

Report to CPARB
BE/DBI Retainage Workgroup
Best Practices and Guideline
Retainage on Public Works Projects

In 2022 the BE/DBI Committee conducted a survey of things that cause failure of prompt payment of subcontractors on public works projects. One area that was identified was retention release. Retention on Public Works Projects is grossly misunderstood across the industry and the timeline negatively impacts small and diverse business due to the lack of prompt payment.

The average person likely understands the RCW to say that retention will be released after the 45-day lien period, therefore this duration sticks in their mind. However, in reality that duration could extend to years. First of all, retention is linked to the main contract, not the work performed by each subcontractor, therefore work completed by a subcontractor in the first part of construction must wait for the entire project to be complete and releases received before they will receive their retention. Secondly, Lnl, DOR and ESD are not required to follow the lien period timeline, and their work protecting the workers and taxpayers of Washington State takes time to complete.

Retention ends up being this surprising and unexpected barrier to success for firms performing construction work on public works projects.

Function of retention

In the State of Washington, liens cannot be filed against public property. Therefore, there is a need to accommodate the lien process for protection and payment of claims arising out of the contract and payments with respect to taxes, increases and penalties from the Department of Labor and Industries (Lnl), Department of Revenue (DOR) and Employment Security Department (ESD).

Retention must be held on public improvement contracts in an amount up to five percent of the contract amount to protect those interests mentioned above and only for those interests. It is the only contractual requirement specifically noted in statute that is to be applied as a percentage to the contract for public works contracts.

Case Studies/Evidence of Barriers to Payment of Retention

The barriers to prompt payment are complex and involve many stakeholders. From the lowest tier subcontract, prime builder, owner and State Agencies (even designers) are impacted and involved in the processes required to release retention.

Disguising retention as something else:

We have heard that retention impacts can be found in the inappropriate application of retention-like line items within a Schedule of Values of the application for payment. It can look like an owner or prime directed percentage for “closeout” or “demobilization” that is not based in actual costs and is paid when the project is complete. An example of which was from the 57.20 WSDOT Statute which impacted a design consultant providing professional services. Halfway through the job, the Prime Design-Builder elected to withhold 5% of designer invoices. Even though there was not a clause in the contract allowing for retention against the designer, the DB still held retention.

Link to stories from BEDBI Report to Leg and Stories from the Survey.

Retainage Bond Costs

We have heard of subcontractors being charged an administrative fee on top of the bond premium from the prime contractor when they elect to submit a retainage bond for their scope of work. Between the bond premiums and the admin fee this can significantly reduce the profit earned by the firm, which harms small and diverse businesses.

Agency releases take a long time:

Lnl, DOR and ESD, who are all required to provide releases, state they are understaffed and overworked. Therefore, initial action until submission of a Notice of Completion by an Owner is first looked at after a 50-100 day wait period by Lnl. Similar time frames are needed for DOR to review. ESD is often the most prompt, within 24 hours. While the statutes contemplate 45-day lien period for subcontractors and suppliers to file claims against the retainage, and State Agencies providing releases have no time restriction.

In some cases we heard of contractors who wanted to exit the business (even just to retire) being required to maintain their business licenses and remain in business in order to receive their retention years after they had wanted to close.

Best Practices

On the Part of Owners:

1. Host pre-construction administrative meetings.
 - a. Communicate the retention options beyond just forms. Help contractors to link the processes and options around retention so that they can make the most informed decision.
 - b. Clearly communicate and ensure understanding of the contract closeout process.
 - c. Be an active participant in the closeout process. Provide reminders, be available.
2. Be prepared to accommodate those instances when the prime contractor does not elect to obtain a bond in lieu of retention and a subcontractor does. Make sure that your processes have already been thought out and are ready to accommodate to help reduce the potential administrative burden on the part of the prime contractor.
3. Encourage the use of retention bonds when appropriate. Consider making Retainage Bonds a cost of the Work.
4. Do not hide or disguise retention-like line items within the SOV or within contract terms that are withholding payments other than true retention.- Characteristics of disguised retention include line items measured by percentages, or days or duration instead of measured by performance of work. (i.e. prescriptive project closeout percentages or final completion costs/percentages)
 - a. Consider the fact that these types of terms are often carried down to subcontractors and it is not necessarily appropriate for that to happen.
- 4.5. Do not treat retention as a leveraging item. It is not for public agencies to use, it is to protect the rights of those entitled to lien the project.
- 5.6. When feasible, form projects so they don't extend out for years.
- 6.7. Part 7 of the RCW allows for early release – develop process
- 7.8. Provide a clear and complete description of the work on the Notice of Completion.

