

1-1 By: Shine, et al. (Senate Sponsor - Creighton) H.B. No. 692  
1-2 (In the Senate - Received from the House May 12, 2021;  
1-3 May 13, 2021, read first time and referred to Committee on Business  
1-4 & Commerce; May 19, 2021, reported favorably by the following vote:  
1-5 Yeas 8, Nays 0; May 19, 2021, sent to printer.)

1-6 COMMITTEE VOTE

	Yea	Nay	Absent	PNV
1-7				
1-8	X			
1-9	X			
1-10	X			
1-11	X			
1-12	X			
1-13	X			
1-14	X			
1-15	X			
1-16			X	

1-17 A BILL TO BE ENTITLED  
1-18 AN ACT

1-19 relating to retainage requirements for certain public works  
1-20 construction projects.

1-21 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-22 SECTION 1. The heading to Subchapter B, Chapter 2252,  
1-23 Government Code, is amended to read as follows:

1-24 SUBCHAPTER B. ~~[INTEREST ON]~~ RETAINED PUBLIC WORKS CONTRACT PAYMENTS

1-25 SECTION 2. Section 2252.031, Government Code, is amended by  
1-26 amending Subdivision (5) and adding Subdivision (6) to read as  
1-27 follows:

1-28 (5) "Retainage" means the percentage ~~[part]~~ of a  
1-29 public works contract payment withheld by a governmental entity to  
1-30 secure performance of the contract.

1-31 (6) "Warranty period" means the period of time  
1-32 specified in a contract during which certain terms applicable to  
1-33 the warranting of work performed under the contract are in effect.

1-34 SECTION 3. Section 2252.032, Government Code, is amended to  
1-35 read as follows:

1-36 Sec. 2252.032. RETAINAGE. (a) A governmental entity  
1-37 shall:

1-38 (1) include in each public works contract a provision  
1-39 that establishes the circumstances under which:

1-40 (A) the public works project that is the subject  
1-41 of the contract is considered substantially complete; and

1-42 (B) the governmental entity may release all or a  
1-43 portion of the retainage for:

1-44 (i) substantially completed portions of the  
1-45 project; or

1-46 (ii) fully completed and accepted portions  
1-47 of the project;

1-48 (2) maintain an accurate record of accounting for:

1-49 (A) ~~[deposit in an interest-bearing account]~~ the  
1-50 retainage withheld on [of a public works contract that provides for  
1-51 retainage of more than five percent of the] periodic contract  
1-52 payments; and

1-53 (B) the retainage released to the prime  
1-54 contractor for a public works contract [payment]; and

1-55 (3) for a public works contract described by  
1-56 Subsection (c), [(2)] pay any remaining retainage described by  
1-57 Subdivision (2)(A) and the interest earned on the retainage to the  
1-58 prime contractor on completion of the work required to be performed  
1-59 under the contract.

1-60 (b) Except as provided by Subsection (i):

1-61 (1) if the total value of a public works contract is

2-1 less than \$5 million, a governmental entity may not withhold  
 2-2 retainage in an amount that exceeds 10 percent of the contract price  
 2-3 and the rate of retainage may not exceed 10 percent for any item in a  
 2-4 bid schedule or schedule of values for the project, including  
 2-5 materials and equipment delivered on site to be installed;

2-6 (2) if the total value of a public works contract is \$5  
 2-7 million or more, a governmental entity may not withhold retainage  
 2-8 in an amount that exceeds five percent of the contract price and the  
 2-9 rate of retainage may not exceed five percent for any item in a bid  
 2-10 schedule or schedule of values for the project, including materials  
 2-11 and equipment delivered on site to be installed; and

2-12 (3) if a public works contract relates to the  
 2-13 construction or maintenance of a dam, as that term is defined by  
 2-14 Section 423.0045, regardless of the total value of the contract, a  
 2-15 governmental entity may not withhold retainage in an amount that  
 2-16 exceeds 10 percent of the contract price and the rate of retainage  
 2-17 may not exceed 10 percent for any item in a bid schedule or schedule  
 2-18 of values for the project, including materials and equipment  
 2-19 delivered on site to be installed.

2-20 (c) For a competitively awarded contract with a value of \$10  
 2-21 million or more, and for a contract that was awarded using a method  
 2-22 other than competitive bidding, a governmental entity and prime  
 2-23 contractor may agree to deposit in an interest-bearing account the  
 2-24 retainage withheld on periodic contract payments.

