

BILL ANALYSIS

C.S.H.B. 3913
By: Shine
Urban Affairs
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Interested parties maintain that the amount of a public works contract payment that is retained to secure performance of the contract should be more adequately addressed in statute to avoid excessive retainage that places a significant financial burden on a contractor's ability to pay subcontractors and suppliers and realize a profit. C.S.H.B. 3913 seeks to achieve this goal by setting out provisions relating to the retainage withheld by a governmental entity and by a prime contractor or subcontractor in connection with a public works contract.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 3913 amends the Government Code to require a governmental entity to include in each public works contract to which the governmental entity is a party a provision that establishes, for the project that is the subject of the contract, the circumstances under which the project will be considered substantially complete and if retainage will be released on substantial completion of the project and, if so, the percentage of the amount of retainage that will be released on substantial completion. The bill replaces the requirement that a governmental entity deposit in an interest-bearing account the retainage of a public works contract that provides for retainage of more than five percent of the periodic contract payment with a requirement that a governmental entity deposit in such an account the retainage of a periodic contract payment of a public works contract and provides for the payment of the retainage remaining in the account to the prime contractor on completion of the contract. The bill prohibits a governmental entity that has entered into a public works contract that has a total value of \$1 million or more from withholding retainage in an amount that exceeds five percent of the contract price and authorizes such a governmental entity to release retainage for completed portions of the work and to release a portion of the retainage on substantial completion of the project. The bill prohibits a governmental entity from withholding retainage after completion of the contract by the prime contractor, including during any warranty period after completion of the contract, or withholding retainage for the purpose of requiring the prime contractor, after completion of the contract, to perform work on manufactured goods or systems that were specified by the designer of record and properly installed by the contractor.

C.S.H.B. 3913 includes in the definition of "retainage" under provisions relating to retained public works contract payments the part of a payment under a public works contract withheld by

a prime contractor or subcontractor to secure performance of any work that is required of the prime contractor under the contract that a subcontractor contracts to perform. The bill prohibits a prime contractor who enters into a subcontract that has a total value of at least \$250,000 for the purpose of fulfilling an obligation of the prime contractor under a public works contract from withholding from a subcontractor a greater percentage of retainage than the percentage being withheld from the prime contractor by the governmental entity under the public works contract and prohibits a subcontractor who enters into a contract with another subcontractor to provide labor or materials under the public works contract from withholding from that subcontractor a greater percentage of retainage than the percentage that may be withheld from the subcontractor by the prime contractor.

C.S.H.B. 3913 requires a prime contractor who receives a payment of interest earned on retainage to pay to any subcontractor of the prime contractor from whom the prime contractor has withheld retainage under a public works contract a proportionate share of the interest the prime contractor receives in an amount based on a specified ratio. The bill requires a subcontractor who receives a payment of interest to pay to any contracting subcontractor from whom the subcontractor withheld retainage a proportionate share of the interest the subcontractor receives in an amount based on a specified ratio.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2017.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 3913 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and formatted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

INTRODUCED

SECTION 1. The heading to Subchapter B, Chapter 2252, Government Code, is amended.

SECTION 2. Section 2252.031, Government Code, is amended to read as follows:

Sec. 2252.031. DEFINITIONS. In this subchapter:

(1) "Beneficial use" means, following completion of all or a portion of work under a public works contract:

(A) for a public works project, the ability of a governmental entity to place the project into operation for the project's intended purpose; or

(B) for a public building, the ability of a governmental entity to be issued a certificate of occupancy or temporary certificate of occupancy for the building.

(2) "Governmental entity" means:

(A) the state, a county, or a municipality;

HOUSE COMMITTEE SUBSTITUTE

SECTION 1. Same as introduced version.

SECTION 2. Section 2252.031, Government Code, is amended by amending Subdivision (5) and adding Subdivisions (6) and (7) to read as follows:

(B) a department, board, or agency of the state, a county, or a municipality;

(C) a school district or a subdivision of a school district; or

(D) any other governmental or quasi-governmental authority authorized by statute to make a public works contract.

(3) [(2)] "Prime contractor" means a person or persons, firm, or corporation contracting with a governmental entity for a public work.

(4) [(3)] "Public works" includes the construction, alteration, or repair of a public building or the construction or completion of a public work.

