

ASSEMBLY BILL

No. 341

Introduced by Assembly Member Huff

February 10, 2005

An act to amend Section 7108.5 of the Business and Professions Code, to amend Sections 3260 and 3260.1 of the Civil Code, and to amend Sections 7107 and 10262.5 of the Public Contract Code, relating to works of improvement.

LEGISLATIVE COUNSEL'S DIGEST

AB 341, as introduced, Huff. Works of improvement: disputed amounts.

Existing law contains various provisions relating to contracts for the performance of private and public works of improvement, including provisions for the withholding and disbursement of retention proceeds. Existing law provides that, with respect to those contracts for works of improvement, the retention proceeds withheld from any payment may not exceed 150% of the disputed amount.

This bill would increase the amount that may be withheld from progress payments or final payments, depending on the circumstances, to a sum of various amounts and percentages, as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 7108.5 of the Business and Professions
- 2 Code is amended to read:
- 3 7108.5. (a) A prime contractor or subcontractor shall pay to
- 4 any subcontractor, not later than 10 days of receipt of each

1 progress payment, unless otherwise agreed to in writing, the
2 respective amounts allowed the contractor on account of the
3 work performed by the subcontractors, to the extent of each
4 subcontractor's interest therein. In the event that there is a good
5 faith dispute over ~~all or any portion of the amount due on a~~
6 ~~progress payment from the prime contractor or subcontractor to a~~
7 ~~subcontractor, then the prime contractor or subcontractor may~~
8 ~~withhold no more than 150 percent of the disputed amount the~~
9 ~~amount due on a progress payment, the prime contractor or~~
10 ~~subcontractor may withhold from the progress payment an~~
11 ~~amount not to exceed the sum of both of the following:~~

12 (1) *The liquidated damages owed by the subcontractor.*

13 (2) *One hundred fifty percent of the estimated cost of repair or*
14 *replacement of subcontract work that was not performed*
15 *according to the subcontract.*

16 (b) Any violation of this section shall constitute a cause for
17 disciplinary action and shall subject the licensee to a penalty,
18 payable to the subcontractor, of 2 percent of the amount due per
19 month for every month that payment is not made. In any action
20 for the collection of funds wrongfully withheld, the prevailing
21 party shall be entitled to his or her attorney's fees and costs.

22 (c) The sanctions authorized under this section shall be
23 separate from, and in addition to, all other remedies either civil,
24 administrative, or criminal.

25 (d) This section applies to all private works of improvement
26 and to all public works of improvement, except where Section
27 10262 of the Public Contract Code applies.

28 SEC. 2. Section 3260 of the Civil Code is amended to read:

29 3260. (a) This section is applicable with respect to all
30 contracts entered into on or after July 1, 1991, relating to the
31 construction of any private work of improvement. However, the
32 amendments made to this section during the 1992 portion of the
33 1991–92 Regular Session of the Legislature are applicable only
34 with respect to contracts entered into on or after January 1, 1993,
35 relating to the construction of any private work of improvement.
36 Moreover, the amendments made to this section during the 1993
37 portion of the 1993–94 Regular Session of the Legislature are
38 applicable only with respect to contracts entered into on or after
39 January 1, 1994, relating to the construction of any private work
40 of improvement.

1 (b) The retention proceeds withheld from any payment by the
2 owner from the original contractor, or by the original contractor
3 from any subcontractor, shall be subject to this section.

4 (c) Within 45 days after the date of completion, the retention
5 withheld by the owner shall be released. "Date of completion,"
6 for purposes of this section, means any of the following:

7 (1) The date of issuance of any certificate of occupancy
8 covering the work by the public agency issuing the building
9 permit.

10 (2) The date of completion indicated on a valid notice of
11 completion recorded pursuant to Section 3093.

12 (3) The date of completion as defined in Section 3086.

13 However, release of retentions withheld for any portion of the
14 work of improvement which ultimately will become the property
15 of a public agency, may be conditioned upon the acceptance of
16 the work by the public agency. In the event of a dispute between
17 the owner and the original contractor, the owner may withhold
18 from the final payment an amount not to exceed ~~150 percent of~~
19 ~~the disputed amount~~ *the sum of all of the following:*

20 (A) *The liquidated damages owed by the contractor.*

21 (B) *The amounts that may be withheld pursuant to Section*
22 *3153.*

23 (C) *One hundred fifty percent of the estimated cost of*
24 *uncompleted contract work.*

25 (D) *One hundred fifty percent of the estimated cost to repair*
26 *or replace contract work that was not performed according to*
27 *the contract.*

28 (d) Subject to subdivision (e), within 10 days from the time
29 that all or any portion of the retention proceeds are received by
30 the original contractor, the original contractor shall pay each of
31 its subcontractors from whom retention has been withheld, each
32 subcontractor's share of the retention received. However, if a
33 retention payment received by the original contractor is
34 specifically designated for a particular subcontractor, payment of
35 the retention shall be made to the designated subcontractor, if the
36 payment is consistent with the terms of the subcontract.