2-25 (d) If, for the purpose of fulfilling an obligation of a  
 2-26 prime contractor under a public works contract, the prime  
 2-27 contractor enters into a subcontract:

2-28 (1) the prime contractor may not withhold from a  
 2-29 subcontractor a greater percentage of retainage than the percentage  
 2-30 that may be withheld from the prime contractor by the governmental  
 2-31 entity under the contract; and

2-32 (2) a subcontractor who enters into a contract with  
 2-33 another subcontractor to provide labor or materials under the  
 2-34 contract may not withhold from that subcontractor a greater  
 2-35 percentage of retainage than the percentage that may be withheld  
 2-36 from the subcontractor as determined under Subdivision (1).

2-37 (e) A governmental entity may not withhold retainage:

2-38 (1) after completion of the work required to be  
 2-39 performed under the contract by the prime contractor, including  
 2-40 during the warranty period; or

2-41 (2) for the purpose of requiring the prime contractor,  
 2-42 after completion of the work required to be performed under the  
 2-43 contract, to perform work on manufactured goods or systems that  
 2-44 were:

2-45 (A) specified by the designer of record; and

2-46 (B) properly installed by the contractor.

2-47 (f) On application to a governmental entity for final  
 2-48 payment and release of retainage, the governmental entity may  
 2-49 withhold retainage if there is a bona fide dispute between the  
 2-50 governmental entity and the prime contractor and the reason for the  
 2-51 dispute is that labor, services, or materials provided by the prime  
 2-52 contractor, or by a person under the direction or control of the  
 2-53 prime contractor, failed to comply with the express terms of the  
 2-54 contract or if the surety on any outstanding surety bond executed  
 2-55 for the contract does not agree to the release of retainage. The  
 2-56 governmental entity must provide to the prime contractor written  
 2-57 notice of the basis on which the governmental entity is withholding  
 2-58 retainage under this subsection. If there is no bona fide dispute  
 2-59 between the governmental entity and the prime contractor and  
 2-60 neither party is in default under the contract, the prime  
 2-61 contractor is entitled to:

2-62 (1) cure any noncompliant labor, services, or  
 2-63 materials; or

2-64 (2) offer the governmental entity a reasonable amount  
 2-65 of money as compensation for any noncompliant labor, services, or  
 2-66 materials that cannot be promptly cured.

2-67 (g) A governmental entity is not required to accept a prime  
 2-68 contractor's offer of compensation under Subsection (f)(2).

2-69 (h) Subsection (f) may not be construed to limit either the

3-1 governmental entity's or prime contractor's right to pursue any  
3-2 remedy available under the express terms of the public works  
3-3 contract or other applicable law.

3-4 (i) For purposes of this subsection, a project is considered  
3-5 formally approved if the project is the subject of a resolution  
3-6 approving an application for financial assistance adopted by the  
3-7 Texas Water Development Board before September 1, 2019, for any  
3-8 part of the project's financing. Subsection (b) of this section  
3-9 does not apply to a governmental entity that receives financial  
3-10 assistance under Section 15.432 or 15.472, Water Code, for a  
3-11 project that is formally approved by the Texas Water Development  
3-12 Board. A governmental entity described by this subsection shall  
3-13 deposit in an interest-bearing account the retainage withheld under  
3-14 a public works contract that provides for retainage that exceeds  
3-15 five percent of the periodic contract payments.

3-16 (j) This section may not be construed as affecting a  
3-17 governmental entity's ability to retain certain amounts due under a  
3-18 contract as required by Chapter 2258.

3-19 SECTION 4. The changes in law made by this Act apply only to  
3-20 a contract to which Subchapter B, Chapter 2252, Government Code,  
3-21 applies that is entered into on or after the effective date of this  
3-22 Act. A contract to which Subchapter B, Chapter 2252, Government  
3-23 Code, applies that is entered into before the effective date of this  
3-24 Act is governed by the law in effect when the contract was entered  
3-25 into, and the former law is continued in effect for that purpose.

3-26 SECTION 5. This Act takes effect immediately if it receives  
3-27 a vote of two-thirds of all the members elected to each house, as  
3-28 provided by Section 39, Article III, Texas Constitution. If this  
3-29 Act does not receive the vote necessary for immediate effect, this  
3-30 Act takes effect September 1, 2021.

3-31 \* \* \* \* \*