

Introduced by Senator CalderonFebruary 23, 2007

An act to amend Section 7108.5 of the Business and Professions Code, to amend Sections 3252 and 3260 of the Civil Code, and to amend Sections 10262 and 10262.5 of the Public Contract Code, relating to works of improvement.

LEGISLATIVE COUNSEL'S DIGEST

SB 738, as introduced, Calderon. Works of improvement.

(1) Existing law, the Contractors' State License Law, requires a prime contractor or subcontractor to pay to any subcontractor, not later than within 10 days of receipt of each progress payment, unless otherwise agreed to in writing, the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor's interest therein. A similar provision applies under the State Contract Act with respect to payments made by a contractor, prime contractor, or subcontractor to a subcontractor. Any contractor or his or her agent or employee who permits the violation of any contract awarded pursuant to the State Contract Act to the injury of the state, and any subcontractor or agent or employee of any contractor or subcontractor who has knowledge of any work being done in violation of any contract under the State Contract Act and does not report it as specified is guilty of a felony punishable by imprisonment in the state prison.

This bill would instead require, under both the Contractors' State License Law and the State Contract Act, a contractor, prime contractor, or subcontractor, as applicable, to pay those amounts to the subcontractor not later than within 7, rather than 10, days of receipt of each progress

payment. By expanding the scope of a crime, the bill would impose a state-mandated local program.

(2) Existing law requires that a 20-day public work preliminary bond notice be given under specified circumstances. If the notice is not given, a claimant may enforce a claim by giving written notice to the surety and the bond principal within 15 days after recordation of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety and the bond principal is extended to 75 days after completion of the work of improvement.

This bill would delete the provisions authorizing a claimant to enforce a claim by giving written notice to the surety and the bond principal within 15 days after recordation of a notice of completion and extending the time for giving written notice to the surety and bond principal to 75 days after completion of the work of improvement if a notice of completion has not been recorded.

(3) Existing law requires the original contractor to pay each of its subcontractors from whom retention has been withheld, each subcontractor's share of the retention received, within 10 days from the time that all or any portion of the retention proceeds are received by the original contractor. Within 10 days of receipt of written notice by the owner from the original contractor or by the original contractor from the subcontractor, as applicable, that any work in dispute has been completed in accordance with the terms of the contract, the owner or original contractor is required to advise the notifying party of the acceptance or rejection of the disputed work. Within 10 days of acceptance of the disputed work, the owner or original contractor is required to release the retained portion of the retention proceeds.

This bill would require those acts to be taken within 7, rather than 10, days.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

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

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 prime contractor or subcontractor shall pay to any
4 subcontractor, not later than ~~40~~ *within seven* days of receipt of
5 each progress payment, unless otherwise agreed to in writing, the
6 respective amounts allowed the contractor on account of the work
7 performed by the subcontractors, to the extent of each
8 subcontractor's interest therein. In the event that there is a good
9 faith dispute over all or any portion of the amount due on a progress
10 payment from the prime contractor or subcontractor to a
11 subcontractor, then the prime contractor or subcontractor may
12 withhold no more than 150 percent of the disputed amount.

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

19 The sanctions authorized under this section shall be separate
20 from, and in addition to, all other remedies either civil,
21 administrative, or criminal.

22 This section applies to all private works of improvement and to
23 all public works of improvement, except where Section 10262 of
24 the Public Contract Code applies.

25 SEC. 2. Section 3252 of the Civil Code is amended to read:

26 3252. ~~(a)~~ With regard to a contract entered into on or after
27 January 1, 1995, in order to enforce a claim upon any payment
28 bond given in connection with a public work, a claimant shall give
29 the 20-day public works preliminary bond notice as provided in
30 Section 3098.

31 ~~(b) If the 20-day public work preliminary bond notice was not~~
32 ~~given as provided in Section 3098, a claimant may enforce a claim~~
33 ~~by giving written notice to the surety and the bond principal as~~
34 ~~provided in Section 3227 within 15 days after recordation of a~~
35 ~~notice of completion. If no notice of completion has been recorded,~~
36 ~~the time for giving written notice to the surety and the bond~~
37 ~~principal is extended to 75 days after completion of the work of~~
38 ~~improvement.~~

1 SEC. 3. Section 3260 of the Civil Code is amended to read:

2 3260. (a) This section is applicable with respect to all contracts
3 entered into on or after July 1, 1991, relating to the construction
4 of any private work of improvement. However, the amendments
5 made to this section during the 1992 portion of the 1991–92
6 Regular Session of the Legislature are applicable only with respect
7 to contracts entered into on or after January 1, 1993, relating to
8 the construction of any private work of improvement. Moreover,
9 the amendments made to this section during the 1993 portion of
10 the 1993–94 Regular Session of the Legislature are applicable only
11 with respect to contracts entered into on or after January 1, 1994,
12 relating to the construction of any private work of improvement.

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

16 (c) Within 45 days after the date of completion, the retention
17 withheld by the owner shall be released. “Date of completion,”
18 for purposes of this section, means any of the following:

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

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

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

24 However, release of retentions withheld for any portion of the
25 work of improvement which ultimately will become the property
26 of a public agency, may be conditioned upon the acceptance of
27 the work by the public agency. In the event of a dispute between
28 the owner and the original contractor, the owner may withhold
29 from the final payment an amount not to exceed 150 percent of
30 the disputed amount.

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

1 (e) If a bona fide dispute exists between a subcontractor and the
2 original contractor, the original contractor may withhold from that
3 subcontractor with whom the dispute exists its portion of the
4 retention proceeds. The amount withheld from the retention
5 payment shall not exceed 150 percent of the estimated value of
6 the disputed amount.

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

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

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

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

28 SEC. 4. Section 10262 of the Public Contract Code is amended
29 to read:

30 10262. The contractor shall pay to his or her subcontractors,
31 within~~10~~ *seven* days of receipt of each progress payment, the
32 respective amounts allowed the contractor on account of the work
33 performed by his or her subcontractors, to the extent of each
34 subcontractor's interest therein. The payments to subcontractors
35 shall be based on estimates made pursuant to Section 10261. Any
36 diversion by the contractor of payments received for prosecution
37 of a contract, or failure to reasonably account for the application
38 or use of the payments constitutes ground for actions proscribed
39 in Section 10253, in addition to disciplinary action by the
40 Contractors' State License Board. The subcontractor shall notify,

1 in writing, the Contractors' State License Board and the department
2 of any payment less than the amount or percentage approved for
3 the class or item of work as set forth in Section 10261.

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

6 10262.5. (a) Notwithstanding any other provision of law, a
7 prime contractor or subcontractor shall pay to any subcontractor,
8 not later than ~~10~~ seven days of receipt of each progress payment,
9 the respective amounts allowed the contractor on account of the
10 work performed by the subcontractors, to the extent of each
11 subcontractor's interest therein. In the event that there is a good
12 faith dispute over all or any portion of the amount due on a progress
13 payment from the prime contractor or subcontractor to a
14 subcontractor, then the prime contractor or subcontractor may
15 withhold no more than 150 percent of the disputed amount.

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

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

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

32 SEC. 6. No reimbursement is required by this act pursuant to
33 Section 6 of Article XIII B of the California Constitution because
34 the only costs that may be incurred by a local agency or school
35 district will be incurred because this act creates a new crime or
36 infraction, eliminates a crime or infraction, or changes the penalty
37 for a crime or infraction, within the meaning of Section 17556 of
38 the Government Code, or changes the definition of a crime within

1 the meaning of Section 6 of Article XIII B of the California
2 Constitution.

O