87R2030 CJC-F

By:  Creighton S.B. No. 1097

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 by amending Subdivision (5) and adding Subdivision (6) to read as follows:

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

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

SECTION 3.  Section 2252.032, Government Code, is amended to read as follows:

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

(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 may 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)  [~~deposit in an interest-bearing account~~] the retainage withheld on [~~of a public works contract that provides for retainage of more than five percent of the~~] periodic contract payments; and

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

(3)  for a public works contract described by Subsection (c), [~~(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.

(b)  Except as provided by Subsection (h), if the total value of a public works contract is $1 million or more, a governmental entity may not withhold retainage in an amount that exceeds five percent of the contract price and the rate of retainage may not exceed 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)  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, a governmental entity and prime contractor may agree to deposit in an interest-bearing account the retainage withheld on periodic contract payments.

(d)  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 may not withhold from a subcontractor a greater percentage of retainage than the percentage that may 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 may not withhold from that subcontractor a greater percentage of retainage than the percentage that may be withheld from the subcontractor as determined under Subdivision (1).

(e)  A governmental entity may not withhold 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)  On application to a governmental entity for final payment and release of retainage, the governmental entity may 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. 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)  Subsection (f) may not be 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)  Subsection (b) does not apply to a governmental entity that receives financial assistance from a fund described by Section 15.432 or 15.472, Water Code, for a project formally approved for that assistance by the Texas Water Development Board before September 1, 2019. A governmental entity described by this subsection shall 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.  The changes in law made by this Act apply only to a contract to which Subchapter B, Chapter 2252, Government Code, applies that is entered into on or after the effective date of this Act. A contract to which Subchapter B, Chapter 2252, Government Code, applies that is entered into before the effective date of this Act is governed by the law in effect when the contract was entered into, and the former law is continued in effect for that purpose.

SECTION 5.  This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2021.