

ASSEMBLY BILL

No. 396

Introduced by Assembly Member Fuentes

February 23, 2009

An act to amend Sections 3186, 3252, 3260, 3260.1, and 3262.5 of, and to add Section 3260.5 to, the Civil Code, and to amend Sections 7107, 10261, and 10261.5 of, and to add Section 7201 to, the Public Contract Code, relating to works of improvement.

LEGISLATIVE COUNSEL'S DIGEST

AB 396, as introduced, Fuentes. Works of improvement: liens.

(1) Existing law provides that all persons and laborers of every class, except for an original contractor, performing labor upon, bestowing skill or other necessary services on, furnishing materials or leasing equipment to be used or consumed in, or furnishing appliances, teams, or power contributing to, a public work of improvement may serve a stop notice upon the public entity responsible for the public work, as specified. Existing law imposes a duty on a public entity to withhold money or bonds due or to become due to the original contractor in an amount sufficient to answer the claim stated in the stop notice and to provide for the public entity's reasonable cost of any litigation on the matter, as specified.

This bill would qualify the requirement that the public entity withhold money or bonds sufficient to provide for reasonable litigation costs to make it applicable only if the original contractor fails to promptly accept a tender of defense of the public entity in the litigation.

(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 provide, instead, if no notice is given, a claimant may enforce a claim by giving written notice to the surety and the bond principal prior to the completion of the project or recordation of a notice of completion.

(3) Existing law imposes a penalty of 2% per month on funds that are improperly withheld in a contract dispute relating to public and private works of improvement, as specified. Existing law requires any person or corporation that has contracted to do business with a public utility to pay any subcontractor within 15 working days of receipt of each progress payment from the public utility, except as specified. Existing law also requires a state agency that fails to make any progress payment within 30 days after receipt of the payment request to pay interest at the rate of 10% per year.

This bill would revise, recast, and consolidate these and various other provisions governing the timely payment of progress payments, retention proceeds, and final payments under a contract for a public or private work of improvement with respect to contracts entered into on or after January 1, 2010. The bill would make the 2% penalty described above, in lieu of any interest otherwise due, applicable to an owner, including a public utility or a state agency, a contractor, or a subcontractor that fails to make timely progress, retention, or final payments, as specified. The bill would revise and recast notice and withholding requirements in the case of a dispute, as specified.

(4) Existing law provides that in a contract between the original contractor and a subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of retention proceeds withheld cannot exceed the percentage specified in the contract between the public entity and the original contractor.

This bill would instead require that retention proceeds not exceed 5% of the payment, as specified, for all contracts entered into on or after January 1, 2010, between a public entity, as defined, and an original contractor, between an original contractor and a subcontractor, and between all subcontractors thereunder.

(5) Existing law requires the Department of General Services to withhold not less than 5% of the contract price for a public work of improvement until final completion and acceptance of the project.

This bill would require the Department of General Services to withhold not more than 5% of the contract price until final completion and acceptance of the project.

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

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

1 SECTION 1. Section 3186 of the Civil Code is amended to
2 read:

3 3186. It shall be the duty of the public entity, upon receipt of
4 a stop notice pursuant to this chapter, to withhold from the original
5 contractor, or from any person acting under his or her authority,
6 money or bonds ~~(where, if bonds are to be issued in payment for~~
7 ~~the work of improvement)~~ *improvement, that are due or to become*
8 *due to that contractor in an amount sufficient to (a) answer the*
9 *claim stated in the stop notice and to (b) provide for the public*
10 *entity's reasonable cost of any litigation thereunder, if the original*
11 *contractor fails to promptly accept a tender of defense of the public*
12 *entity in the litigation. The public entity may satisfy this duty by*
13 *refusing to release money held in escrow pursuant to Section 10263*
14 *or 22300 of the Public Contract Code.*

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

16 3252. (a) With regard to a contract entered into on or after
17 January 1, 1995, in order to enforce a claim upon any payment
18 bond given in connection with a public work, a claimant shall give
19 the 20-day public works preliminary bond notice as provided in
20 Section 3098.

