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SENATE BILL 6390

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State of Washington

58th Legislature

2004 Regular Session

By Senator T. Sheldon

Read first time 01/19/2004. Referred to Committee on Government Operations & Elections.

1 AN ACT Relating to creating a public body right to retained funds  
2 under public improvement contracts; and amending RCW 60.28.010,  
3 60.28.011, and 60.28.040.

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

5 **Sec. 1.** RCW 60.28.010 and 1986 c 181 s 6 are each amended to read  
6 as follows:

7 (1) Contracts for public improvements or work, other than for  
8 professional services, by the state, or any county, city, town,  
9 district, board, or other public body, herein referred to as "public  
10 body", shall provide, and there shall be reserved by the public body  
11 from the moneys earned by the contractor on estimates during the  
12 progress of the improvement or work, a sum not to exceed five percent,  
13 (~~said~~) this sum to be retained by the state, county, city, town,  
14 district, board, or other public body, as a trust fund for the  
15 protection and payment of any person or persons, mechanic,  
16 subcontractor, or materialman who shall perform any labor upon such  
17 contract or the doing of (~~said~~) the work(~~(, and)~~); all persons who  
18 shall supply such person or persons or subcontractors with provisions  
19 and supplies for the carrying on of such work(~~(,)~~); the public body

1 party to the contract for public improvements or work; and the state  
2 with respect to taxes imposed pursuant to Title 82 RCW which may be due  
3 from such contractor. Every person performing labor or furnishing  
4 supplies toward the completion of ~~((said))~~ the improvement or work  
5 shall have a lien upon ~~((said))~~ the moneys so reserved: PROVIDED, That  
6 such notice of the lien of such claimant shall be given in the manner  
7 and within the time provided in RCW 39.08.030 ~~((as now existing and in  
8 accordance with any amendments that may hereafter be made thereto))~~:  
9 PROVIDED FURTHER, That the board, council, commission, trustees,  
10 officer or body acting for the state, county or municipality or other  
11 public body; (a) at any time after fifty percent of the original  
12 contract work has been completed, if it finds that satisfactory  
13 progress is being made, may make any of the partial payments which  
14 would otherwise be subsequently made in full; but in no event shall the  
15 amount to be retained be reduced to less than five percent of the  
16 amount of the moneys earned by the contractor: PROVIDED, That the  
17 contractor may request that retainage be reduced to one hundred percent  
18 of the value of the work remaining on the project; and (b) thirty days  
19 after completion and acceptance of all contract work other than  
20 landscaping, may release and pay in full the amounts retained during  
21 the performance of the contract (other than continuing retention of  
22 five percent of the moneys earned for landscaping) subject to the  
23 provisions of RCW 60.28.020.

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

26 (a) Retained in a fund by the public body until thirty days  
27 following the final acceptance of ~~((said))~~ the improvement or work as  
28 completed;

29 (b) Deposited by the public body in an interest bearing account in  
30 a bank, mutual savings bank, or savings and loan association, not  
31 subject to withdrawal until after the final acceptance of ~~((said))~~ the  
32 improvement or work as completed, or until agreed to by both parties:  
33 PROVIDED, That interest on such account shall be paid to the  
34 contractor;

35 (c) Placed in escrow with a bank or trust company by the public  
36 body until thirty days following the final acceptance of ~~((said))~~ the  
37 improvement or work as completed. When the moneys reserved are to be  
38 placed in escrow, the public body shall issue a check representing the

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

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

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

30 (5) If the public body administering a contract, after a  
31 substantial portion of the work has been completed, finds that an  
32 unreasonable delay will occur in the completion of the remaining  
33 portion of the contract for any reason not the result of a breach  
34 thereof, it may, if the contractor agrees, delete from the contract the  
35 remaining work and accept as final the improvement at the stage of  
36 completion then attained and make payment in proportion to the amount  
37 of the work accomplished and in such case any amounts retained and  
38 accumulated under this section shall be held for a period of thirty

1 days following such acceptance. In the event that the work shall have  
2 been terminated before final completion as provided in this section,  
3 the public body may thereafter enter into a new contract with the same  
4 contractor to perform the remaining work or improvement for an amount  
5 equal to or less than the cost of the remaining work as was provided  
6 for in the original contract without advertisement or bid. The  
7 provisions of this chapter 60.28 RCW shall be deemed exclusive and  
8 shall supersede all provisions and regulations in conflict herewith.

