

**SUBJECT:** Establishing retainage requirements for public works construction projects

**COMMITTEE:** State Affairs — committee substitute recommended

**VOTE:** 13 ayes — Paddie, Hernandez, Deshotel, Harless, Howard, Hunter, P. King, Lucio, Metcalf, Raymond, Shaheen, Slawson, Smithee

0 nays

**WITNESSES:** For — Fred Dodd, CSA Construction, Inc; Perry Fowler and Clayton Utkov, Texas Water Infrastructure Network; (*Registered, but did not testify*: CJ Tredway, Independent Electrical Contractors of Texas; Randy Cubriel, Nucor; Eric Woomer, Precast Concrete Manufacturers of Texas, Texas Crane Owners Association, and Mechanical Contractors Association of Texas; Jennifer Fagan, Texas Construction Association; Ryan Skrobarczyk, Texas Nursery and Landscape Association; Adam Leggett, Texas Water Infrastructure Network; Chris Keffer, Vortex Infrastructure; Fred Shannon)

Against — (*Registered, but did not testify*: Brie Franco, City of Austin)

On — Matt Phillips, Brazos River Authority; Tom Oney, Lower Colorado River Authority; Stephanie Gharakhanian, Workers Defense Action Fund; (*Registered, but did not testify*: Clay Schultz, Texas Water Development Board)

**BACKGROUND:** Government Code ch. 2252 governs contracts with governmental entities, and subch. B contains provisions on retainage used in contracts for public works projects. "Retainage" is defined by sec. 2252.031 to mean the part of a public works contract payment withheld by a governmental entity to secure performance of the contract.

Sec. 2252.032 requires governmental entities to:

- deposit in an interest-bearing account the retainage of a public works contract that provides for retainage of more than 5 percent of

- the periodic contract payment; and
- pay the interest earned on the retainage to the prime contractor on completion of the contract.

Concerns have been raised that current law does not specify the amount of retainage allowed on certain public works contracts or terms for its release and that varying practices across the state and have resulted in protracted disputes.

**DIGEST:**

CSHB 692 would establish limits on retainage for certain public work projects governed by Government Code ch 2252 and provisions governing when retainage could be withheld and how it would be handled in cases of disputes.

**Contracts, records.** The bill would require governmental entities to include in each public works contract a provision that established the circumstances under which the project would be considered substantially complete and under which the entity could release all or a portion of the retainage for substantially completed portions of the project or fully completed and accepted portions.

Governmental entities also would have to maintain an accurate record of the retainage withheld on periodic contract payments and the retainage released to the prime contractor for a public works contract.

**Amount of retainage.** If the value of a public works contract was \$1 million or more, a governmental entity could not withhold retainage of more than 5 percent of the contract, and the rate of retainage could not exceed 5 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.

For a competitively awarded contract of \$10 million or more and for a contract awarded using a method other than competitive bidding, a governmental entity and prime contractor could agree to deposit in an interest-bearing account the retainage withheld on periodic contract

payments.

If the prime contractor entered into subcontracts, the prime contractor could not withhold from a subcontractor a greater percent of the retainage than the percent withheld from the prime contractor by the governmental entity under the bill's provisions. Subcontractors who entered into contracts with another subcontractor for labor or materials could not withhold a greater percent of retainage than the percent that could be withheld from the first subcontractor.

The 5 percent retainage limit on certain contracts would not apply to a governmental entity that received certain financial assistance under the Water Code for a project that was formally approved by the Texas Water Development Board. For these projects, governmental entities would be required to deposit in an interest-bearing account the retainage withheld under a public works contract that provided for retainage of more than 5 percent of the periodic contract payments.

**Paying, withholding of retainage.** Governmental entities could not withhold retainage after a project was completed, including during the warranty period. Governmental entities also could not withhold retainage to require the prime contractor, after completion of the contract, to perform work on manufactured goods or systems that were specified by a designer and properly installed by the contractor.

For competitively awarded contracts valued over \$10 million and contracts awarded other than through competitive bidding, governmental entities also would be required to pay to the prime contractor upon completion any remaining retainage withheld and the interest earned on the retainage.

**Disputes, final cures.** A governmental entity could withhold retainage if there was a bona fide dispute between the entity and the prime contractor and the reason for the dispute was that labor, services, or materials provided by the prime contractor or a subcontractor was not in compliance with the contract or if the surety on an outstanding surety bond did not

agree to releasing the retainage.

If there was no bona fide dispute between the governmental entity and the prime contractor and neither party was in default under the contract, the prime contractor would be entitled to:

- cure any noncompliant labor, services, or materials; or
- offer the governmental entity a reasonable amount of money as compensation for any noncompliant labor, services, or materials that could not be promptly cured.

These sections could not be construed to limit a person who was a party to a public works contract from pursuing another remedy available to the person under other law or to limit the withholding of any offsets from retainage as provided by the terms of the public works contract.

A project would be considered formally approved if the project was 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.

**Other provisions.** CSHB 692 would apply only to a contract under Subchapter B, Chapter 2252, Government Code that was entered into on or after the bill's effective date.

This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2021.