21 (b) If the 20-day public work preliminary bond notice was not
22 given as provided in Section 3098, a claimant may enforce a claim
23 by giving written notice to the surety and the bond principal as
24 provided in Section 3227 ~~within 15 days after recordation of a~~
25 ~~notice of completion. If no notice of completion has been recorded,~~
26 ~~the time for giving written notice to the surety and the bond~~
27 ~~principal is extended to 75 days after completion of the work of~~
28 ~~improvement prior to the completion of the project, as defined in~~
29 *Section 3086, or recordation of a notice of completion.*

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

31 3260. (a) This section is applicable with respect to all contracts
32 entered into on or after July 1, 1991, relating to the construction

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

10 *(b) This section shall apply only to contracts entered into prior*
11 *to January 1, 2010.*

12 ~~(b)~~

13 *(c) 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 ~~(e)~~

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

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

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

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

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

32 ~~(d)~~

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

1 shall be made to the designated subcontractor, if the payment is
2 consistent with the terms of the subcontract.

3 ~~(e)~~

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

10 ~~(f)~~

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

20 ~~(g)~~

21 (h) In the event that retention payments are not made within the
22 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 amount,
25 in lieu of any interest otherwise due. Additionally, in any action
26 for the collection of funds wrongfully withheld, the prevailing
27 party shall be entitled to his or her attorney's fees and costs.

28 ~~(h)~~

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

31 ~~(i)~~

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

35 SEC. 4. Section 3260.1 of the Civil Code is amended to read:

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

39 (b) *This section shall apply only to contracts entered into prior*
40 *to January 1, 2010.*

1 ~~(b)~~
 2 (c) Except as otherwise agreed in writing, the owner shall pay
 3 to the contractor, within 30 days following receipt of a demand
 4 for payment in accordance with the contract, any progress payment
 5 due thereunder as to which there is no good faith dispute between
 6 the parties. In the event of a dispute between the owner and the
 7 contractor, the owner may withhold from the progress payment
 8 an amount not to exceed 150 percent of the disputed amount. If
 9 any amount is wrongfully withheld in violation of this subdivision,
 10 the contractor shall be entitled to the penalty specified in
 11 subdivision~~(g)~~ (h) of Section 3260.

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

16 SEC. 5. Section 3260.5 is added to the Civil Code, to read:

17 3260.5. (a) Notwithstanding any other law, this section applies
 18 to all contracts entered into on or after January 1, 2010, relating
 19 to the construction of any private or public work of improvement.

20 (b) This section applies to contractual obligations between all
 21 of the following entities:

- 22 (1) Owners and original contractors.
- 23 (2) Original contractors and subcontractors.
- 24 (3) Subcontractors and subcontractors.

25 (c) The owner shall pay to the contractor, within 30 days
 26 following receipt of a demand for payment, any progress payment
 27 due if there is no good faith dispute between the parties.

28 (d) (1) Within 45 days after the date of completion, or 100 days
 29 after cessation of labor, the retention proceeds or final payment
 30 withheld by the owner shall be released. "Date of completion,"
 31 for purposes of this section, means any of the following:

- 32 (A) The date of issuance of any certificate of occupancy
 33 covering the work by the public agency issuing the building permit.
- 34 (B) The date of completion indicated on a valid notice of
 35 completion recorded pursuant to Section 3093.
- 36 (C) The date of completion as defined in Section 3086.

37 (2) Notwithstanding paragraph (1), the release of retention
 38 proceeds or final payments, withheld for any portion of a work of
 39 improvement which ultimately will become the property of a public

1 agency, may be conditioned upon the acceptance of the work by
2 the public agency.

