

AMENDED IN ASSEMBLY JANUARY 4, 2012

AMENDED IN ASSEMBLY APRIL 26, 2011

AMENDED IN ASSEMBLY APRIL 12, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 1354

Introduced by Assembly Member Huber

February 18, 2011

~~An act to amend Section 7108.5 of the Business and Professions Code, to amend Sections 3252 and 9560 of the Civil Code, and to amend Sections 10262 and 10262.5 of, to amend, repeal, and add Section 10261 of, and to add and repeal Section 7201 of, the Public Contract Code, relating to works of improvement. An act to amend Section 2031.240 of the Code of Civil Procedure, relating to discovery.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 1354, as amended, Huber. ~~Public works: progress payments: notice: retention proceeds. Civil procedure: discovery: objections.~~

The Civil Discovery Act permits a party to a civil action to obtain discovery, as specified, by inspecting documents, tangible things, and land or other property in the possession of any other party to the action. The act provides for procedures that must be followed when the responding party objects to part or all of an inspection demand.

This bill would require the responding party, when that party objects to a demand on the basis of privilege or work product, to provide sufficient factual information in its response for other parties to evaluate the merits of that claim, including, if necessary, a privilege log.

~~(1) Existing law requires that, for private and public works of improvement, and in a public works contract, a prime contractor or~~

~~subcontractor pay to any subcontractor, not later than 10 days after receipt of each progress payment, unless otherwise agreed to in writing, the respective amount allowed the contractor on account of the work performed by the subcontractors, to the extent of each contractor's interest therein, as prescribed.~~

~~This bill would, instead, require that those amounts be paid not later than 7 days after receipt of each progress payment.~~

~~(2) Existing law requires, with regard to a contract entered into on or after January 1, 1995, in order to enforce a claim upon any payment bond given in connection with a public work, that a claimant give the 20-day public works bond preliminary notice, as provided. Existing law further authorizes a claimant, if the 20-day public works preliminary bond notice was not given as prescribed by statute, to enforce a claim by giving written notice to the surety and the bond principal, as provided, within 15 days after recordation of a notice of completion or, if no notice of completion has been recorded, within 75 days after completion of the work of improvement.~~

~~This bill would, instead, with regard to a contract entered into on or after January 1, 2012, require that the written notice to be given to the surety and the bond principal be given prior to the completion, as defined, of the project, or recordation of a notice of completion.~~

~~(3) Existing law authorizes the Department of General Services, or any other department with authority to enter into contracts, to contract with suppliers for goods and services and for public works. Existing law provides that in a contract relating to the construction of a public work of improvement between the public entity and original contractor, 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 prohibit retention proceeds from exceeding 5% of the payment, as specified, for those contracts entered into on or after January 1, 2012, between a public entity, as defined, and an original contractor, between an original contractor and a subcontractor, and between all subcontractors thereunder.~~

~~(4) Existing law contains various provisions relating to contracts for the performance of public works of improvement, including provisions for the payment of progress payments and the disbursing and withholding of retention proceeds. Existing law prohibits progress payments upon these contracts from being made in excess of 95% of~~

~~the percentage of actual work completed plus a like percentage of the value of material delivered, as specified, and requires the Department of General Services to withhold not less than 5% of the contract price until final completion and acceptance of the project.~~

~~This bill would, until December 31, 2015, instead, prohibit progress payments upon these contracts from being made in excess of 100% of the percentage of actual work completed, and 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~~-no. State-mandated local program: no.

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

1 *SECTION 1. Section 2031.240 of the Code of Civil Procedure*
2 *is amended to read:*

3 2031.240. (a) If only part of an item or category of item in a
4 demand for inspection, copying, testing, or sampling is
5 objectionable, the response shall contain a statement of compliance,
6 or a representation of inability to comply with respect to the
7 remainder of that item or category.