On the Part of Primes:

1. Known the Agency Release landscape – what are the roles of Lnl, DOR and ESD, and how do you need to ~~best~~ be prepared to successfully navigate the reviews.
 - a. Set the example of culture shift in communicating to Lnl and DOR, so that subtier~~s~~ are willing to ask for clarifications and work with their account managers.
 - b. Respond quickly to any question received from Lnl. Make sure their emails are not sitting in spam folders.
2. Understand the retainage options. Bond in Lieu versus Escrow versus retained by the public agency.
3. Be cautious of mandated percentages that appear to be additional that are not retention-like in the contracts. Submit a question during the bidding phase asking for clarification since the mandated percentages do not appear to be in accordance with statute.
- ~~3.4.~~ Don't bid on work that includes terms that are not reasonable.
5. Discontinue the practice of disguising retention-like contract terms or withholding additional percentages within a schedule of values, or as a pass down from the Owner's contract.
 - a. Make sure that subcontractor schedules of values equate to measurable performance of work, not to days-based timelines or percentage of work withholding.
 - b. Apply good management practices and real time dispute resolution for performance of work instead of putting those into a catch all line in the schedule of values at the end of the job.
- ~~4-6.~~ Understand the closeout process for the agency. Ask questions when activities seem to slow down.
- ~~5-7.~~ Chase subcontractor affidavits.
- ~~6-8.~~ Do not Avoid extending retention to consultant services when consultants are contracted to the prime in alternative public works projects.
9. Publish a project schedule monthly that shows the completion of the contract.
- ~~7-10.~~ When appropriate publish a standard subcontract template with the invitation to subcontract so that subcontractors can be aware of the anticipated structure of the contract and invoicing.

On the part of the Subcontractors and Subtiers:

1. Understand that retention is linked to the prime's contract not your individual scope of work.
2. Become educated about subcontractor rights to obtain bonds in lieu of retention regardless of the option that the prime contractor chose for the project.
 - a. Understand the unintended consequences – prime contractors can require you to pay the premiums that they incur for the retainage bond, and in some cases may change an “administration fee”.
3. Be responsive to Lnl questions. Ask for support from the Prime or even the public agency if needed.
4. Promptly file intent and affidavits upon completion of individual scopes of work. Secondary affidavits can be filed should a change order occur after the main scope of work has been completed.
5. Watch for disguised language such as “project closeout” in your schedule of values, that may serve the same purpose as retainage.
 - a. Look for a description of activities if a project closeout line is included so that you can confirm it is not a disguised term.
 - b. Question and/or negotiate if it shows up as a percentage of the work, instead of a quantified effort.

c. Watch for contract terms where the schedule of values is to be determined after award. Whenever possible set the schedule of values in advance.

~~5-6.~~ Be familiar with the RCW's governing the use of retention bonds in lieu of retainage, knowing you have the right to use a retention bond regardless of Prime Contractor's choice to use one or not.

~~6-7.~~ ~~DO NOT KNOW IF THIS IS A BEST PRACTICE BUT b~~ Be familiar with bank lending allowances specific to your firm regarding long term receivables (greater than 90 days) such as retainage.

~~7-8.~~ Make sure you understand the contract's specific completion date, and milestones. Follow project schedules continuously updated completion date due to allowable day(s) extensions. Follow published (newspaper or agency) date of completion for ~~each individual~~ the main contract between the Prime and Owner to understand when retention will likely be released.

Education

Lack of understanding around the function of retention, allowable methods and timelines of retention have clearly shown that there is a lack of education for the contracting community, that needs everyone to take a part of filling the gap.

Public owners need to do a better job of communicating and clearly explaining retention to contractors as they make their decisions and choose the form of retention for each project.

Resources of existing training and experts willing to provide education need to be shared across the industry. Agencies like Lnl and DOR and ESD may be able to help by educating contractors as to the role they fill, what they are reviewing for and how they can support contractors.

Encourage contractors to speak with their Lnl Account Managers early and often. . Municipal Research and Services Center (MRSC) is another resource. In addition to training events, they provide legal and policy guidance on public works, including retainage.

For instance, there is a relationship between Worker's Comp classifications and prevailing wage classifications, that may not be globally understood by contractors. And takes a lot of time for Lnl to chase. Contractor's educated in how the crosswalk between these two branches of Lnl are working to protect the state and the worker, could proactively comply with the rules and regulations better.

Prime Contractors should reflect the efforts of public owners to lower tier subcontractors, providing them the best understanding, and directing them to resources to understand retention.

Retention is linked to the primes' contract with the Public Agency, not by individual subcontractor work completed. There may be misunderstanding that the retainage and timeline is linked to work performed by individual contractor and that is not the case. Retention is driven by the overall contract, so early subcontractors end up having to wait the longest for retention to be released.

Potential Legislative Changes

1. Allow acceptance at halfway point of contract completion.
2. Extend the lien period statutory timelines to DOR, ESD and LNI.
3. Co-locate the RCWs related to retention.

4. Make Retainage Bond costs reimbursable.
5. Prohibit the charging of an admin fee for managing retainage bonds.
6. Exclude consultant services as being subject to retainage.