37 (e) If a bona fide dispute exists between a subcontractor and
38 the original contractor, the original contractor may withhold from
39 that subcontractor with whom the dispute exists its portion of the
40 retention proceeds. The amount withheld from the retention

1 payment shall not exceed ~~150 percent of the estimated value of~~
 2 ~~the disputed amount~~ *the sum of all of the following:*

- 3 (1) *The liquidated damages owed by the subcontractor.*
- 4 (2) *That portion of any mechanic's lien or stop notice claim by*
 5 *the subcontractor for which the subcontractor has already been*
 6 *paid.*
- 7 (3) *One hundred fifty percent of the estimated cost of*
 8 *uncompleted subcontract work.*
- 9 (4) *One hundred fifty percent of the estimated cost to repair or*
 10 *replace subcontract work that was not performed according to*
 11 *the subcontract.*

12 (f) Within 10 days of receipt of written notice by the owner
 13 from the original contractor or by the original contractor from the
 14 subcontractor, as the case may be, that any work in dispute has
 15 been completed in accordance with the terms of the contract, the
 16 owner or original contractor shall advise the notifying party of
 17 the acceptance or rejection of the disputed work. Within 10 days
 18 of acceptance of the disputed work, the owner or original
 19 contractor, as the case may be, shall release the retained portion
 20 of the retention proceeds.

21 (g) In the event that retention payments are not made within
 22 the time periods required by this section, the owner or original
 23 contractor withholding the unpaid amounts shall be subject to a
 24 charge of 2 percent per month on the improperly withheld
 25 amount, in lieu of any interest otherwise due. Additionally, in
 26 any action for the collection of funds wrongfully withheld, the
 27 prevailing party shall be entitled to his or her attorney's fees and
 28 costs.

29 (h) It shall be against public policy for any party to require any
 30 other party to waive any provision of this section.

31 (i) This section shall not be construed to apply to retentions
 32 withheld by a lender in accordance with the construction loan
 33 agreement.

34 SEC. 3. Section 3260.1 of the Civil Code is amended to read:

35 3260.1. (a) This section is applicable with respect to all
 36 contracts entered into on or after January 1, 1992, relating to the
 37 construction of any private work of improvement.

38 (b) Except as otherwise agreed in writing, the owner shall pay
 39 to the contractor, within 30 days following receipt of a demand
 40 for payment in accordance with the contract, any progress

1 payment due thereunder as to which there is no good faith
2 dispute between the parties. In the event of a dispute between the
3 owner and the contractor, the owner may withhold from the
4 progress payment an amount not to exceed ~~150 percent of the~~
5 ~~disputed amount~~ *the sum of both of the following:*

6 *(1) The liquidated damages owed by the contractor.*

7 *(2) One hundred fifty percent of the estimated cost of repair or*
8 *replacement of contract work that was not performed according*
9 *to the contract. If*

10 *If any amount is wrongfully withheld in violation of this*
11 *subdivision, the contractor shall be entitled to the penalty*
12 *specified in subdivision (g) of Section 3260.*

13 *(c) Nothing in this section shall be deemed to supersede any*
14 *requirement of Section 3260 respecting the withholding of*
15 *retention proceeds.*

16 SEC. 4. Section 7107 of the Public Contract Code is amended
17 to read:

18 7107. (a) This section is applicable with respect to all
19 contracts entered into on or after January 1, 1993, relating to the
20 construction of any public work of improvement.

21 (b) The retention proceeds withheld from any payment by the
22 public entity from the original contractor, or by the original
23 contractor from any subcontractor, shall be subject to this
24 section.

25 (c) *(1) Within 60 days after the date of completion of the*
26 *work of improvement, the retention withheld by the public entity*
27 *shall be released. In the event of a dispute between the public*
28 *entity and the original contractor, the public entity may withhold*
29 *from the final payment an amount not to exceed ~~150 percent of~~*
30 *~~the disputed amount~~ the sum of all of the following:*

31 *(A) The liquidated damages owed by the original contractor.*

32 *(B) The amounts that may be withheld pursuant to Section*
33 *3186.*

34 *(C) One hundred fifty percent of the estimated cost of*
35 *uncompleted contract work.*

36 *(D) One hundred fifty percent of the estimated cost to repair*
37 *or replace contract work that was not performed according to*
38 *the contract.*

1 (E) One hundred fifty percent of the estimated cost of claims
2 made by third parties for which the contractor is obligated to
3 indemnify the public entity.

4 (F) One hundred fifty percent of the estimated cost to be
5 incurred by the public entity as a result of the contractor's
6 abandonment or material default of the contract.

7 (G) The amounts that may be withheld in accordance with
8 other provisions of law, including Section 1727 of the Labor
9 Code and Section 4110 of this code. For

10 (2) For purposes of this subdivision, "completion" means any
11 of the following:

12 ~~(1)~~

13 (A) The occupation, beneficial use, and enjoyment of a work
14 of improvement, excluding any operation only for testing,
15 startup, or commissioning, by the public agency, or its agent,
16 accompanied by cessation of labor on the work of improvement.