9 (6) Whenever the department of transportation has contracted for  
10 the construction of two or more ferry vessels, thirty days after  
11 completion and final acceptance of each ferry vessel, the department  
12 may release and pay in full the amounts retained in connection with the  
13 construction of such vessel subject to the provisions of RCW 60.28.020:  
14 PROVIDED, That the department of transportation may at its discretion  
15 condition the release of funds retained in connection with the  
16 completed ferry upon the contractor delivering a good and sufficient  
17 bond with two or more sureties, or with a surety company, in the amount  
18 of the retained funds to be released to the contractor, conditioned  
19 that no taxes shall be certified or claims filed for work on such ferry  
20 after a period of thirty days following final acceptance of such ferry;  
21 and if such taxes are certified or claims filed, recovery may be had on  
22 such bond by the department of revenue and the materialmen and laborers  
23 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 not be subject to subsections (1) through (6) of this  
27 section.

28 **Sec. 2.** RCW 60.28.011 and 2003 c 301 s 7 are each amended to read  
29 as follows:

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

36 (2) Every person performing labor or furnishing supplies toward the  
37 completion of a public improvement contract and the public body party

1 to the contract for public improvements or work shall have a lien upon  
2 moneys reserved by a public body under the provisions of a public  
3 improvement contract. However, the notice of the lien of the claimant  
4 shall be given within forty-five days of completion of the contract  
5 work, and in the manner provided in RCW 39.08.030.

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

9 (a) After completion of all contract work other than landscaping,  
10 the contractor may request that the public body release and pay in full  
11 the amounts retained during the performance of the contract, and sixty  
12 days thereafter the public body must release and pay in full the  
13 amounts retained (other than continuing retention of five percent of  
14 the moneys earned for landscaping) subject to the provisions of  
15 chapters 39.12 and 60.28 RCW.

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

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

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

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

27 (c) Placed in escrow with a bank or trust company by the public  
28 body. When the moneys reserved are placed in escrow, the public body  
29 shall issue a check representing the sum of the moneys reserved payable  
30 to the bank or trust company and the contractor jointly. This check  
31 shall be converted into bonds and securities chosen by the contractor  
32 and approved by the public body and the bonds and securities shall be  
33 held in escrow. Interest on the bonds and securities shall be paid to  
34 the contractor as the interest accrues.

35 (5) The contractor or subcontractor may withhold payment of not  
36 more than five percent from the moneys earned by any subcontractor or  
37 sub-subcontractor or supplier contracted with by the contractor to  
38 provide labor, materials, or equipment to the public project. Whenever

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

6 (6) A contractor may submit a bond for all or any portion of the  
7 contract retainage in a form acceptable to the public body and from a  
8 bonding company meeting standards established by the public body. The  
9 public body shall accept a bond meeting these requirements unless the  
10 public body can demonstrate good cause for refusing to accept it. This  
11 bond and any proceeds therefrom are subject to all claims and liens and  
12 in the same manner and priority as set forth for retained percentages  
13 in this chapter. The public body shall release the bonded portion of  
14 the retained funds to the contractor within thirty days of accepting  
15 the bond from the contractor. Whenever a public body accepts a bond in  
16 lieu of retained funds from a contractor, the contractor shall accept  
17 like bonds from any subcontractors or suppliers from which the  
18 contractor has retained funds. The contractor shall then release the  
19 funds retained from the subcontractor or supplier to the subcontractor  
20 or supplier within thirty days of accepting the bond from the  
21 subcontractor or supplier.