8 (b) If the responding party objects to the demand for inspection,
9 copying, testing, or sampling of an item or category of item, the
10 response shall do both of the following:

11 (1) Identify with particularity any document, tangible thing,
12 land, or electronically stored information falling within any
13 category of item in the demand to which an objection is being
14 made.

15 (2) Set forth clearly the extent of, and the specific ground for,
16 the objection. If an objection is based on a claim of privilege, the
17 particular privilege invoked shall be stated. If an objection is based
18 on a claim that the information sought is protected work product
19 under Chapter 4 (commencing with Section 2018.010), that claim
20 shall be expressly asserted.

21 (c) *If an objection is based on a claim of privilege or a claim*
22 *that the information sought is protected work product, the response*
23 *shall provide sufficient factual information for other parties to*
24 *evaluate the merits of that claim, including, if necessary, a privilege*
25 *log.*

1 SECTION 1. ~~Section 7108.5 of the Business and Professions~~
2 ~~Code is amended to read:~~

3 ~~7108.5. (a) This section applies to all private works of~~
4 ~~improvement and to all public works of improvement, except where~~
5 ~~Section 10262 of the Public Contract Code applies.~~

6 ~~(b) Except as provided in subdivision (e), a prime contractor or~~
7 ~~subcontractor shall pay to any subcontractor, not later than seven~~
8 ~~days of receipt of each progress payment, unless otherwise agreed~~
9 ~~to in writing, the respective amounts allowed the contractor on~~
10 ~~account of the work performed by the subcontractors, to the extent~~
11 ~~of each subcontractor's interest therein. A prime contractor or~~
12 ~~subcontractor that fails to comply with this subdivision shall be~~
13 ~~subject to a penalty, payable to the subcontractor, of 2 percent of~~
14 ~~the amount due per month for every month that payment is not~~
15 ~~made as required under this subdivision.~~

16 ~~(c) If there is a good faith dispute over all or any portion of the~~
17 ~~amount due on a progress payment from the prime contractor or~~
18 ~~subcontractor to a subcontractor, the prime contractor or~~
19 ~~subcontractor may withhold no more than 150 percent of the~~
20 ~~disputed amount.~~

21 ~~(d) A violation of this section shall constitute a cause for~~
22 ~~disciplinary action.~~

23 ~~(e) In any action for the collection of funds wrongfully withheld,~~
24 ~~the prevailing party shall be entitled to his or her attorney's fees~~
25 ~~and costs.~~

26 ~~(f) The sanctions authorized under this section shall be separate~~
27 ~~from, and in addition to, all other remedies, either civil,~~
28 ~~administrative, or criminal.~~

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

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

35 ~~(b) (1) On and after January 1, 1995, and before January 1,~~
36 ~~2012, if the 20-day public work preliminary bond notice was not~~
37 ~~given as provided in Section 3098, a claimant may enforce a claim~~
38 ~~by giving written notice to the surety and the bond principal as~~
39 ~~provided in Section 3227 within 15 days after recordation of a~~
40 ~~notice of completion. If no notice of completion has been recorded,~~

1 the time for giving written notice to the surety and the bond
2 principal is extended to 75 days after completion of the work of
3 improvement.

4 (2) ~~On and after January 1, 2012, if the 20-day public work
5 preliminary bond notice was not given as provided in Section 3098,
6 a claimant may enforce a claim by giving written notice to the
7 surety and the bond principal, as provided in Section 3227, prior
8 to completion, as defined in Section 3086, of the project, or
9 recordation of a notice of completion.~~

10 (e) ~~This section shall become inoperative on July 1, 2012, and,
11 as of January 1, 2013, is repealed, unless a later enacted statute,
12 that becomes operative on or before January 1, 2013, deletes or
13 extends the dates on which it becomes inoperative and is repealed.~~

14 ~~SEC. 3.— Section 9560 of the Civil Code is amended to read:~~

15 ~~9560. (a) In order to enforce a claim against a payment bond,
16 a claimant shall give the preliminary notice provided in Chapter
17 3 (commencing with Section 9300).~~

