

By: Shine

H.B. No. 2135

A BILL TO BE ENTITLED

AN ACT

relating to retainage requirements for certain public works construction projects.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. The heading to Subchapter B, Chapter 2252, Government Code, is amended to read as follows:

SUBCHAPTER B. [~~INTEREST ON~~] RETAINED PUBLIC WORKS CONTRACT PAYMENTS

SECTION 2. Section 2252.031, Government Code, is amended to read as follows:

Sec. 2252.031. DEFINITIONS. In this subchapter:

(1) "Beneficial use" means, following completion of all or a portion of work under a public works contract, the ability of a governmental entity to place a public works project that is the subject of the contract into operation for the project's intended purpose.

(2) "Civil works project" has the meaning assigned by Section 2269.351.

(3) "Governmental entity" means:

(A) the state, a county, or a municipality;

(B) a department, board, or agency of the state, a county, or a municipality;

(C) a school district or a subdivision of a school district; or

(D) any other governmental or quasi-governmental

1 authority authorized by statute to make a public works contract.

2 (4) [~~(2)~~] "Prime contractor" means a person or
3 persons, firm, or corporation contracting with a governmental
4 entity for a public work.

5 (5) [~~(3)~~] "Public works" includes the construction,
6 alteration, or repair of a public building or the construction or
7 completion of a public work.

8 (6) [~~(4)~~] "Public works contract payment" means a
9 payment by a governmental entity for the value of labor, material,
10 machinery, fixtures, tools, power, water, fuel, or lubricants used
11 or consumed, ordered and delivered for use or consumption, or
12 specially fabricated for use or consumption but not yet delivered,
13 in the direct performance of a public works contract.

14 (7) [~~(5)~~] "Retainage" means the percentage [~~part~~] of a
15 public works contract payment withheld by a governmental entity to
16 secure performance of the contract.

17 (8) "Warranty period" means the period of time
18 specified in a contract during which certain terms applicable to
19 the warranting of work performed under the contract are in effect.

20 SECTION 3. Section [2252.032](#), Government Code, is amended to
21 read as follows:

22 Sec. 2252.032. RETAINAGE. (a) A governmental entity shall:

23 (1) include in each public works contract a provision
24 that establishes:

25 (A) the circumstances under which a public works
26 project, including a civil works project, is considered
27 substantially complete; and

1 (B) for a civil works project, the circumstances
2 under which the governmental entity has beneficial use of the
3 project;

4 (2) deposit in an interest-bearing account the
5 retainage of a [~~public works contract that provides for retainage~~
6 ~~of more than five percent of the~~] periodic contract payment of a
7 public works contract; and

8 (3) [~~(2)~~] pay the retainage remaining in the account
9 described by Subdivision (2), including any interest earned on the
10 retainage, to the prime contractor on completion of the contract.

11 (b) If the total value of a public works contract is \$1
12 million or more, a governmental entity may not withhold retainage
13 in an amount that exceeds:

14 (1) the greater of:

15 (A) five percent of the contract price; or

16 (B) the established rate of retainage for
17 materials and equipment that are delivered on-site to be installed;
18 and

19 (2) if the public works contract is for a civil works
20 project, two percent of the contract price, excluding interest
21 earned on the retainage, after the governmental entity has
22 beneficial use of the project.

23 (c) A governmental entity may not withhold retainage:

24 (1) after completion of the contract by the prime
25 contractor, including during the warranty period; or

26 (2) for the purpose of requiring the prime contractor,
27 after completion of the contract, to perform work on manufactured

1 goods or systems that were:

2 (A) specified by the designer of record; and

3 (B) properly installed by the contractor.

4 (d) On application to a governmental entity for final
5 payment and release of retainage, the governmental entity may
6 withhold retainage if there is a bona fide dispute between the
7 governmental entity and the prime contractor and the reason for the
8 dispute is that labor, services, or materials provided by the prime
9 contractor or the prime contractor's subcontractors were not
10 provided in compliance with the contract. The prime contractor is
11 entitled to:

12 (1) cure the noncompliance of the labor, services, or
13 materials that are the subject of the dispute; or

14 (2) offer the governmental entity a reasonable amount
15 of money as compensation for the noncompliant labor, services, or
16 materials that cannot be promptly cured.

17 (e) This section does not prohibit a governmental entity
18 from releasing portions of retainage for substantially complete or
19 fully completed portions of work under a public works contract.

20 SECTION 4. The changes in law made by this Act apply only to
21 a contract to which Subchapter B, Chapter 2252, Government Code,
22 applies that is entered into on or after the effective date of this
23 Act. A contract to which Subchapter B, Chapter 2252, Government
24 Code, applies that is entered into before the effective date of this
25 Act is governed by the law in effect when the contract was entered
26 into, and the former law is continued in effect for that purpose.

27 SECTION 5. This Act takes effect immediately if it receives

H.B. No. 2135

1 a vote of two-thirds of all the members elected to each house, as
2 provided by Section 39, Article III, Texas Constitution. If this
3 Act does not receive the vote necessary for immediate effect, this
4 Act takes effect September 1, 2019.