject
15 to withdrawal until after completion of the work of improvement. The
16 interest on the account shall be paid to the contractor; or

17 (b) Placed in escrow with a bank or trust company by the retainor
18 until after completion of the work of improvement. If the moneys
19 retained are placed in escrow, the retainor shall issue a check
20 representing the sum of the moneys retained payable to the bank or
21 trust company and the contractor jointly. The check shall be converted
22 into bonds and securities chosen by the contractor and approved by the
23 retainor and the bonds and securities shall be held in escrow.

24 (2) Except as permitted in subsections (4) and (5) of this section,
25 retainage and interest earned on the retainage, shall be released no
26 later than ninety days from the date of completion of the work of
27 improvement.

28 (3) Except under subsections (4) and (5) of this section, the prime
29 contractor and each contractor or subcontractor shall pay each of its

1 contractors or subcontractors their proportionate share of the
2 retainage and interest received within ten days from the time all or
3 any portion of the retainage is received by the prime contractor.

4 (4) In the event there is a good faith dispute over the release of
5 all or any portion of the retainage, the retainor may not withhold an
6 amount in excess of one hundred fifty percent of the estimated value of
7 the issue in dispute. Others not party to a dispute are entitled to
8 full and prompt payment of their portion of the retained amount.

9 (5) The retainor may withhold from the retained percentage amounts
10 required to meet the claims of those who filed claims under chapter
11 60.04 RCW, together with sums sufficient to defray the cost of
12 foreclosing the liens, including reasonable attorneys' fees. The
13 retainor may either retain in its fund, or in an interest bearing
14 account, or retain in escrow, at the option of the retainee, an amount
15 equal to such unpaid claims together with a sum sufficient to defray
16 the costs and attorney fees incurred in foreclosing the lien, and shall
17 pay, or release from escrow, the remainder of the retainee.

18 NEW SECTION. **Sec. 5.** REMEDIES. In addition to all other remedies
19 either civil, administrative, or criminal, any person from whom funds
20 have been withheld in violation of this chapter is entitled to receive
21 from the person wrongfully withholding the funds, for every month and
22 portion thereof that payment including retainage is not made, interest
23 of twelve percent per annum or as established under RCW 19.52.025,
24 whichever is greater, plus an additional charge of one and one-half
25 percent per month. In any action for the collection of funds withheld,
26 the prevailing party is entitled to costs of suit and his or her
27 reasonable attorneys' fees.

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

3 (1) Except as provided in RCW 39.76.020, every state agency (~~and~~
4 ~~unit of local government~~) county, city, town, school district, board,
5 commission, or any other public body shall pay interest at the rate of
6 one and one-half percent per month, (~~but at least one dollar per~~
7 ~~month,~~) on amounts due on written contracts for public works, personal
8 services, goods and services, equipment, and travel, whenever the state
9 agency or unit of local government fails to make timely payment.

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

11 (a) Except under (b), (c), or (d) of this subsection, a check or
12 warrant is mailed or is available on the date specified for the amount
13 specified in the applicable contract documents (~~or, if no date is~~
14 ~~specified, within~~) but not later than thirty days of receipt of a
15 properly completed invoice or receipt of goods or services (~~, whichever~~
16 ~~is later~~)).

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

28 (c) The notification by the public body required by (b) of this
29 subsection does not comply with (b) of this subsection, the public body
30 shall pay the interest and penalty under subsection (1) of this section

1 from the ninth working day after receipt of the initial payment request
2 until the contractor receives the notice that does comply with (b) of
3 this subsection.

4 (d) Part or all of a payment is withheld under (b) of this
5 subsection, the public body shall pay the withheld amount within thirty
6 calendar days after the prime contractor satisfactorily completes the
7 remedial actions identified in the notice. If the withheld amount is
8 not paid within the thirty calendar days, the public body shall pay
9 interest under subsection (1) of this section from the thirty-first
10 calendar day until the date paid.

11 **Sec. 7.** RCW 60.28.010 and 1986 c 181 s 6 are each amended to read
12 as follows:

13 (1) Contracts for public improvements or work, other than for
14 professional services, by the state, or any county, city, town, school
15 district, commission, district, board, or other public body, herein
16 referred to as "public body", shall provide, and there shall be
17 reserved by the public body from the moneys earned by the contractor on
18 estimates during the progress of the improvement or work, a sum not to
19 exceed five percent, ~~((said))~~ this sum to be retained by the state,
20 county, city, town, district, board, or other public body, as a trust
21 fund for the protection and payment of any person or persons, mechanic,
22 subcontractor or materialman who ~~((shall))~~ performs any labor upon such
23 a contract or the doing of ~~((said))~~ the work, and all persons who
24 ~~((shall))~~ supply such a person or persons or subcontractors with
25 provisions and supplies for the carrying on of ~~((such))~~ the work, and
26 the state with respect to taxes imposed pursuant to Title 82 RCW which
27 may be due from ~~((such))~~ the contractor. Every person performing labor
28 or furnishing supplies toward the completion of ~~((said))~~ the
29 improvement or work ~~((shall have))~~ has a lien upon ~~((said))~~ the moneys

1 so reserved: PROVIDED, That ((such)) the notice of the lien of
2 ((such)) the claimant ((shall be)) is given within forty-five days of
3 completion of all of the contract work other than landscaping, and in
4 the manner ((and within the time)) provided in RCW 39.08.030 ((as now
5 existing and in accordance with any amendments that may hereafter be
6 made thereto))): PROVIDED FURTHER, That if the board, council,
7 commission, trustees, officer, or body acting for the state, county, or
8 municipality or other public body((?)):

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

17 (b) ((thirty)) Sixty days after completion ((and acceptance)) of
18 all contract work other than landscaping, ((may)) must release and pay
19 in full the amounts retained during the performance of the contract
20 (other than continuing retention of five percent of the moneys earned
21 for landscaping) subject to the provisions of RCW 60.28.020 and chapter
22 39.12 RCW.

