

By: Shine, Bell of Kaufman, Darby,
Bell of Montgomery, et al.

H.B. No. 692

Substitute the following for H.B. No. 692:

By: Paddie

C.S.H.B. No. 692

A BILL TO BE ENTITLED

1 AN ACT
2 relating to retainage requirements for certain public works
3 construction projects.

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

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

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

8 SECTION 2. Section 2252.031, Government Code, is amended by
9 amending Subdivision (5) and adding Subdivision (6) to read as
10 follows:

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

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

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

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

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

23 (A) the public works project that is the subject
24 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 contract.

18 (b) Except as provided by Subsection (h), if the total value
19 of a public works contract is \$1 million or more, a governmental
20 entity may not withhold retainage in an amount that exceeds five
21 percent of the contract price and the rate of retainage may not
22 exceed five percent for any item in a bid schedule or schedule of
23 values for the project, including materials and equipment delivered
24 on-site to be installed.

25 (c) For a competitively awarded contract with a value of \$10
26 million or more, and for a contract that was awarded using a method
27 other than competitive bidding, a governmental entity and prime

1 contractor may agree to deposit in an interest-bearing account the
2 retainage withheld on periodic contract payments.

3 (d) If, for the purpose of fulfilling an obligation of a
4 prime contractor under a contract described by Subsection (b), the
5 prime contractor enters into a subcontract:

6 (1) the prime contractor may not withhold from a
7 subcontractor a greater percentage of retainage than the percentage
8 withheld from the prime contractor by the governmental entity under
9 Subsection (b); and

10 (2) a subcontractor who enters into a contract with
11 another subcontractor to provide labor or materials under the
12 contract may not withhold from that subcontractor a greater
13 percentage of retainage than the percentage that may be withheld
14 from the subcontractor as determined under Subdivision (1).

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

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

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

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

22 (B) properly installed by the contractor.

23 (f) On application to a governmental entity for final
24 payment and release of retainage, the governmental entity may
25 withhold retainage if there is a bona fide dispute between the
26 governmental entity and the prime contractor and the reason for the
27 dispute is that labor, services, or materials provided by the prime

1 contractor or the prime contractor's subcontractors were not
2 provided in compliance with the contract or if the surety on any
3 outstanding surety bond executed for the contract does not agree to
4 the release of retainage. If there is no bona fide dispute between
5 the governmental entity and the prime contractor and neither party
6 is in default under the contract, the prime contractor is entitled
7 to:

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

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

13 (g) Subsection (f) may not be construed to limit:

14 (1) a person who is a party to a public works contract
15 from pursuing another remedy available to the person under other
16 applicable law; or

17 (2) the withholding of any offsets from retainage as
18 provided by the terms of the public works contract.

19 (h) For purposes of this subsection, a project is considered
20 formally approved if the project is the subject of a resolution
21 approving an application for financial assistance adopted by the
22 Texas Water Development Board before September 1, 2019, for any
23 part of the project's financing. Subsection (b) of this section
24 does not apply to a governmental entity that receives financial
25 assistance under Section 15.432 or 15.472, Water Code, for a
26 project that is formally approved by the Texas Water Development
27 Board. A governmental entity described by this subsection shall

1 deposit in an interest-bearing account the retainage withheld under
2 a public works contract that provides for retainage that exceeds
3 five percent of the periodic contract payments.

4 SECTION 4. The changes in law made by this Act apply only to
5 a contract to which Subchapter B, Chapter 2252, Government Code,
6 applies that is entered into on or after the effective date of this
7 Act. A contract to which Subchapter B, Chapter 2252, Government
8 Code, applies that is entered into before the effective date of this
9 Act is governed by the law in effect when the contract was entered
10 into, and the former law is continued in effect for that purpose.

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