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H.B. No. 692

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

1 (B) the governmental entity may release all or a
2 portion of the retainage for:

3 (i) substantially completed portions of the
4 project; or

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

7 (2) maintain an accurate record of accounting for:

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

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

14 (3) for a public works contract described by
15 Subsection (c), [~~(2)~~] pay any remaining retainage described by
16 Subdivision (2)(A) and the interest earned on the retainage to the
17 prime contractor on completion of the work required to be performed
18 under the contract.

19 (b) Except as provided by Subsection (i):

20 (1) if the total value of a public works contract is
21 less than \$5 million, a governmental entity may not withhold
22 retainage in an amount that exceeds 10 percent of the contract price
23 and the rate of retainage may not exceed 10 percent for any item in a
24 bid schedule or schedule of values for the project, including
25 materials and equipment delivered on site to be installed;

26 (2) if the total value of a public works contract is \$5
27 million or more, a governmental entity may not withhold retainage

1 in an amount that exceeds five percent of the contract price and the
2 rate of retainage may not exceed five percent for any item in a bid
3 schedule or schedule of values for the project, including materials
4 and equipment delivered on site to be installed; and

5 (3) if a public works contract relates to the
6 construction or maintenance of a dam, as that term is defined by
7 Section 423.0045, regardless of the total value of the contract, a
8 governmental entity may not withhold retainage in an amount that
9 exceeds 10 percent of the contract price and the rate of retainage
10 may not exceed 10 percent for any item in a bid schedule or schedule
11 of values for the project, including materials and equipment
12 delivered on site to be installed.

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

18 (d) If, for the purpose of fulfilling an obligation of a
19 prime contractor under a public works contract, the prime
20 contractor enters into a subcontract:

21 (1) the prime contractor may not withhold from a
22 subcontractor a greater percentage of retainage than the percentage
23 that may be withheld from the prime contractor by the governmental
24 entity under the contract; and

25 (2) a subcontractor who enters into a contract with
26 another subcontractor to provide labor or materials under the
27 contract may not withhold from that subcontractor a greater

1 percentage of retainage than the percentage that may be withheld
2 from the subcontractor as determined under Subdivision (1).

3 (e) A governmental entity may not withhold retainage:

4 (1) after completion of the work required to be
5 performed under the contract by the prime contractor, including
6 during the warranty period; or

7 (2) for the purpose of requiring the prime contractor,
8 after completion of the work required to be performed under the
9 contract, to perform work on manufactured goods or systems that
10 were:

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

12 (B) properly installed by the contractor.

13 (f) On application to a governmental entity for final
14 payment and release of retainage, the governmental entity may
15 withhold retainage if there is a bona fide dispute between the
16 governmental entity and the prime contractor and the reason for the
17 dispute is that labor, services, or materials provided by the prime
18 contractor, or by a person under the direction or control of the
19 prime contractor, failed to comply with the express terms of the
20 contract or if the surety on any outstanding surety bond executed
21 for the contract does not agree to the release of retainage. The
22 governmental entity must provide to the prime contractor written
23 notice of the basis on which the governmental entity is withholding
24 retainage under this subsection. If there is no bona fide dispute
25 between the governmental entity and the prime contractor and
26 neither party is in default under the contract, the prime
27 contractor is entitled to:

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

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

6 (g) A governmental entity is not required to accept a prime
7 contractor's offer of compensation under Subsection (f)(2).

8 (h) Subsection (f) may not be construed to limit either the
9 governmental entity's or prime contractor's right to pursue any
10 remedy available under the express terms of the public works
11 contract or other applicable law.

12 (i) For purposes of this subsection, a project is considered
13 formally approved if the project is the subject of a resolution
14 approving an application for financial assistance adopted by the
15 Texas Water Development Board before September 1, 2019, for any
16 part of the project's financing. Subsection (b) of this section
17 does not apply to a governmental entity that receives financial
18 assistance under Section 15.432 or 15.472, Water Code, for a
19 project that is formally approved by the Texas Water Development
20 Board. A governmental entity described by this subsection shall
21 deposit in an interest-bearing account the retainage withheld under
22 a public works contract that provides for retainage that exceeds
23 five percent of the periodic contract payments.

24 (j) This section may not be construed as affecting a
25 governmental entity's ability to retain certain amounts due under a
26 contract as required by Chapter 2258.

27 SECTION 4. The changes in law made by this Act apply only to

1 a contract to which Subchapter B, Chapter 2252, Government Code,
2 applies that is entered into on or after the effective date of this
3 Act. A contract to which Subchapter B, Chapter 2252, Government
4 Code, applies that is entered into before the effective date of this
5 Act is governed by the law in effect when the contract was entered
6 into, and the former law is continued in effect for that purpose.

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