

**ASSEMBLY BILL**

**No. 2021**

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**Introduced by Assembly Member Wagner**

February 23, 2012

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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 2021, as introduced, Wagner. 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:

1 7108.5. (a) A prime contractor or subcontractor shall pay to  
2 any subcontractor, not later than ~~seven~~ 10 days ~~after~~ of receipt of  
3 each progress payment, unless otherwise agreed to in writing, the  
4 respective amounts allowed the contractor on account of the work  
5 performed by the subcontractors, to the extent of each  
6 subcontractor's interest therein. In the event that there is a good  
7 faith dispute over ~~all or any portion of~~ the amount due on a progress  
8 ~~payment from payment~~, the prime contractor or subcontractor ~~to~~  
9 ~~a subcontractor, the prime contractor or subcontractor may~~  
10 ~~withhold no more than 150 percent of the disputed amount. may~~  
11 ~~withhold from the progress payment an amount not to exceed the~~  
12 ~~sum of the following:~~

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

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

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

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 ~~(d)~~

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

30 ~~(e)~~

31 (d) This section applies to all private works of improvement  
32 and to all public works of improvement, except where Section  
33 10262 of the Public Contract Code applies.

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

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

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

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

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

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

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

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

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

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

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

26 (C) *One hundred fifty percent of the estimated cost of*  
27 *uncompleted contract work, except for those costs that are withheld*  
28 *under subparagraph (B).*

29 (D) *One hundred fifty percent of the estimated cost to repair or*  
30 *replace contract work that was not performed according to the*  
31 *contract, except for those costs that are withheld under*  
32 *subparagraph (B) or (C).*

33 (d) Subject to subdivision (e), within 10 days from the time that  
34 all or any portion of the retention proceeds are received by the  
35 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) If a bona fide dispute exists between a subcontractor and the  
4 original contractor, the original contractor may withhold from that  
5 subcontractor with whom the dispute exists its portion of the  
6 retention proceeds. The amount withheld from the retention  
7 payment shall not exceed ~~150 percent of the estimated value of~~  
8 ~~the disputed amount.~~ *the sum of all of the following:*

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

10 (2) *That portion of any mechanic's lien or stop notice claim by*  
11 *the subcontractor for which the subcontractor has already been*  
12 *paid.*

13 (3) *One hundred fifty percent of the estimated cost of*  
14 *uncompleted subcontract work, except for those costs that are*  
15 *withheld under paragraph (2).*

16 (4) *One hundred fifty percent of the estimated cost to repair or*  
17 *replace subcontract work that was not performed according to the*  
18 *subcontract, except for those costs that are withheld under*  
19 *paragraph (2) or (3).*

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

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

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

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

1 SEC. 3. Section 3260.1 of the Civil Code is amended to read:  
2 3260.1. (a) This section is applicable with respect to all  
3 contracts entered into on or after January 1, 1992, relating to the  
4 construction of any private work of improvement.

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

- 15 (1) *The liquidated damages owed by the contractor.*  
16 (2) *One hundred fifty percent of the estimated cost of repair or*  
17 *replacement of contract work that was not performed according*  
18 *to the contract.*

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

22 (c) Nothing in this section shall be deemed to supersede any  
23 requirement of Section 3260 respecting the withholding of retention  
24 proceeds.

25 SEC. 4. Section 7107 of the Public Contract Code is amended  
26 to read:

27 7107. (a) This section is applicable with respect to all contracts  
28 entered into on or after January 1, 1993, relating to the construction  
29 of any public work of improvement.

30 (b) The retention proceeds withheld from any payment by the  
31 public entity from the original contractor, or by the original  
32 contractor from any subcontractor, shall be subject to this section.

33 (c) (1) Within 60 days after the date of completion of the work  
34 of improvement, the retention withheld by the public entity shall  
35 be released. In the event of a dispute between the public entity and  
36 the original contractor, the public entity may withhold from the  
37 final payment an amount not to exceed ~~150 percent of the disputed~~  
38 ~~amount. For purposes of this subdivision, "completion" means any~~  
39 *the sum of all of the following:*

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

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

2 (C) *One hundred fifty percent of the estimated cost of*  
3 *uncompleted contract work, except for those costs that are withheld*  
4 *under subparagraph (B).*

5 (D) *One hundred fifty percent of the estimated cost to repair or*  
6 *replace contract work that was not performed according to the*  
7 *contract, except for those costs that are withheld under*  
8 *subparagraph (B) or (C).*