18 ~~(b) If preliminary notice was not given as provided in Chapter
19 3 (commencing with Section 9300), a claimant may enforce a
20 claim by giving written notice to the surety and bond principal, as
21 provided in Section 9562, prior to completion, as defined in Section
22 9200, of the project, or recordation of notice of completion.~~

23 ~~(c) This section shall become operative on July 1, 2012.~~

24 ~~SEC. 4.— Section 7201 is added to the Public Contract Code, to
25 read:~~

26 ~~7201. (a) (1) This section shall apply with respect to all
27 contracts entered into on or after January 1, 2012, between a public
28 entity and an original contractor, between an original contractor
29 and a subcontractor, and between all subcontractors thereunder,
30 relating to the construction of any public work of improvement.~~

31 ~~(2) Under no circumstances shall any provision of this section
32 be construed to limit the ability of any public entity to withhold
33 150 percent of the value of any disputed amount of work from the
34 final payment, as provided for in subdivision (c) of Section 7107.
35 In the event of a good faith dispute, nothing in this section shall
36 be construed to require a public entity to pay for work that is not
37 approved or accepted in accordance with the proper plans or
38 specifications.~~

39 ~~(3) For purposes of this section, “public entity” means the state,
40 including every state agency, office, department, division, bureau,~~

1 board, or commission, the California State University, the
 2 University of California, city, county, city and county, including
 3 chartered cities and chartered counties, district, special district,
 4 public authority, political subdivision, public corporation, or
 5 nonprofit transit corporation wholly owned by a public agency
 6 and formed to carry out the purposes of the public agency.

7 (b) (1) The retention proceeds withheld from any payment by
 8 a public entity from the original contractor, by the original
 9 contractor from any subcontractor, and by a subcontractor from
 10 any subcontractor thereunder shall not exceed 5 percent of the
 11 payment. In no event shall the total retention proceeds withheld
 12 exceed 5 percent of the contract price. In a contract between the
 13 original contractor and a subcontractor, and in a contract between
 14 a subcontractor and any subcontractor thereunder, the percentage
 15 of the retention proceeds withheld shall not exceed the percentage
 16 specified in the contract between the public entity and the original
 17 contractor.

18 (2) This subdivision shall not apply if the contractor provides
 19 written notice to the subcontractor, pursuant to subdivision (c) of
 20 Section 4108, prior to, or at, the time that the bid is requested, that
 21 bonds may be required, and the subcontractor subsequently is
 22 unable or refuses to furnish to the contractor a performance and
 23 payment bond issued by an admitted surety insurer.

24 (e) A party identified in subdivision (a) shall not require any
 25 other party to waive any provision of this section.

26 (d) This section shall remain in effect only until January 1, 2016,
 27 and as of that date is repealed.

28 SEC. 5. Section 10261 of the Public Contract Code is amended
 29 to read:

30 10261. (a) Payments upon contracts shall be made as the
 31 department prescribes upon estimates made and approved by the
 32 department, but progress payments shall not be made in excess of
 33 95 percent of the percentage of actual work completed plus a like
 34 percentage of the value of material delivered on the ground or
 35 stored subject to or under the control of the state, and unused,
 36 except as otherwise provided in this section. The department shall
 37 withhold not more than 5 percent of the contract price until final
 38 completion and acceptance of the project. However, at any time
 39 after 100 percent of the work has been completed, the department
 40 may reduce the funds withheld to an amount not less than 125

1 percent of the estimated value of the work yet to be completed, as
2 determined by the department, if the reduction has been approved,
3 in writing, by the surety on the performance bond and by the surety
4 on the payment bond. The Controller shall draw his or her warrants
5 upon estimates so made and approved by the department and the
6 Treasurer shall pay them. The funds may be released by electronic
7 transfer if that procedure is requested by the contractor, in writing,
8 and if the public entity has, in place at the time of the request, the
9 mechanism for the transfer.