17 ~~(2)~~

18 (B) The acceptance by the public agency, or its agent, of the
19 work of improvement.

20 ~~(3)~~

21 (C) After the commencement of a work of improvement, a
22 cessation of labor on the work of improvement for a continuous
23 period of 100 days or more, due to factors beyond the control of
24 the contractor.

25 ~~(4)~~

26 (D) After the commencement of a work of improvement, a
27 cessation of labor on the work of improvement for a continuous
28 period of 30 days or more, if the public agency files for record a
29 notice of cessation or a notice of completion.

30 (d) Subject to subdivision (e), within seven days from the time
31 that all or any portion of the retention proceeds are received by
32 the original contractor, the original contractor shall pay each of
33 its subcontractors from whom retention has been withheld, each
34 subcontractor's share of the retention received. However, if a
35 retention payment received by the original contractor is
36 specifically designated for a particular subcontractor, payment of
37 the retention shall be made to the designated subcontractor, if the
38 payment is consistent with the terms of the subcontract.

39 (e) The original contractor may withhold from a subcontractor
40 its portion of the retention proceeds if a bona fide dispute exists

1 between the subcontractor and the original contractor. The
2 amount withheld from the retention payment shall not exceed
3 ~~150 percent of the estimated value of the disputed amount~~ *the*
4 *sum of all of the following:*

- 5 (1) *The liquidated damages owed by the subcontractor.*
- 6 (2) *That portion of any stop notice claim by the subcontractor*
7 *for which the subcontractor has already been paid.*
- 8 (3) *One hundred fifty percent of the estimated cost of*
9 *uncompleted subcontract work.*
- 10 (4) *One hundred fifty percent of the estimated cost to repair or*
11 *replace subcontract work that was not performed according to*
12 *the subcontract.*
- 13 (5) *The amounts withheld by the public entity on account of*
14 *acts or omissions of the subcontractor.*

15 (f) In the event that retention payments are not made within
16 the time periods required by this section, the public entity or
17 original contractor withholding the unpaid amounts shall be
18 subject to a charge of 2 percent per month on the improperly
19 withheld amount, in lieu of any interest otherwise due.
20 Additionally, in any action for the collection of funds wrongfully
21 withheld, the prevailing party shall be entitled to attorney's fees
22 and costs.

23 (g) If a state agency retains an amount greater than 125
24 percent of the estimated value of the work yet to be completed
25 pursuant to Section 10261, the state agency shall distribute
26 undisputed retention proceeds in accordance with subdivision (c).
27 However, notwithstanding subdivision (c), if a state agency
28 retains an amount equal to or less than 125 percent of the
29 estimated value of the work yet to be completed, the state agency
30 shall have 90 days in which to release undisputed retentions.

31 (h) Any attempted waiver of the provisions of this section
32 shall be void as against the public policy of this state.

33 SEC. 5. Section 10262.5 of the Public Contract Code is
34 amended to read:

35 10262.5. (a) Notwithstanding any other provision of law, a
36 prime contractor or subcontractor shall pay to any subcontractor,
37 not later than 10 days of receipt of each progress payment, the
38 respective amounts allowed the contractor on account of the
39 work performed by the subcontractors, to the extent of each
40 subcontractor's interest therein. In the event that there is a good

1 ~~faith dispute over all or any portion of the amount due on a~~
2 ~~progress payment from the prime contractor or subcontractor to a~~
3 ~~subcontractor, then the prime contractor or subcontractor may~~
4 ~~withhold no more than 150 percent of the disputed amount the~~
5 ~~amount due on a progress payment, the prime contractor or~~
6 ~~subcontractor may withhold from the progress payment an~~
7 ~~amount not to exceed the sum of both of the following:~~

- 8 (1) *The liquidated damages owed by the subcontractor.*
9 (2) *One hundred fifty percent of the estimated cost of repair or*
10 *replacement of the subcontract work that was not performed*
11 *according to the subcontract.*

12 Any contractor who violates this section shall pay to the
13 subcontractor a penalty of 2 percent of the amount due per month
14 for every month that payment is not made. In any action for the
15 collection of funds wrongfully withheld, the prevailing party
16 shall be entitled to his or her attorney's fees and costs.

17 (b) This section shall not be construed to limit or impair any
18 contractual, administrative, or judicial remedies otherwise
19 available to a contractor or a subcontractor in the event of a
20 dispute involving late payment or nonpayment by a contractor or
21 deficient subcontract performance or nonperformance by a
22 subcontractor.

23 (c) On or before September 1 of each year, the head of each
24 state agency shall submit to the Legislature a report on the
25 number and dollar volume of written complaints received from
26 subcontractors and prime contractors on contracts in excess of
27 three hundred thousand dollars (\$300,000), relating to violations
28 of this section.