

House Bill 692
Senate Amendments
Section-by-Section Analysis

HOUSE VERSION

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:

SENATE VERSION (IE)

SECTION 1. Same as House version.

SECTION 2. Same as House version.

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

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(i) substantially completed portions of the project; or

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~~(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 work required to be performed under the contract.~~

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

~~(1) if the total value of a public works contract is less than \$5 million, a governmental entity may not withhold retainage in an amount that exceeds 10 percent of the contract price and the rate of retainage may not exceed 10 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;~~

~~(2) if the total value of a public works contract is \$5 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; and~~

~~(3) if a public works contract relates to the construction or maintenance of a dam, as that term is defined by Section 423.0045, regardless of the total value of the contract, a governmental entity may not withhold retainage in an amount that exceeds 10 percent of the contract price and the rate of retainage may not exceed 10 percent for any item in~~

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~~(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 work required to be performed under the contract.~~

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

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~~(2) if the total value of a public works contract is \$5 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; and~~

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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 public works contract, 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 the contract; 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 work required to be performed under 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 work required to be performed under 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.

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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 public works contract, 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 the contract; 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 work required to be performed under 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 work required to be performed under 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.

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(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 by a person under the direction or control of the prime contractor, failed to comply with the express terms of the contract or if the surety on any outstanding surety bond executed for the contract does not agree to the release of retainage. The governmental entity must provide to the prime contractor written notice of the basis on which the governmental entity is withholding retainage under this subsection. If there is no 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) A governmental entity is not required to accept a prime contractor's offer of compensation under Subsection (f)(2).

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

(i) For purposes of this subsection, a project is considered formally approved if the project is the subject of a resolution approving an application for financial assistance adopted by the Texas Water Development Board before September 1, 2019, for any part of the project's financing. Subsection (b) of this section does not apply to a governmental entity that

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(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 by a person under the direction or control of the prime contractor, failed to comply with the express terms of the contract or if the surety on any outstanding surety bond executed for the contract does not agree to the release of retainage. The governmental entity must provide to the prime contractor written notice of the basis on which the governmental entity is withholding retainage under this subsection. If there is no 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) A governmental entity is not required to accept a prime contractor's offer of compensation under Subsection (f)(2).

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

(i) For purposes of this subsection, a project is considered formally approved if the project is the subject of a resolution approving an application for financial assistance adopted by the Texas Water Development Board before September 1, 2019, for any part of the project's financing. Subsection (b) of this section does not apply to a governmental entity that

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receives financial assistance under Section 15.432 or 15.472, Water Code, for a project that is formally approved by the Texas Water Development Board. 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.

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

No equivalent provision.

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

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receives financial assistance under Section 15.432 or 15.472, Water Code, for a project that is formally approved by the Texas Water Development Board or to a governmental entity that is a wholesale water supplier that supplies water to customers in 10 or more counties and is governed by Chapter 49, Water Code. 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. [FA1]

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

SECTION __. Section 2252.033, Government Code, is amended to read as follows:

Sec. 2252.033. EXEMPTIONS. This subchapter does not apply to:

- (1) a public works contract executed before August 31, 1981;
- (2) a public works contract in which the total contract price estimate at the time of execution of the contract is less than \$400,000; or
- (3) a public works contract made by the Texas Department of Transportation under [~~Subchapter A,~~] Chapter 223, Transportation Code. [FA2]

SECTION 4. Same as House version.

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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.

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SECTION 5. Same as House version.

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