3 (e) Subject to subdivision (h), within 10 days from the time that
4 all or any portion of the progress payment, retention proceeds, or
5 final payment is received by the original contractor, the original
6 contractor shall pay each of its subcontractors from which the
7 progress payment, retention proceeds, or final payment has been
8 withheld, each subcontractor's share of the progress payment,
9 retention proceeds, or final payment received. However, if the
10 progress payment, retention proceeds, or final payment received
11 by the original contractor is specifically designated for a particular
12 subcontractor, payment of the progress payment, retention
13 proceeds, or final payment shall be made to the designated
14 subcontractor.

15 (f) If a bona fide dispute exists between an owner and original
16 contractor or between the original contractor and a subcontractor,
17 the owner or original contractor may withhold from the party with
18 which the dispute exists an amount not to exceed 150 percent of
19 the disputed amount. The amount withheld shall not exceed 150
20 percent of the estimated value of the disputed amount.

21 (g) Within 10 days of receipt of written notice by the owner
22 from the original contractor, or by the original contractor from the
23 subcontractor, that any work in dispute has been completed in
24 accordance with the terms of the contract, the owner or original
25 contractor shall advise the notifying party of the acceptance or
26 rejection of the disputed work. Within 10 days of acceptance of
27 the disputed work, the owner or original contractor shall release
28 the retained portion of the disputed payment.

29 (h) If any payment is not made within the time periods required
30 by this section, the owner or original contractor withholding the
31 unpaid amount shall be subject to a charge of 2 percent per month
32 on the improperly withheld amount, in lieu of any interest
33 otherwise due. Additionally, in any action for the collection of
34 funds wrongfully withheld, the prevailing party shall be entitled
35 to attorney's fees and costs.

36 (i) It is against public policy for any party to require any other
37 party to waive any provision of this section.

38 (j) The remedies authorized pursuant to this section are separate
39 from, and in addition to, any other remedy authorized by law.

40 SEC. 6. Section 3262.5 of the Civil Code is amended to read:

1 3262.5. (a) *This section shall apply only to contracts entered*
 2 *into prior to January 1, 2010.*

3 (b) Any person or corporation which has contracted to do
 4 business with a public utility, hereafter referred to in this section
 5 as a contractor, shall pay any subcontractors within 15 working
 6 days of receipt of each progress payment from the public utility,
 7 unless otherwise agreed in writing by the parties, the respective
 8 amounts allowed the contractor on account of the work performed
 9 by the subcontractors, to the extent of each of the subcontractors'
 10 interest in that work. In the event that there is a good faith dispute
 11 over all or any portion of the amount due on a progress payment
 12 from a contractor to a subcontractor, then the contractor may
 13 withhold no more than 150 percent of the disputed amount.

14 ~~(b)~~

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

20 ~~(e)~~

21 (d) 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 performance or nonperformance by a subcontractor.

26 SEC. 7. Section 7107 of the Public Contract Code is amended
 27 to read:

28 7107. (a) This section is applicable with respect to all contracts
 29 entered into on or after January 1, 1993, relating to the construction
 30 of any public work of improvement.

31 (b) *This section shall apply only to contracts entered into prior*
 32 *to January 1, 2010.*

33 ~~(b)~~

34 (c) The retention proceeds withheld from any payment by the
 35 public entity from the original contractor, or by the original
 36 contractor from any subcontractor, shall be subject to this section.

37 ~~(e)~~

38 (d) Within 60 days after the date of completion of the work of
 39 improvement, the retention withheld by the public entity shall be
 40 released. In the event of a dispute between the public entity and

1 the original contractor, the public entity may withhold from the
2 final payment an amount not to exceed 150 percent of the disputed
3 amount. For purposes of this subdivision, “completion” means any
4 of the following:

5 (1) The occupation, beneficial use, and enjoyment of a work of
6 improvement, excluding any operation only for testing, startup, or
7 commissioning, by the public agency, or its agent, accompanied
8 by cessation of labor on the work of improvement.

9 (2) The acceptance by the public agency, or its agent, of the
10 work of improvement.