10 (b) This section shall remain in effect only until December 31,
11 2015, and as of January 1, 2016, is repealed.

12 ~~SEC. 6.~~ Section 10261 is added to the Public Contract Code,
13 to read:

14 10261. (a) On and after January 1, 2016, payments upon
15 contracts shall be made as the department prescribes upon estimates
16 made and approved by the department, but progress payments shall
17 not be made in excess of 95 percent of the percentage of actual
18 work completed plus a like percentage of the value of material
19 delivered on the ground or stored subject to or under the control
20 of the state, and unused, except as otherwise provided in this
21 section. The department shall withhold not less than 5 percent of
22 the contract price until final completion and acceptance of the
23 project. However, at any time after 95 percent of the work has
24 been completed, the department may reduce the funds withheld to
25 an amount not less than 125 percent of the estimated value of the
26 work yet to be completed, as determined by the department, if the
27 reduction has been approved, in writing, by the surety on the
28 performance bond and by the surety on the payment bond. The
29 Controller shall draw his or her warrants upon estimates so made
30 and approved by the department and the Treasurer shall pay them.
31 The funds may be released by electronic transfer if that procedure
32 is requested by the contractor, in writing, and if the public entity
33 has, in place at the time of the request, the mechanism for the
34 transfer.

35 (b) This section shall take effect on January 1, 2016.

36 ~~SEC. 7.~~ Section 10262 of the Public Contract Code is amended
37 to read:

38 10262. The contractor shall pay to his or her subcontractors,
39 within seven days of receipt of each progress payment, the
40 respective amounts allowed the contractor on account of the work

1 performed by his or her subcontractors, to the extent of each
 2 subcontractor's interest therein. The payments to subcontractors
 3 shall be based on estimates made pursuant to Section 10261. Any
 4 diversion by the contractor of payments received for prosecution
 5 of a contract, or failure to reasonably account for the application
 6 or use of the payments constitutes ground for actions proscribed
 7 in Section 10253, in addition to disciplinary action by the
 8 Contractors' State License Board. The subcontractor shall notify,
 9 in writing, the Contractors' State License Board and the department
 10 of any payment less than the amount or percentage approved for
 11 the class or item of work as set forth in Section 10261.

12 ~~SEC. 8. Section 10262.5 of the Public Contract Code is~~
 13 ~~amended to read:~~

14 ~~10262.5. (a) Notwithstanding any other law, a prime contractor~~
 15 ~~or subcontractor shall pay to any subcontractor, not later than seven~~
 16 ~~days of receipt of each progress payment, the respective amounts~~
 17 ~~allowed the contractor on account of the work performed by the~~
 18 ~~subcontractors, to the extent of each subcontractor's interest~~
 19 ~~therein. In the event that there is a good faith dispute over all or~~
 20 ~~any portion of the amount due on a progress payment from the~~
 21 ~~prime contractor or subcontractor to a subcontractor, then the prime~~
 22 ~~contractor or subcontractor may withhold no more than 150 percent~~
 23 ~~of the disputed amount.~~

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

29 ~~(b) This section shall not be construed to limit or impair any~~
 30 ~~contractual, administrative, or judicial remedies otherwise available~~
 31 ~~to a contractor or a subcontractor in the event of a dispute involving~~
 32 ~~late payment or nonpayment by a contractor or deficient~~
 33 ~~subcontract performance or nonperformance by a subcontractor.~~

34 ~~(c) On or before September 1 of each year, the head of each~~
 35 ~~state agency shall submit to the Legislature a report on the number~~
 36 ~~and dollar volume of written complaints received from~~
 37 ~~subcontractors and prime contractors on contracts in excess of~~

1 ~~three hundred thousand dollars (\$300,000), relating to violations~~
2 ~~of this section.~~

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