

## **BILL ANALYSIS**

Senate Research Center  
87R2030 CJC-F

S.B. 1097  
By: Creighton  
Business & Commerce  
3/26/2021  
As Filed

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

Sections 2252.031-032, Government Code, govern retainage law for public works contracts, which allows a government entity to withhold a portion of periodic payments made to contractors until the project is complete. Unfortunately, current law is not prescriptive, and the practice of withholding retainage varies greatly across the state. In addition to contracts between government and contractors that prescribe the terms and conditions of work, Chapter 2253, Government Code, also requires contractors to provide performance, or "surety" bonds, and payment bonds on public works construction projects.

Bonds are intended to protect public owners' financial interests in the event that there is a non-performing contractor, or in situations where a default may occur. Retainage does not protect owners in instances where a project is a failure. Contracts provide the legal framework for the execution of work, and bonds protect the public's financial interests.

In addition to legally binding contracts and bonds, current law states that public owners are required to withhold retainage, although the amount of withholding is not specified. Current laws also state that the government shall place "retainage" for public works construction projects in excess of five (5) percent of the contract price into an interest-bearing account, however, this does not always occur. There are also not any limits on the amount of retainage that may be withheld, or conditions on the release of retainage.

There are other instances where retainage is withheld during the warranty period, or is used to assign additional liability, or leverage contractors for free work. Utilizing retainage to do so often results in claims, or expensive and unnecessary protracted legal negotiations to receive final payment and release of retainage.

S.B. 1097 provides a framework for fairness by doing the following:

- Prevents misuse, abuse, and withholding of excessive retainage.
- Protects the interests of public owners by establishing clarity around the process of withholding retainage by providing clear conditions for the partial release of retainage to incentivize project completion and minimize unnecessary and costly disputes.
- Prohibits the misuse of retainage to confer additional unreasonable liability or free warranty work.
- Preserves public owners' ability to utilize retainage for its intended purpose to ensure and incentivize completion of work under fair and reasonable conditions.
- Preserves the rights of public owners to hold contractors accountable and maintain standing in the event of default or genuine disputes.
- Promotes fair and reasonable payment of retainage so Texas public works contractors can maintain cash flow, and pay subcontractors and suppliers.
- Promotes common sense policy to protect Texas construction companies and promote successful project completion and minimize payment disputes.

As proposed, S.B. 1097 amends current law relating to retainage requirements for certain public works construction projects.

### **RULEMAKING AUTHORITY**

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends the heading to Subchapter B, Chapter 2252, Government Code, to read as follows:

#### **SUBCHAPTER B. RETAINED PUBLIC WORKS CONTRACT PAYMENTS**

SECTION 2. Amends Section 2252.031, Government Code, by amending Subdivision (5) and adding Subdivision (6), to redefine "retainage" and to define "warranty period" for Subchapter B.

SECTION 3. Amends Section 2252.032, Government Code, as follows:

Sec. 2252.032. RETAINAGE. (a) Creates this subsection from existing text. Requires that a governmental entity:

(1) include in each public works contract a provision that establishes the circumstances under which:

(A) the public works project that is the subject of the contract is considered substantially complete; and

(B) the governmental entity is authorized to release all or a portion of the retainage for:

(i) substantially completed portions of the project; or

(ii) fully completed and accepted portions of the project;

(2) maintain an accurate record of accounting for:

(A) the retainage withheld on periodic contract payments, rather than deposit in an interest-bearing account the retainage of a public works contract that provides for retainage of more than five percent of the periodic contract payment; and

(B) the retainage released to the prime contractor for a public works contract; and

(3) for a public works contract described by Subsection (c), rather than by Subdivision (2), pay any remaining retainage described by Subdivision (2)(A) and the interest earned on the retainage to the prime contractor on completion of the contract.

Makes nonsubstantive changes.

(b) Prohibits a governmental entity, except as provided by Subsection (h), if the total value of a public works contract is \$1 million or more, from withholding retainage in an amount that exceeds five percent of the contract price and prohibits the rate of retainage from exceeding five percent for any item in a bid schedule or schedule of values for the project, including materials and equipment delivered on-site to be installed.

(c) Authorizes a governmental entity and prime contractor, for a competitively awarded contract with a value of \$10 million or more, and for a contract that was awarded using a method other than competitive bidding, to agree to deposit in an interest-bearing account the retainage withheld on periodic contract payments.

(d) Provides that if, for the purpose of fulfilling an obligation of a prime contractor under a contract described by Subsection (b), the prime contractor enters into a subcontract:

(1) the prime contractor is prohibited from withholding from a subcontractor a greater percentage of retainage than the percentage that is authorized to be withheld from the prime contractor by the governmental entity under Subsection (b); and

(2) a subcontractor who enters into a contract with another subcontractor to provide labor or materials under the contract is prohibited from withholding from that subcontractor a greater percentage of retainage than the percentage that is authorized to be withheld from the subcontractor as determined under Subdivision (1).

(e) Prohibits a governmental entity from withholding retainage:

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

(2) for the purpose of requiring the prime contractor, after completion of the contract, to perform work on manufactured goods or systems that were:

(A) specified by the designer of record; and

(B) properly installed by the contractor.

(f) Authorizes the governmental entity, on application to a governmental entity for final payment and release of retainage, to withhold retainage if there is a bona fide dispute between the governmental entity and the prime contractor and the reason for the dispute is that labor, services, or materials provided by the prime contractor or the prime contractor's subcontractors were not provided in compliance with the contract. Provides that, if there is no such bona fide dispute between the governmental entity and the prime contractor and neither party is in default under the contract, the prime contractor is entitled to:

(1) cure any noncompliant labor, services, or materials; or

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

(g) Prohibits Subsection (f) from being construed to limit a person who is a party to a public works contract from pursuing another remedy available to the person under other applicable law.

(h) Provides that Subsection (b) does not apply to a governmental entity that receives financial assistance from a fund described by Section 15.432 (Fund) or 15.472 (Fund), Water Code, for a project formally approved for that assistance by the Texas Water Development Board before September 1, 2019. Requires a governmental entity described by this subsection to deposit in an interest-bearing account the retainage withheld under a public works contract that provides for retainage that exceeds five percent of the periodic contract payments.

SECTION 4. Makes application of this Act prospective.

SECTION 5. Effective date: upon passage or September 1, 2021.