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Bill Analysis
Legislative Service Commission

H.B. 208

125th General Assembly
(As Introduced)

**Reps. Young, Brinkman, Buehrer, McGregor, Flowers, Aslanides, Peterson,
D. Evans, Gibbs, Reidelbach, Callender**

BILL SUMMARY

- Eliminates statutory authority allowing or requiring the practice of holding a retainage from payments to contractors in the case of public improvement projects.
- Limits the use of holding a retainage to a percentage-based system in the private sector.
- Requires contractors who contract to perform public improvements to have a written safety program.

CONTENT AND OPERATION

Background

Currently the law permits or requires various contracting authorities to withhold a specified percentage of a contract price from contractors, subcontractors, and materials suppliers. This withheld amount is commonly referred to as "retainage." "Retainage," though not a defined term, is used in the construction industry to refer to a percentage of the contract price that is withheld from a contractor by an owner or withheld from a subcontractor or materials supplier by a contractor for a period of time, usually as a form of guarantee for work performed or materials supplied pursuant to a contract for a project.

The bill eliminates all statutory provisions allowing or requiring this practice of withholding a retainage in the public sector and modifies current practices in the private sector.

Public Improvements Law

The Public Improvements Law, R.C. Chapter 153., contains various provisions governing many construction-related improvements undertaken by public authorities at the state and local level. The law includes provisions concerning public notice requirements, submission of bids and plans, estimates of costs, separate bid requirements, bid guaranties and bonds, professional design services, and a number of other issues relevant to construction projects.

Under current law, contracts for the construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decoration of a public improvement made by the state, or any county, township, municipal corporation, school district, or other political subdivision, or any public board, commission, authority, instrumentality, or special purpose district of or in the state or a political subdivision, or that is authorized by state law, must be executed in accordance with specific provisions, including retainage provisions. Current law specifies that partial payments to a contractor for labor performed under either a unit or lump sum price contract must be made at the rate of 92% of the estimates prepared by the contractor and approved by the architect or engineer. All labor performed after the job is 50% completed must be paid for at the rate of 100% of the estimates submitted by the contractor and approved by the architect or engineer.

The bill specifies that these partial payments must be made at the rate of 100% instead of 92%. It also eliminates the provision regarding 100% payment after 50% job completion, since this provision is no longer applicable when payment is made at 100%. (Sec. 153.12(A).)

Regarding the provisions described above, existing law, when referring to partial payment made to a contractor, indicates that the payment is for work performed. The bill adds that it is also for materials supplied. (Sec. 153.12(A).)

The Public Improvements Law currently specifies that, in addition to all other payments on account of work performed, the public owner of the project must pay the contractor a sum at the rate of 92% of the invoice costs, within specified limits, of material delivered, provided that the materials are inspected and meet the specifications. The balance of the invoiced value must be paid when the material is incorporated into and becomes a part of the building, construction, addition, improvement, alteration, or installation. The bill requires that the contractor be paid at 100% of the invoice cost instead of 92% and correspondingly eliminates the provision requiring the balance to be paid when the material is incorporated. (Sec. 153.14.)

For the type of contracts described above and for contracts for other similar public improvements, current law specifies that, from the date the contract is 50%

complete, as evidenced by payments in the amount of at least 50% of the contract to the person with whom the owner has contracted, all funds retained pursuant to the Public Improvements Law for the faithful performance of work must be deposited in the escrow account established by public owners under that law.¹ This requirement does not, however, apply in the case of contracts the total cost of which is less than \$15,000.

After the contract is 50% complete, existing law specifies that no further funds can be retained. When the major portion of the project is substantially completed and occupied, or in use, or otherwise accepted, and there exists no other reason to withhold retainage, existing law further specifies that the retained percentages held in connection with such portion must be released from escrow and paid to the contractor, withholding only that amount necessary to assure completion. Funds in the escrow account not already paid, with accumulated interest, must be paid to the person with whom the owner has contracted 30 days from the date of completion or either acceptance or occupancy by the owner.

The bill eliminates all of the retainage provisions described above. Correspondingly, the bill eliminates references to these retained funds being placed in or released from an escrow account. Furthermore, under the bill, the state or any county, township, municipal corporation, school district, or other political subdivision, or any public board, commission authority, instrumentality, or special purpose district of or in the state or a political subdivision or that is authorized by state law that enters into a contract for the construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decoration of a public improvement is required to include a provision in the contract that requires the contractor to have a safety program in writing that applies to the public improvement that is the subject of the contract and includes a plan that describes conditions under which and the manner in which drug and alcohol testing may be performed on individuals performing work pursuant to the contract. For public improvements estimated to take longer than two months to complete or estimated to cost more than \$500,000, the bill specifies that the safety

¹ *The other similar public improvements to which this provision applies are: erecting, constructing, adding to or altering buildings and structures, or installing or supplying material for heating, cooling, or ventilating plants or other equipment therefor, the aggregate cost of which amounts to \$50,000, which are for the use of the state or any institution supported in whole or in part by the state, or in or upon the public works of the state, and administered by the Director of Administrative Services or by any other state officer or state agency authorized by law to administer a project, including state universities and community colleges, the Medical College of Ohio at Toledo, and the Northeastern Ohio Universities College of Medicine.*

program is specifically designed for the site or each separate site where work is performed pursuant to the contract. (Sec. 153.13(A) and (C).)

