



Sub. H.B. 208

125th General Assembly
(As Reported by H. Commerce & Labor)

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

BILL SUMMARY

- Decreases the percentage of retainage that may be withheld for specified public improvement projects from 8% to a maximum of 2%.
- Limits the use of holding a retainage to a percentage-based system in the private sector.
- Prohibits a contractor, subcontractor, and material supplier from withholding retainage at a higher rate than the amount being withheld from that contractor, subcontractor, and material supplier.
- Requires that interest be paid on retainage withheld.
- Modifies conditions for the release of retainage withheld for specified public improvement projects and establishes similar conditions for the release of retainage withheld for private sector construction projects, including a "line item release" by trade.
- Modifies penalties for the delayed release or unauthorized withholding of retainage for public improvement projects and establishes similar penalties relative to private sector construction projects.
- Shortens by ten days statutorily specified payment deadlines and adds new criteria to establish the deadline.
- Except for contracts for residential construction, establishes criteria regarding the unauthorized withholding of funds that render a construction contract void and unenforceable as against public policy.

- Abolishes retainage provisions applicable to contracts for specified street improvements authorized by county commissioners.
- Requires public and private owners to state in their construction contracts the percentage amount of retainage to be withheld for the project.
- Allows contractors to use insurance for replacing delivered materials that are stolen, destroyed, or damaged by casualty.
- Defines "retainage" and "schedule of values" as those terms apply to specified provisions governing public and private sector construction projects.

CONTENT AND OPERATION

Background

Currently the law permits or requires various public sector contracting authorities to withhold a specified percentage of a contract price from contractors. This withheld amount is commonly referred to as "retainage." "Retainage," though not a defined term under existing law, 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.

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 between 98% and 100% instead of 92%. It also eliminates the provision requiring 100% payment after 50% job completion. The bill also requires public owners to state the percentage amount of retainage in the contract for a project. (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, not to exceed the bid price in a unit price contract, 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 between 98% and 100% of the invoice cost instead of 92% and eliminates the qualifier that payment cannot exceed the bid price in a unit price contract. (Sec. 153.14.)

Existing law specifies that if delivered materials are stolen, destroyed, or damaged by casualty before being used, the contractor must replace the materials at the contractor's expense. The bill adds that the materials also could be replaced using applicable insurance purchased to cover that risk. (Sec. 153.14.)

Currently, payment on approved estimates filed with the owner or the owner's representative must be made within 30 days. Failure to make timely payment results in an interest penalty on the money not timely paid. The bill revises this deadline to the following time periods, whichever occurs first: (1) 20 days after the owner's approval, (2) 20 days after the issuance of a certificate of occupancy, or (3) the last day an affidavit for a mechanics' lien can be served. The bill also revises the penalty by specifying that the interest charged must be at the rate of 18% per annum and by adding that reasonable attorney's fees can be allowed. Under current law, interest is the average of the prime rate established at the commercial banks in the city of over 100,000 population that is nearest the construction project.

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. (Sec. 153.13(A) and (C).)

The bill retains the provision specifying that retained funds must be deposited in an escrow account but eliminates the timing provision requiring deposit from the date the contract is 50% complete and 50% paid. The bill also eliminates the provision specifying that no further funds can be retained after the contract is 50% complete.

Additionally, the bill revises the standard for release of escrowed funds. It states that when each portion of the project, as identified in the schedule of values (see "Retainage" and "schedule of values" defined below), is completed and accepted, the retained amounts held in connection with such portion plus a proportional share of interest earned on the retained amounts must be released from escrow and paid to the contractor, subcontractor, and material supplier, as appropriate withholding only that amount necessary to assure satisfactory completion of that portion of the project, or to cover any and all damages incurred by the owner for the tardy completion of that portion of the project or failure by the contractor to meet the milestone date associated with that portion of the project or other damages as set forth in the schedule of values. The bill further specifies that at the completion of the project, the final release of retainage is subject to the

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.*

withholding of any additional damages incurred by the owner as they are specifically identified in the schedule of values. The bill also shortens the period for payment of escrowed funds from 30 days to 20 days from the date of completion, or acceptance or occupancy by the owner. (Sec. 153.13.)