9 (E) *One hundred fifty percent of the estimated cost of claims*  
10 *made by third parties for which the contractor is obligated to*  
11 *indemnify the public entity.*

12 (F) *One hundred fifty percent of the estimated cost to be*  
13 *incurred by the public entity as a result of the contractor’s*  
14 *abandonment or material default of the contract, except for those*  
15 *costs that are withheld under subparagraph (B), (C), or (D).*

16 (G) *The amounts that may be withheld in accordance with other*  
17 *provisions of law, including Section 1727 of the Labor Code and*  
18 *Section 4110 of this code.*

19 (2) *For purposes of this subdivision, “completion” means any*  
20 *of the following:*

21 ~~(1)~~

22 (A) *The occupation, beneficial use, and enjoyment of a work of*  
23 *improvement, excluding any operation only for testing, startup, or*  
24 *commissioning, by the public agency, or its agent, accompanied*  
25 *by cessation of labor on the work of improvement.*

26 ~~(2)~~

27 (B) *The acceptance by the public agency, or its agent, of the*  
28 *work of improvement.*

29 ~~(3)~~

30 (C) *After the commencement of a work of improvement, a*  
31 *cessation of labor on the work of improvement for a continuous*  
32 *period of 100 days or more, due to factors beyond the control of*  
33 *the contractor.*

34 ~~(4)~~

35 (D) *After the commencement of a work of improvement, a*  
36 *cessation of labor on the work of improvement for a continuous*  
37 *period of 30 days or more, if the public agency files for record a*  
38 *notice of cessation or a notice of completion.*

39 (d) *Subject to subdivision (e), within seven days from the time*  
40 *that all or any portion of the retention proceeds are received by*

1 the original contractor, the original contractor shall pay each of its  
2 subcontractors from whom retention has been withheld, each  
3 subcontractor's share of the retention received. However, if a  
4 retention payment received by the original contractor is specifically  
5 designated for a particular subcontractor, payment of the retention  
6 shall be made to the designated subcontractor, if the payment is  
7 consistent with the terms of the subcontract.

8 (e) The original contractor may withhold from a subcontractor  
9 its portion of the retention proceeds if a bona fide dispute exists  
10 between the subcontractor and the original contractor. The amount  
11 withheld from the retention payment shall not exceed ~~150 percent~~  
12 ~~of the estimated value of the disputed amount.~~ *the sum of all of*  
13 *the following:*

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

15 (2) *That portion of any stop notice claim by the subcontractor*  
16 *for which the subcontractor has already been paid.*

17 (3) *One hundred fifty percent of the estimated cost of*  
18 *uncompleted subcontract work, except for those costs that are*  
19 *withheld under paragraph (2) or (5).*

20 (4) *One hundred fifty percent of the estimated cost to repair or*  
21 *replace subcontract work that was not performed according to the*  
22 *subcontract, except for those costs that are withheld under*  
23 *paragraph (2), (3), or (5).*

24 (5) *The amounts withheld by the public entity on account of acts*  
25 *or omissions of the subcontractor.*

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

33 (g) If a state agency retains an amount greater than 125 percent  
34 of the estimated value of the work yet to be completed pursuant  
35 to Section 10261, the state agency shall distribute undisputed  
36 retention proceeds in accordance with subdivision (c). However,  
37 notwithstanding subdivision (c), if a state agency retains an amount  
38 equal to or less than 125 percent of the estimated value of the work  
39 yet to be completed, the state agency shall have 90 days in which  
40 to release undisputed retentions.

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

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

5 10262.5. (a) Notwithstanding any other law, a prime contractor  
6 or subcontractor shall pay to any subcontractor, not later than ~~seven~~  
7 *10 days after* of receipt of each progress payment, the respective  
8 amounts allowed the contractor on account of the work performed  
9 by the subcontractors, to the extent of each subcontractor’s interest  
10 therein. In the event that there is a good faith dispute over ~~all or~~  
11 ~~any portion of~~ the amount due on a progress ~~payment from~~  
12 ~~payment~~, the prime contractor or subcontractor ~~to a subcontractor~~,  
13 ~~then the prime contractor or subcontractor may withhold no more~~  
14 ~~than 150 percent of the disputed amount.~~ *may withhold from the*  
15 *progress payment an amount not to exceed the sum of both of the*  
16 *following:*

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

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

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

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