

SUBJECT: Revising retainage requirements for certain public works projects

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 12 ayes — Phelan, Hernandez, Deshotel, Guerra, Harless, Holland,
Hunter, P. King, Parker, E. Rodriguez, Smithee, Springer

0 nays

1 absent — Raymond

WITNESSES: For — Mark Smith, BAR Constructors; Fred Dodd, CSA Construction Company, Inc.; Perry Fowler, Texas Water Infrastructure Network; (*Registered, but did not testify*: Corbin Van Arsdale, AGC Texas Building Branch; Jon Fisher, Associated Builders and Contractors of Texas; Randy Cubriel, Nucor; Jennifer Fagan, Texas Construction Association)

Against — Veronica Ocanas, City of Austin; (*Registered, but did not testify*: Bill Kelly and Jamaal Smith, City of Houston Mayor's Office; Blaire Parker, San Antonio Water System; John Dahill, Texas Conference of Urban Counties; Shanna Igo, Texas Municipal League)

BACKGROUND: Government Code sec. 2252.032 requires a governmental entity 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 excessive retainage, which is the practice of withholding periodic payments on construction contracts for release to the contractor at the completion of a project, is withheld or remains unpaid for prolonged periods of time.

DIGEST: CSHB 2135 would require a governmental entity to include in each public works contract a provision that established the circumstances under which the project would be considered substantially complete and the entity

could release all or a portion of the retainage for substantially or fully completed portions of the project.

The bill would require the governmental entity to maintain an accurate record of accounting for retainage withheld on periodic contract payments and the retainage released to the prime contractor for a public works contract.

For a competitively awarded public works contract, the entity also would have to pay any remaining retainage withheld and the interest earned on the retainage to the prime contractor on completion of the contract.

If the total value of a contract was at least \$1 million, the governmental entity could not withhold retainage exceeding 5 percent of the contract price, 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.

If the prime contractor entered into a subcontract to fulfill an obligation under a contract with a value of at least \$1 million, the prime contractor could not withhold from a subcontractor a greater percentage of retainage than was withheld from the prime contractor by the governmental entity. A subcontractor who entered into a contract with another subcontractor also could not withhold a greater percentage of retainage.

For a competitively awarded contract with a value of at least \$10 million, and for a contract that was awarded using a method other than competitive bidding, the governmental entity and prime contractor could agree to deposit in an interest-bearing account the retainage withheld on periodic contract payments.

CSHB 2135 would prohibit a governmental entity from withholding retainage after completion of the contract by the prime contractor, including during the warranty period. The entity also could not withhold retainage for the purpose of requiring the prime contractor, after completion of the project, to perform work on manufactured goods or

systems that were specified by the designer of record and properly installed.

On application for final payment and release of retainage, the governmental entity could withhold retainage if there was a bona fide dispute between the entity and prime contractor because the labor, services, or materials provided by the prime contractor or subcontractors were not provided in compliance with the contract.

The bill would allow the prime contractor to be entitled to cure the noncompliance or offer the governmental entity a reasonable amount of money as compensation for the noncompliant labor, services, or materials that could not promptly be cured.

The bill would apply only to a contract entered into on or after the bill's effective date.

CSHB 2135 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, 2019.