



## House Bill 320/aHBIC/aSJC -- Page 2

- Adds a provision stating “A creditor shall not collect, enforce a security interest against, garnish or levy execution on those retainage, progress payments or other payments that are owed by an owner, contractor or subcontractor to a person, or his surety, who has furnished labor or material pursuant to a construction contract.”
- Amends a provision stating “When a project is ~~fifty percent~~ substantially complete, no further retainage shall be withheld. This allows additional retainage withholding until the project is substantially complete.
- Adds a new provision that a contractor shall retain no more than five percent retainage regardless of whether retainage is withheld by owner.
- Adds a provision requiring the contractor and his subcontractors shall pay interest as it is received prorata to their subcontractors.
- One of the requirements for final payment on the project is proof of ~~substantial~~ completion.
- Adds the following section: ATTORNEY FEES.—In an action to enforce the provisions of the Retainage Act, the court may award court costs and reasonable attorney fees.

### Synopsis of HBIC Amendment

The House Business & Industry Committee amendment exempts the State Highway and Transportation Department and residential properties with four or less dwelling units. It exempts public bodies from establishing an escrow arrangement for retainage funds. Local public bodies must deposit retainage in an interest-bearing account and the interest must be distributed prorata to the contractor and subcontractors upon completion of the project.

The amendment also allows the owner to make payments up to forty-five days after the contractor submits an undisputed request for payment, however, this extended payment provision must be specified in construction documents.

### Synopsis of Original Bill

House Bill 320 entitled the Retainage Act establishes provisions in connection with a construction contract for withholding funds payable to the contractors until the project is substantially complete.

### Significant Issues

This bill impacts all public projects with the exception of the State Highway and Transportation Department. It also impacts all private, commercial and residential projects with the exception of residential projects with four or fewer dwelling units. It requires establishment of an escrow arrangement prior to the owner withholding retainage funds on applicable construction contracts.

The amendment requires the owner to make payment within forty-five days of receipt of an undisputed request for payment, on applicable construction contracts. It requires the owner to place a conspicuous notification on construction documents, specifying the number of days in which an undisputed request for payment will be paid. If the owner fails to pay the contractor within this time, the owner is required to pay interest on the unpaid balance at the rate of one and one-half percent of the undisputed amount per month until the payment is made.

The bill provides that all construction contracts require contractors and subcontractors make prompt payment to their subcontractors and suppliers for amounts owed within seven days after receipt of payment from the owner, contractor or subcontractor. If this payment is not made within this time, the contractor or subcontractor is required to pay interest on this outstanding amount beginning on the eighth day, at the rate of one and one-half percent of the undisputed amount until payment is issued.

The bill allows a maximum of five percent of the cost of estimated work done, and value of materials stored on the site or off-site, to be withheld as retainage. When the project is fifty percent complete, no further retainage shall be withheld.

This bill formalizes and places in state statutes, retainage, payment and escrow account requirements that are currently managed through the written agreement between the owner and contractor, and between the contractor, subcontractors and vendors. While the intent of the law is to assure that payments on construction work are made promptly, placement of funds in escrow would be a burdensome additional task. This would add cost to the project.

The Construction Industries Division has no regulatory authority over contractual arrangements between the owner and contractor. Therefore, there is no mechanism in place to enforce the provisions of this bill.

#### **OTHER SUBSTANTIVE ISSUES**

The Regulation and Licensing Department offered the following unsupported speculations about the impact of this bill. The provisions regulating payment of money due contractors may have a positive impact on undercapitalized contractors. Getting them paid more promptly would arguably help them remain solvent. Subcontractors and suppliers would, presumably, also receive payment more quickly, which would contribute to their economic stability. On the other hand, there may be a negative impact in that retainage is likely to be an owner's sole remedy when a contractor underbids a project and abandons it after the money runs out, which is not an uncommon occurrence.

MV/ar