

BILL ANALYSIS

C.S.H.B. 692
By: Shine
State Affairs
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Retainage is the practice of withholding periodic payments on construction contracts for release to the contractor at the completion of a project, with a goal of incentivizing efficient contractor performance. The practice of withholding and the rates of retainage vary across the state, and in certain instances excessive retainage is withheld or is not paid for prolonged periods. Excessive withholding represents an undue and significant financial burden on a contractor's ability to pay subcontractors and suppliers and realize profits on projects. The lack of specificity in current law often leads to protracted disputes over receiving payment of retainage and final payments on public works contracts. C.S.H.B. 692 seeks to revise retainage requirements for certain public works contracts to prevent the withholding of excessive retainage 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. 692 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. 692 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 periodic 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. 692 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 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. 692 establishes that the five percent retainage caps do not apply to a governmental entity that receives financial assistance from the state water implementation fund for Texas or the state water implementation revenue fund for Texas for a project formally approved for that assistance by the Texas Water Development Board (TWDB). Such a governmental entity must 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. A project is considered formally approved if it is the subject of a resolution approving an application for financial assistance adopted by the TWDB before September 1, 2019, for any part of the project's financing.

C.S.H.B. 692 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. 692 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.

C.S.H.B. 692 authorizes a governmental entity, on application to the entity for final payment and release of retainage, to withhold retainage as follows:

- 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 their subcontractors were not provided in compliance with the contract; or
- if the surety on any outstanding surety bond executed for the contract does not agree to the release of retainage.

The bill entitles the prime contractor to do the following if there is no bona fide dispute between the governmental entity and the prime contractor and neither party is in default under the contract:

- 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 cannot be promptly cured.

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

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2021.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 692 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 does the following:

- revises the provision prohibiting a prime contractor that enters into an applicable subcontract from withholding from a subcontractor a greater percentage of retainage than the percentage that may be withheld from the prime contractor by the contracting governmental entity to instead prohibit the prime contractor from withholding more in retainage than the percentage that is actually withheld from the prime contractor;
- authorizes a governmental entity to withhold retainage if the surety on any outstanding surety bond executed for the contract does not agree to the release of retainage;
- establishes that the provisions setting out the limited circumstances under which retainage may be withheld by a governmental entity may not be construed to limit the withholding of any offsets from retainage as provided by the terms of the applicable public works contract; and
- clarifies the point at which a project is considered formally approved by the TWDB for purposes of the exception from the five percent retainage caps.