(5) [(4)] "Public works contract payment" means a payment by a governmental entity for the value of labor, material, machinery, fixtures, tools, power, water, fuel, or lubricants used or consumed, ordered and delivered for use or consumption, or specially fabricated for use or consumption but not yet delivered, in the direct performance of a public works contract.

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

(7) "Warranty" 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:

(5) "Retainage" means the part of a: (A) public works contract payment withheld by a governmental entity to secure performance of the contract; or

(B) payment under a public works contract withheld by a prime contractor or subcontractor to secure performance of any work that is required of the prime contractor under the contract that a subcontractor contracts to perform.

(6) "Subcontractor" means a person who contracts with a prime contractor or any other subcontractor to provide labor or materials to fulfill an obligation of the prime contractor under a public works contract.

(7) "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 WITHHELD BY GOVERNMENTAL ENTITY. (a) A governmental entity shall:

(1) include in each public works contract to which the governmental entity is a party a provision that establishes, for the project

(1) deposit in an interest-bearing account the retainage of a ~~[public works contract that provides for retainage of more than five percent of the]~~ periodic contract payment of a public works contract; and

(2) pay the retainage remaining in the account described by Subdivision (1), including any interest earned on the retainage, to the prime contractor on completion of the contract.

(b) If the total value of a public works contract is \$1 million or more, a governmental entity:

(1) may not withhold retainage in an amount that exceeds five percent of the contract price; and

(2) after the governmental entity has beneficial use of the public work that is the subject of the contract, may not withhold retainage in an amount that exceeds two percent of the contract price, excluding interest earned on the retainage.

(c) If the total value of a public works contract is less than \$1 million, a governmental entity, on receipt of beneficial use of the public work that is the subject of the contract, may not withhold more than one-half of the total retainage under the contract.

(d) A governmental entity may not withhold retainage:

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

(2) for the purpose of requiring the prime contractor, after completion of 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.

No equivalent provision.

that is the subject of the contract:

(A) the circumstances under which the project will be considered substantially complete; and

(B) if retainage will be released on substantial completion of the project and, if so, the percentage of the amount of retainage that will be released on substantial completion;

(2) deposit in an interest-bearing account the retainage of a ~~[public works contract that provides for retainage of more than five percent of the]~~ periodic contract payment of a public works contract; and

(3) ~~[(2)]~~ pay the retainage remaining in the account described by Subdivision (2), including any interest earned on the retainage, to the prime contractor on completion of the contract.

(b) If the total value of a public works contract is \$1 million or more, a governmental entity:

(1) may not withhold retainage in an amount that exceeds five percent of the contract price;

(2) may release retainage for completed portions of the work; and

(3) may release a portion of the retainage on substantial completion of the project.

(c) A governmental entity may not withhold retainage:

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

(2) for the purpose of requiring the prime contractor, after completion of 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.

SECTION 4. Subchapter B, Chapter 2252, Government Code, is amended by adding Section 2252.0325 to read as follows:

Sec. 2252.0325. RETAINAGE WITHHELD BY PRIME CONTRACTOR OR SUBCONTRACTOR. (a) If, for the purpose of fulfilling an obligation of the prime contractor under a public works contract, a prime contractor enters into a subcontract that has a total value of at least \$250,000:

(1) the prime contractor may not withhold from a subcontractor a greater percentage of retainage than the percentage being withheld from the prime contractor by the governmental entity under the public works contract; and

(2) a subcontractor who enters into a contract with another subcontractor to provide labor or materials under the public works 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).

(b) A prime contractor who receives a payment of interest under Section 2252.032 shall pay to any subcontractor of the prime contractor from whom the prime contractor has withheld retainage under a public works contract a proportionate share of the interest the prime contractor receives in an amount based on the ratio of the amount of retainage withheld by the prime contractor from the subcontractor to the amount of retainage withheld by the governmental entity from the prime contractor.

(c) A subcontractor who receives a payment of interest under this section shall pay to any contracting subcontractor from whom the subcontractor withheld retainage a proportionate share of the interest the subcontractor receives in an amount based on the ratio of the amount of retainage withheld by the subcontractor from the contracting subcontractor to the amount of retainage withheld from the subcontractor by the prime contractor or by another subcontractor, as applicable.

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 effective date of this Act. A contract to which Subchapter B, Chapter 2252, Government Code, applies that is entered

SECTION 5. Same as introduced version.

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, 2017.

SECTION 6. Same as introduced version.