Private sector construction contract provisions

The bill establishes new provisions applicable to private sector construction that are similar to those described above for public sector construction. It specifies that at the time named in the contract for payment to the person with whom it is made, the owner must prepare a schedule of values (see **"Retainage" and "schedule of values" defined** below) and approve a full, accurate, and detailed estimate of the various kinds of labor performed and material furnished under the contract, with the amount due for each kind of labor and material, and the materials and amount due in the aggregate. This estimate must be based upon actual measurement of the labor and materials, and must give the amounts of the preceding estimate, and the amount of labor performed and materials furnished since the preceding estimate. (Sec. 4113.63(A).)

Payments to a contractor, subcontractor, or material supplier for labor performed must be made at the rate of between 98% to 100% of the estimates prepared by the contractor, subcontractor, or material supplier and approved by the owner. If an owner, contractor, subcontractor, or material supplier chooses to withhold retainage, that owner, contractor, subcontractor, or material supplier must state the retainage percentage in the contract and the owner must deposit the amount retained into an interest-bearing escrow account. (Sec. 4113.63(B).)

When each portion of the project, as identified in the schedule of values, is completed and accepted, the retained amounts held in trust in connection with that portion of the project plus a proportional share of interest earned on the retained amounts, must be paid to the contractor, subcontractor, or material supplier, as appropriate, withholding only the amount necessary to assure satisfactory completion of that portion of the project, or to cover any and all damages incurred by the owner for the tardy completion of that portion of the project or failure by the contractor to meet the milestone date associated with that portion of the project or other damages as set forth in the schedule of values. The bill further specifies that at the completion of the project, the final release of retainage is subject to the withholding of any additional damages incurred by the owner as they are specifically identified in the schedule of values. (Sec. 4113.63(C).)

Payment on approved estimates filed with the owner must be made not later than whichever of the following events occurs first: (1) 20 days after the owner's approval, (2) 20 days after the issuance of a certificate of occupancy, or (3) the last day an affidavit for a mechanics' lien can be served. Upon the failure of the owner



to make the payment timely, or upon an unauthorized withholding of retainage, there must be allowed to the contractor, in addition to any other remedies allowed by law, attorney fees and interest on the money not timely paid in the amount of 18% per annum. Interest on the unauthorized withholding of retainage must be in addition to any interest earned in the escrow account. (Sec. 4113.63(C).)

Prompt Pay Law revisions

The Contractor Prompt Pay Law, R.C. section 4113.61, establishes minimum requirements 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.

The bill eliminates the condition requiring submission of an application or request for payment or invoice in order for the Prompt Pay provisions to apply. Thus, payment must be made within ten days regardless of whether an application, request, or invoice is submitted.

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 is void and unenforceable, being against public policy if it (1) permits the holding of retainage from payments to contractors, subcontractors, materials suppliers, lower tier subcontractors, or lower tier materials suppliers in an amount exceeding the amounts allowed under the Public Improvements Law and the Contractor Prompt Payment Law, (2) permits the withholding of any other amount except for work identified as not completed or for liquidated damages, or (3) waives statutory remedies including payment of interest and fees. 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.

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.)

"Retainage" and "schedule of values" defined

For purposes of the Public Improvements Law and the bill's new provisions applicable to private sector construction contracts, the bill defines "retainage" as "any undisputed amount withheld from any payment to a contractor, subcontractor, or material supplier pursuant to the terms of a contract until the occurrence of a specified event that is stated in the contract, and includes any holdback or set-off for satisfactorily completed work or valuation of an item of work in excess of the actual value of the uncompleted item, as that value is stated or described in the contract." (Secs. 153.12(C)(1) and 4113.61(G)(8).)

It also defines "schedule of values" as "an accurate and complete schedule of all materials, labor, and other work for a contract by trade and item of work reflecting its reasonable and accurate value, not reflecting excessive holdbacks or overvalued items, and containing sufficient detail to allow the proper calculations and releases of retainage to assist owners, contractors, and subcontractors in determining when pay estimates and retainage are due and owing." The bill further specifies that the aggregate dollar value of all work shown on a schedule of

values cannot exceed the contract price. The schedule of values also must include a listing of milestone dates for project completion and damages associated with failure to complete the work on time as well as any other damages that may be incurred by the owner that are identifiable at the onset of the project. (Secs. 153.12(C)(2) and 4113.63(D).)

HISTORY

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Introduced	05-03-03	p. 531
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