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

25 (a) Retained in a fund by the public body until ((thirty)) sixty
26 days following ((the final acceptance of said improvement or work as
27 completed)) completion of all contract work;

28 (b) Deposited by the public body in an interest bearing account in
29 a bank, mutual savings bank, or savings and loan association, not
30 subject to withdrawal until ((after the final acceptance)) sixty days

1 following completion of (~~said~~) the improvement or work as completed,
2 or until agreed to by both parties(~~(: PROVIDED, That)~~). Interest on
3 (~~such~~) the account shall be paid to the contractor; or

4 (c) Placed in escrow with a bank or trust company by the public
5 body until (~~thirty~~) sixty days following (~~the final acceptance~~)
6 completion of (~~said~~) the improvement (~~or work as completed~~). When
7 the moneys reserved are (~~to be~~) placed in escrow, the public body
8 shall issue a check representing the sum of the moneys reserved payable
9 to the bank or trust company and the contractor jointly. (~~Such~~) This
10 check shall be converted into bonds and securities chosen by the
11 contractor and approved by the public body and (~~such~~) the bonds and
12 securities shall be held in escrow. Interest on (~~such~~) the bonds and
13 securities shall be paid to the contractor as the (~~said~~) interest
14 accrues.

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

24 (4) With the consent of the public body the contractor may submit
25 a bond for all or any portion of the amount of funds retained by the
26 public body in a form acceptable to the public body. (~~Such~~) This
27 bond and any proceeds therefrom (~~shall be made~~) are subject to all
28 claims and liens and in the same manner and priority as set forth for
29 retained percentages in this chapter. The public body shall release
30 the bonded portion of the retained funds to the contractor within

1 thirty days of accepting the bond from the contractor. Whenever a
2 public body accepts a bond in lieu of retained funds from a contractor,
3 the contractor shall accept like bonds from any subcontractors or
4 suppliers from which the contractor has retained funds. The contractor
5 shall then release the funds retained from the subcontractor or
6 supplier to the subcontractor or supplier within thirty days of
7 accepting the bond from the subcontractor or supplier.

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

26 (6) Whenever the department of transportation has contracted for
27 the construction of two or more ferry vessels, ~~((thirty))~~ sixty days
28 after completion ~~((and final acceptance))~~ of all contract work on each
29 ferry vessel, the department ~~((may))~~ must release and pay in full the
30 amounts retained in connection with the construction of ~~((such))~~ the

1 vessel subject to the provisions of RCW 60.28.020 and chapter 39.12
2 RCW: PROVIDED, That the department of transportation may at its
3 discretion condition the release of funds retained in connection with
4 the completed ferry upon the contractor delivering a good and
5 sufficient bond with two or more sureties, or with a surety company, in
6 the amount of the retained funds to be released to the contractor,
7 conditioned that no taxes shall be certified or claims filed for work
8 on ((such)) the ferry after a period of ((thirty)) forty-five days
9 following ((final acceptance)) completion of ((such)) the ferry; and if
10 ((such)) taxes are certified or claims filed, recovery may be had on
11 ((such)) the bond by the department of revenue and the materialmen and
12 laborers filing claims.

13 (7) Contracts on projects funded in whole or in part by farmers
14 home administration and subject to farmers home administration
15 regulations ((shall)) are not ((be)) subject to subsections (1) through
16 (6) of this section.

17 **Sec. 8.** RCW 60.28.020 and 1975 1st ex.s. c 104 s 2 are each
18 amended to read as follows:

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

1 If such taxes have not been discharged or the claims, expenses, and
2 fees have not been paid, the public body shall either retain in its
3 fund, or in an interest bearing account, or retain in escrow, at the
4 option of the contractor, an amount equal to such unpaid taxes and
5 unpaid claims together with a sum sufficient to defray the costs and
6 attorney fees incurred in foreclosing the lien of such claims, and
7 shall pay, or release from escrow, the remainder to the contractor.

8 **Sec. 9.** RCW 60.28.050 and 1982 c 170 s 2 are each amended to read
9 as follows:

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

22 NEW SECTION. **Sec. 10.** APPLICATION--CONSTRUCTION. (1) It is
23 against public policy for any party to require any other party to waive
24 any provision of this chapter.

25 (2) It is against public policy to enforce a contract provision
26 which requires the receipt of construction funds by the owner, prime
27 contractor, or subcontractor, as a condition that must be fulfilled
28 before the owner, prime contractor, or subcontractor has any financial

1 obligation to those who provided labor and/or material for the
2 improvement of real property.

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

5 NEW SECTION. **Sec. 11.** EFFECTIVE DATE. This act shall take effect
6 September 1, 1992, and is applicable to all contracts entered into on
7 or after September 1, 1992, relating to the construction of any work of
8 improvement.

9 NEW SECTION. **Sec. 12.** SHORT TITLE. This chapter may be known and
10 cited as the fair pay act.

11 NEW SECTION. **Sec. 13.** CAPTIONS NOT LAW. Section headings as used
12 in this chapter do not constitute any part of the law.

13 NEW SECTION. **Sec. 14.** Sections 1 through 5 and 10 through 13
14 of this act shall constitute a new chapter in Title 60 RCW.