

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

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 that may be withheld from the prime contractor by the governmental  
9 entity under 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. If there is no such bona  
3 fide dispute between the governmental entity and the prime  
4 contractor and neither party is in default under the contract, the  
5 prime contractor is entitled to:

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

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

11 (g) Subsection (f) may not be construed to limit a person  
12 who is a party to a public works contract from pursuing another  
13 remedy available to the person under other applicable law.

14 (h) Subsection (b) does not apply to a governmental entity  
15 that receives financial assistance from a fund described by Section  
16 15.432 or 15.472, Water Code, for a project formally approved for  
17 that assistance by the Texas Water Development Board before  
18 September 1, 2019. A governmental entity described by this  
19 subsection shall deposit in an interest-bearing account the  
20 retainage withheld under a public works contract that provides for  
21 retainage that exceeds five percent of the periodic contract  
22 payments.

23 SECTION 4. The changes in law made by this Act apply only to  
24 a contract to which Subchapter B, Chapter 2252, Government Code,  
25 applies that is entered into on or after the effective date of this  
26 Act. A contract to which Subchapter B, Chapter 2252, Government  
27 Code, applies that is entered into before the effective date of this

1 Act is governed by the law in effect when the contract was entered  
2 into, and the former law is continued in effect for that purpose.

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