11 (3) After the commencement of a work of improvement, a
12 cessation of labor on the work of improvement for a continuous
13 period of 100 days or more, due to factors beyond the control of
14 the contractor.

15 (4) After the commencement of a work of improvement, a
16 cessation of labor on the work of improvement for a continuous
17 period of 30 days or more, if the public agency files for record a
18 notice of cessation or a notice of completion.

19 ~~(d)~~

20 (e) Subject to subdivision ~~(e)~~ (f), within seven days from the
21 time that all or any portion of the retention proceeds are received
22 by the original contractor, the original contractor shall pay each
23 of its subcontractors from whom retention has been withheld, each
24 subcontractor’s share of the retention received. However, if a
25 retention payment received by the original contractor is specifically
26 designated for a particular subcontractor, payment of the retention
27 shall be made to the designated subcontractor, if the payment is
28 consistent with the terms of the subcontract.

29 ~~(e)~~

30 (f) The original contractor may withhold from a subcontractor
31 its portion of the retention proceeds if a bona fide dispute exists
32 between the subcontractor and the original contractor. The amount
33 withheld from the retention payment shall not exceed 150 percent
34 of the estimated value of the disputed amount.

35 ~~(f)~~

36 (g) In the event that retention payments are not made within the
37 time periods required by this section, the public entity or original
38 contractor withholding the unpaid amounts shall be subject to a
39 charge of 2 percent per month on the improperly withheld amount,
40 in lieu of any interest otherwise due. Additionally, in any action

1 for the collection of funds wrongfully withheld, the prevailing
 2 party shall be entitled to attorney’s fees and costs.

3 ~~(g)~~

4 (h) If a state agency retains an amount greater than 125 percent
 5 of the estimated value of the work yet to be completed pursuant
 6 to Section 10261, the state agency shall distribute undisputed
 7 retention proceeds in accordance with subdivision ~~(e)~~ (d). However,
 8 notwithstanding subdivision ~~(e)~~ (d), if a state agency retains an
 9 amount equal to or less than 125 percent of the estimated value of
 10 the work yet to be completed, the state agency shall have 90 days
 11 in which to release undisputed retentions.

12 ~~(h)~~

13 (i) Any attempted waiver of the provisions of this section shall
 14 be void as against the public policy of this state.

15 SEC. 8. Section 7201 is added to the Public Contract Code, to
 16 read:

17 7201. (a) (1) This section shall apply with respect to all
 18 contracts entered into on or after January 1, 2010, between a public
 19 entity and an original contractor, between an original contractor
 20 and a subcontractor, and between all subcontractors thereunder,
 21 relating to the construction of any public work of improvement.

22 (2) Under no circumstances shall any provision of this section
 23 be construed to limit the ability of any public entity to withhold
 24 150 percent of the value of any disputed amount of work from the
 25 final payment, as provided for in subdivision (c) of Section 7107.
 26 In the event of a good faith dispute, nothing in this section shall
 27 be construed to require a public entity to pay for work that is not
 28 approved or accepted in accordance with the proper plans or
 29 specifications.

30 (3) For purposes of this section, “public entity” means the state,
 31 including every state agency, office, department, division, bureau,
 32 board, or commission, the California State University, the
 33 University of California, a city, county, city and county, including
 34 chartered cities and chartered counties, district, special district,
 35 public authority, political subdivision, public corporation, or
 36 nonprofit transit corporation wholly owned by a public agency
 37 and formed to carry out the purposes of the public agency.

38 (b) (1) The retention proceeds withheld from any payment by
 39 a public entity from the original contractor, by the original
 40 contractor from any subcontractor, and by a subcontractor from

1 any subcontractor thereunder shall not exceed 5 percent of the
2 payment. In no event shall the total retention proceeds withheld
3 exceed 5 percent of the contract price. In a contract between the
4 original contractor and a subcontractor, and in a contract between
5 a subcontractor and any subcontractor thereunder, the percentage
6 of the retention proceeds withheld may not exceed the percentage
7 specified in the contract between the public entity and the original
8 contractor.