22 (7) If the public body administering a contract, after a  
23 substantial portion of the work has been completed, finds that an  
24 unreasonable delay will occur in the completion of the remaining  
25 portion of the contract for any reason not the result of a breach  
26 thereof, it may, if the contractor agrees, delete from the contract the  
27 remaining work and accept as final the improvement at the stage of  
28 completion then attained and make payment in proportion to the amount  
29 of the work accomplished and in this case any amounts retained and  
30 accumulated under this section shall be held for a period of sixty days  
31 following the completion. In the event that the work is terminated  
32 before final completion as provided in this section, the public body  
33 may thereafter enter into a new contract with the same contractor to  
34 perform the remaining work or improvement for an amount equal to or  
35 less than the cost of the remaining work as was provided for in the  
36 original contract without advertisement or bid. The provisions of this  
37 chapter are exclusive and shall supersede all provisions and  
38 regulations in conflict herewith.

1 (8) Whenever the department of transportation has contracted for  
2 the construction of two or more ferry vessels, sixty days after  
3 completion of all contract work on each ferry vessel, the department  
4 must release and pay in full the amounts retained in connection with  
5 the construction of the vessel subject to the provisions of RCW  
6 60.28.020 and chapter 39.12 RCW. However, the department of  
7 transportation may at its discretion condition the release of funds  
8 retained in connection with the completed ferry upon the contractor  
9 delivering a good and sufficient bond with two or more sureties, or  
10 with a surety company, in the amount of the retained funds to be  
11 released to the contractor, conditioned that no taxes shall be  
12 certified or claims filed for work on the ferry after a period of sixty  
13 days following completion of the ferry; and if taxes are certified or  
14 claims filed, recovery may be had on the bond by the department of  
15 revenue and the materialmen and laborers filing claims.

16 (9) Except as provided in subsection (1) of this section,  
17 reservation by a public body for any purpose from the moneys earned by  
18 a contractor by fulfilling its responsibilities under public  
19 improvement contracts is prohibited.

20 (10) Contracts on projects funded in whole or in part by farmers  
21 home administration and subject to farmers home administration  
22 regulations are not subject to subsections (1) through (9) of this  
23 section.

24 (11) This subsection applies only to a public body that has  
25 contracted for the construction of a facility using the general  
26 contractor/construction manager procedure, as defined under RCW  
27 39.10.061. If the work performed by a subcontractor on the project has  
28 been completed within the first half of the time provided in the  
29 general contractor/construction manager contract for completing the  
30 work, the public body may accept the completion of the subcontract.  
31 The public body must give public notice of this acceptance. After a  
32 forty-five day period for giving notice of liens, and compliance with  
33 the retainage release procedures in RCW 60.28.021, the public body may  
34 release that portion of the retained funds associated with the  
35 subcontract. Claims against the retained funds after the forty-five  
36 day period are not valid.

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

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

3 (b) "Person" means a person or persons, mechanic, subcontractor, or  
4 materialperson who performs labor or provides materials for a public  
5 improvement contract, and any other person who supplies the person with  
6 provisions or supplies for the carrying on of a public improvement  
7 contract.

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

10 (d) "Public improvement contract" means a contract for public  
11 improvements or work, other than for professional services, or a work  
12 order as defined in RCW 39.10.020.

13 **Sec. 3.** RCW 60.28.040 and 1985 c 80 s 1 are each amended to read  
14 as follows:

15 The amount of all taxes, increases and penalties due or to become  
16 due under Title 82 RCW, from a contractor or the contractor's  
17 successors or assignees with respect to a public improvement contract  
18 wherein the contract price is twenty thousand dollars or more shall be  
19 a lien prior to all other liens upon the amount of the retained  
20 percentage withheld by the disbursing officer under such contract,  
21 except that the employees of a contractor or the contractor's  
22 successors or assignees who have not been paid the prevailing wage  
23 under such a public improvement contract shall have a first priority  
24 lien against the bond or retainage prior to all other liens. Except  
25 for claims or judgments made by or for the public body party to the  
26 contract for public improvements or work, the amount of all other  
27 taxes, increases and penalties due and owing from the contractor shall  
28 be a lien upon the balance of such retained percentage remaining in the  
29 possession of the disbursing officer after all other statutory lien  
30 claims have been paid.

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