Prompt Pay Law revisions

The Contractor Prompt Pay Law, R.C. section 4113.61, establishes minimum requirements in the private sector for payment deadlines and interest penalties for contractors, subcontractors, materials suppliers, lower tier subcontractors, and lower tier materials suppliers. If a subcontractor or materials supplier submits an application or request for payment or an invoice for materials to a contractor in sufficient time to allow the contractor to include the application, request, or invoice in the contractor's own pay request submitted to an owner, then the contractor, within ten days after receipt of payment from the owner, must in turn make appropriate payment to the subcontractor and materials supplier. This provision applies the same way for lower tier subcontractors and lower tier materials suppliers relative to payment they receive from subcontractors, materials suppliers and other lower tier subcontractors and lower tier materials suppliers.

Currently, the Contractor Prompt Payment Law permits contractors to reduce the amount paid by any retainage provision contained in the contract, invoice, or purchase order between the contractor and the subcontractor or materials supplier, and to withhold amounts that may be necessary to resolve disputed liens or claims involving the work or labor performed or material furnished by the subcontractor or materials supplier. This same provision applies to subcontractors, materials suppliers and lower tier subcontractors and lower tier materials suppliers relative to retainage withheld from the lower tier subcontractors and lower tier materials suppliers with whom they contract.

Additionally, the Contractor Prompt Pay Law currently specifies that if a contractor receives any final retainage from an owner for improvements to property, the contractor must pay from that retainage the proportion of the retainage owed to each subcontractor and materials supplier, within ten calendar days after receipt of the retainage from the owner, or within the time period provided in a contract, invoice, or purchase order between the contractor and the subcontractor or materials supplier, whichever time period is shorter, provided that the contractor has determined that the subcontractor's or materials supplier's work, labor, and materials have been satisfactorily performed or furnished and that the owner has approved the subcontractor's or materials supplier's work, labor, and materials. This provision also applies to subcontractors, materials suppliers, lower tier subcontractors and lower tier materials suppliers when they receive final retainage.

Additionally, current law specifies that if the contractor fails to pay a subcontractor or materials supplier within the appropriate time period, the

contractor must pay the subcontractor or materials supplier, in addition to the retainage due, interest in the amount of 18% per annum of the retainage due, beginning on the eleventh day following the receipt of the retainage from the owner and ending on the date of full payment of the retainage due plus interest to the subcontractor or materials supplier. This provision also applies to subcontractors, materials suppliers, lower tier subcontractors and lower tier materials suppliers when they fail to pay within the appropriate time period, as described above.

The bill adds a provision to prohibit any contractor, subcontractor, material supplier, lower tier subcontractor, or lower tier material supplier from withholding retainage from a subcontractor material supplier, lower tier subcontractor, and lower tier material supplier at a higher percentage amount than the percentage amount being withheld from that contractor, subcontractor, material supplier, lower tier subcontractor, or lower tier material supplier. (Sec. 4113.61(F).)

Retainage contract provisions

The bill specifies that any provision of a construction contract, subcontract, agreement, or understanding that permits the holding of retainage from payments to contractors, subcontractors, materials suppliers, lower tier subcontractors, or lower tier materials suppliers is void and unenforceable, being against public policy, if the construction contract, subcontract, agreement, or understanding requires a performance and payment bond for the work that is the subject of the construction contract, subcontract, agreement, or understanding. This provision, however, does not apply in the case of construction contracts, subcontracts, agreements, or understandings involving a single-, two-, or three-family dwelling house.

The bill also prohibits a certified municipal, township, or county building department having jurisdiction, and the Superintendent of the Division of Industrial Compliance from issuing a certificate of occupancy for any building or structure until the contractor provides to the building department or Superintendent certification that all retainage withheld from the contractor or any subcontractor, material supplier, lower tier subcontractor, or lower tier material supplier have been paid, except for amounts necessary to ensure completion of any incomplete work or work that is noted in a written list provided to the owner or public authority specifying deficiencies yet to be corrected, or to compensate for undelivered, defective, or otherwise inadequate supplies. (Secs. 3791.04(I) and 4113.62(F).)

Street improvements authorized by county commissioners

With respect to certain improvements to roads, streets, and alleys authorized by boards of county commissioners, current law prohibits payment for those improvements that are made before the completion of the contract to exceed 90% of the value of the work performed to the date of that payment. Ten per cent of the value of the work performed must be held until the final completion of the contract in accordance with the plans and specifications, except under conditions described below (see "Exceptions"). In addition to payments for work performed, current law permits the county engineer to allow the contractor an estimate for materials, not to exceed 90% of the value of materials delivered on or near the site of the work but not yet incorporated therein, provided the materials have been inspected and found to meet the specifications. (Sec. 5559.14.)

Exceptions

When the retained percentage plus the difference between the contract price and estimates allowed exceeds by more than 15% the estimated cost of completing the work, as determined by the county engineer, the engineer may allow the contractor an estimate equal to all or any part of that excess sum, retaining not less than the estimated cost of completing the work, as determined by the engineer, plus 15%. (Sec. 5559.14.)

The bill eliminates all of these retainage provisions and correspondingly eliminates the exception, since it is inapplicable without retainage provisions.

Bill does not apply to existing contracts

The bill applies only with respect to payment for labor or work performed or materials supplied pursuant to a contract, subcontract, agreement, or understanding that is entered into on and after the bill's effective date. (Section 3.)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-03-03	p. 531

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