9 (2) This subdivision shall not apply if the contractor provides
10 written notice to the subcontractor, prior to or at the time that the
11 bid is requested, that a bond may be required and the subcontractor
12 subsequently is unable or refuses to furnish to the contractor a
13 performance or payment bond issued by an admitted surety insurer.

14 (c) No party identified in subdivision (a) may require any other
15 party to waive any provision of this section.

16 SEC. 9. Section 10261 of the Public Contract Code is amended
17 to read:

18 10261. Payments upon contracts shall be made as the
19 department prescribes upon estimates made and approved by the
20 department, but progress payments shall not be made in excess of
21 95 percent of the percentage of actual work completed plus a like
22 percentage of the value of material delivered on the ground or
23 stored subject to or under the control of the state, and unused,
24 except as otherwise provided in this section. The department shall
25 withhold not less *more* than 5 percent of the contract price until
26 final completion and acceptance of the project. However, at any
27 time after 95 percent of the work has been completed, the
28 department may reduce the funds withheld to an amount not less
29 than 125 percent of the estimated value of the work yet to be
30 completed, as determined by the department, if the reduction has
31 been approved, in writing, by the surety on the performance bond
32 and by the surety on the payment bond. The Controller shall draw
33 his or her warrants upon estimates so made and approved by the
34 department and the Treasurer shall pay them. The funds may be
35 released by electronic transfer if that procedure is requested by the
36 contractor, in writing, and if the public entity has, in place at the
37 time of the request, the mechanism for the transfer.

38 SEC. 10. Section 10261.5 of the Public Contract Code is
39 amended to read:

1 10261.5. (a) *This section shall apply only to contracts entered*
2 *into prior to January 1, 2010.*

3 (b) Any state agency which fails to make any progress payment
4 within 30 days after receipt of the payment request from a
5 contractor on a construction contract for an undisputed payment
6 request, which was properly submitted by the contractor to the
7 agency, shall pay interest to the contractor equivalent to the legal
8 rate set forth in subdivision (a) of Section 685.010 of the Code of
9 Civil Procedure. Any state agency which independently calculates
10 the amount due on a progress payment and which fails to make a
11 progress payment within 30 days of the first submittal of the
12 estimate for each contract by the engineer, shall pay interest to the
13 contractor equivalent to the legal rate set forth in subdivision (a)
14 of Section 685.010 of the Code of Civil Procedure. In the event
15 that the payment is not made within 30 days of receipt of the
16 contractor's request or the first submittal by the engineer, and the
17 Controller has processed the payment within 14 days of receipt of
18 the request or submittal, the contracting state agency shall pay
19 interest to the contractor equivalent to the legal rate set forth in
20 subdivision (a) of Section 685.010 of the Code of Civil Procedure.
21 In the event that the payment is not made within 30 days of receipt
22 of the contractor's request or the first submittal by the engineer,
23 and the contracting state agency has processed the payment within
24 16 days after receipt of the request or submittal, the Controller
25 shall pay interest as provided in Section 685.010 of the Code of
26 Civil Procedure.

27 For purposes of this section, a payment request shall be
28 considered properly executed if funds are available for payment
29 of the payment request, and payment is not delayed due to an audit
30 inquiry by the Controller.

31 ~~(b)~~

32 (c) Upon receipt of a payment request, each agency shall require:

33 (1) That each payment request be reviewed as soon as
34 practicable after receipt for the purpose of determining that a
35 payment request is a proper payment request.

36 (2) Any payment request determined not to be a proper payment
37 request suitable for payment shall be returned as soon as
38 practicable, but not later than seven days, after receipt, specifying
39 the reasons that the payment request is not a proper payment
40 request.

1 (3) The number of days available to a state agency to make a
2 timely payment of payment request without incurring interest shall
3 be reduced by the number of days by which an agency exceeds
4 the requirements of paragraph (2).

O