

BILL ANALYSIS

C.S.H.B. 2135
By: Shine
State Affairs
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Concerns have been raised over excessive retainage, which is the practice of withholding periodic payments on construction contracts for release to the contractor at the completion of a project, being withheld or remaining unpaid for prolonged periods in certain circumstances. C.S.H.B. 2135 seeks to revise retainage requirements for certain public works construction projects to prevent the withholding of retainage over a specified amount for certain contracts and to prohibit the misuse of retainage to confer additional liability or free warranty work, while also providing for the partial release of retainage to incentivize project completion.

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. 2135 amends the Government Code to require a governmental entity to include in each public works contract a provision that establishes the following:

- the circumstances under which the project that is the subject of the contract is considered substantially complete; and
- the circumstances under which the entity may release all or a portion of the retainage for substantially completed portions of the project or fully completed and accepted portions of the project.

C.S.H.B. 2135 removes a requirement for a governmental entity to deposit in an interest-bearing account the retainage of a public works contract that provides for retainage of more than five percent of the period contract payment. The bill requires a governmental entity to maintain an accurate record of accounting for the retainage withheld on periodic contract payments and the retainage released to the prime contractor for a public works contract.

C.S.H.B. 2135 prohibits a governmental entity that enters into a public works contract with a total value of \$1 million or more from withholding retainage in an amount that exceeds five percent of the contract price and prohibits the rate of retainage from exceeding 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. The bill prohibits a prime contractor that enters into a subcontract for the purpose of fulfilling an obligation under such a contract from withholding from a subcontractor a greater percentage of retainage than the percentage that may be withheld

from the prime contractor by the governmental entity. If the subcontractor enters into a contract with another subcontractor to provide labor or materials under the contract, the subcontractor may not withhold 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. 2135 authorizes a governmental entity and prime contractor, 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, to agree to deposit in an interest-bearing account the retainage withheld on periodic contract payments. The bill requires the governmental entity to pay any remaining retainage withheld on the payments and the interest earned on the retainage to the prime contractor on completion of the contract.

C.S.H.B. 2135 prohibits a governmental entity from withholding retainage after completion of a public works contract by the prime contractor or 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. The bill authorizes a governmental entity, on application to the entity for final payment and release of retainage, to withhold retainage if there is a bona fide dispute between the entity and the prime contractor and the reason for the dispute is that labor, services, or materials provided by the prime contractor or the prime contractor's subcontractors were not provided in compliance with the contract. The bill establishes that the prime contractor may be entitled to cure the noncompliance of the labor, services, or materials that are the subject of the dispute or offer the governmental entity a reasonable amount of money as compensation for the noncompliant labor, services, or materials that cannot be promptly cured.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2019.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 2135 may differ from the original in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

The substitute includes the following:

- a requirement for a public works contract to include a provision establishing the circumstances under which the governmental entity may release all or a portion of the retainage for substantially completed portions of the project or fully completed and accepted portions of the project;
- a requirement for a governmental entity to maintain an accurate record of accounting for the retainage withheld on periodic contract payments and the retainage released to the prime contractor for a public works contract;
- a prohibition against the rate of retainage for a public works contract with a total value of \$1 million or more from exceeding five percent for any item in a bid schedule or schedule of values for the project;
- an authorization for a governmental entity and prime contractor, for certain contracts with a value of \$10 million or more, to agree to deposit in an interest-bearing account the retainage withheld on periodic contract payments and a requirement for the governmental entity to pay any remaining retainage and interest earned on the retainage to the prime contractor on completion of the contract;
- a prohibition against the prime contractor in a public works contract with a total value of \$1 million or more withholding from a subcontractor more than a certain percentage of retainage; and

- a prohibition against a subcontractor in a public works contract with a total value of \$1 million or more withholding from certain other subcontractors more than a certain percentage of retainage.

The substitute does not include the following:

- a requirement for a civil works project contract to include a provision establishing the circumstances under which the governmental entity has beneficial use of the project;
- specific retainage limitations for a civil works project with a value of \$1 million or more;
- a requirement for a governmental entity to deposit in an interest-bearing account the retainage of a periodic contract payment of a public works contract; and
- an express disclaimer that the bill's provisions relating to retainage do not prohibit a governmental entity from releasing portions of retainage for substantially complete or fully completed portions of work under a public works contract.

The substitute revises provisions relating to the following:

- the amount of retainage that may be withheld with regard to a public works contract with a value of \$1 million or more; and
- the entitlement of a contractor to cure certain noncompliance or offer compensation in circumstances under which a bona fide dispute has caused the governmental entity to withhold final payment and release of retainage.