

HOUSE BILL REPORT

ESSB 5528

As Passed House - Amended:

April 7, 2023

Title: An act relating to retainage requirements for private construction projects.

Brief Description: Concerning retainage requirements for private construction projects.

Sponsors: Senate Committee on Labor & Commerce (originally sponsored by Senator Stanford).

Brief History:

Committee Activity:

Labor & Workplace Standards: 3/22/23, 3/28/23 [DPA].

Floor Activity:

Passed House: 4/7/23, 96-0.

Brief Summary of Engrossed Substitute Bill (As Amended by House)

- Establishes retainage requirements for contractors and subcontractors in private construction projects.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: Do pass as amended. Signed by 9 members: Representatives Berry, Chair; Fosse, Vice Chair; Robertson, Ranking Minority Member; Schmidt, Assistant Ranking Minority Member; Bronoske, Connors, Doglio, Ormsby and Ortiz-Self.

Staff: Kelly Leonard (786-7147).

Background:

Retainage refers to money earned by a contractor or subcontractor for satisfactory work, but

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held until the contract, or a certain portion of the contract, is complete. Retainage is typically held as an assurance for the timely completion and quality of a contractor or subcontractor's work. It is calculated as a percentage of the total contract price or a progress payment.

State law requires retainage in public works and other types of public improvement projects, with some exceptions. State and local agencies must typically withhold up to 5 percent of the value of a contract, not including sales tax, as retainage until the project is completed and the contract is accepted. The agency must release the retainage to the contractor after the project is completed, minus any claim amounts. Instead of having retainage withheld from the contract payments, a contractor may opt to submit a retainage bond covering any or all of the amount. A subcontractor may also request the contractor to submit a retainage bond for the portion of the subcontractor's retainage. All workers, subcontractors, and suppliers have lien rights against the retainage or retainage bond and can claim all or part of the money if the contractor does not pay them.

State law does not currently provide requirements for retainage for private construction projects.

Summary of Amended Bill:

For any private construction projects, excluding single-family residential construction of less than 12 units, certain retainage and interest requirements are established. An owner, contractor, or subcontractor may withhold as retainage up to 5 percent of the contract price of the work completed for private construction projects. Partial payment is not acceptance or approval of some of the work or a waiver of defects in the work.

The owner, contractor, or subcontractor must pay interest at the rate of 1 percent per month on the final payment due the contractor or subcontractor. The interest commences 30 days after the contractor or subcontractor completes and the owner accepts the work under the contract, and it runs until final payment is tendered to the contractor or subcontractor.

When the contractor or subcontractor considers the work that the contractor or subcontractor is contracted to perform to be complete, the contractor or subcontractor must notify the party to whom the contractor or subcontractor is responsible for performing the construction work under the contract. The party must, within 15 days after receiving the notice, either accept the work or notify the contractor or subcontractor of work yet to be performed under the contract or subcontract. If the party does not accept the work or does not notify the contractor or subcontractor of work yet to be performed, the interest commences 30 days after the end of the 15-day period.

A contractor may provide notice to an owner or upper-tier contractor for release of retainage due to a subcontractor whose work is complete. If an owner or upper-tier contractor does not accept the subcontractor's work or does not notify the contractor of work yet to be

performed by the subcontractor within 15 days after receiving the notice, the interest required commences 30 days after the end of the 15-day period. A contractor's obligation to pay interest to a subcontractor does not begin until the contractor has received payment for the subcontractor's retainage provided that the contractor has submitted the subcontractor's retainage request to the owner or upper-tier contractor within 30 days after receipt from the subcontractor.

In lieu of retainage, a subcontractor or contractor may tender, and a contractor or owner must accept, a retainage bond, which must meet certain requirements. If an owner accepts a bond in lieu of retained funds from a contractor, the contractor must accept like bonds from any subcontractors or suppliers from which the contractor has retained funds.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) While retainage provides protections for owners, it can create significant issues for contractors. Private contracts often require up to 10 percent retainage, which effectively requires the contractor to finance the project on behalf of the owner. Many contracts have a profit margin of less than 10 percent. The contractor still needs to pay for all expenses up front, including labor costs and supplies. This is particularly burdensome for small businesses, which often have less working capital. High retainage limits their ability to take on new projects. The bill strikes a fair balance of capping retainage at 5 percent, similar to public projects. The bill needs to be amended to allow for contractors to submit retainage bonds in lieu of retainage, rather than limiting this to subcontractors only.

(Opposed) None.

Persons Testifying: Jerry VanderWood, Associated General Contractors; Brett Ferullo, Northwest Construction, Incorporated; and Bill Stauffacher, Northwest Wall and Ceiling Contractors Association.

Persons Signed In To Testify But Not Testifying: None.