

AMENDED IN ASSEMBLY MARCH 29, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 2021

Introduced by Assembly Member Wagner

February 23, 2012

An act to amend Section 7108.5 of the Business and Professions Code, *and* to amend Sections ~~3260 and 3260.1~~ 8800, 8812, *and* 8814 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 amended, 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 ~~10~~ *seven* days ~~of~~ *after* 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 the amount due on a progress payment, the prime
8 contractor or subcontractor may withhold from the progress
9 payment an amount not to exceed the sum of the following:

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

14 (b) Any violation of this section shall constitute a cause for
15 disciplinary action and shall subject the licensee to a penalty,
16 payable to the subcontractor, of 2 percent of the amount due per
17 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 (c) The sanctions authorized under this section shall be separate
21 from, and in addition to, all other remedies, either civil,
22 administrative, or criminal.

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

26 ~~SEC. 2.— Section 3260 of the Civil Code is amended to read:~~

27 ~~3260. (a) This section is applicable with respect to all contracts~~
28 ~~entered into on or after July 1, 1991, relating to the construction~~
29 ~~of any private work of improvement. However, the amendments~~
30 ~~made to this section during the 1992 portion of the 1991–92~~
31 ~~Regular Session of the Legislature are applicable only with respect~~
32 ~~to contracts entered into on or after January 1, 1993, relating to~~
33 ~~the construction of any private work of improvement. Moreover,~~
34 ~~the amendments made to this section during the 1993 portion of~~
35 ~~the 1993–94 Regular Session of the Legislature are applicable only~~
36 ~~with respect to contracts entered into on or after January 1, 1994,~~
37 ~~relating to the construction of any private work of improvement.~~

38 ~~(b) The retention proceeds withheld from any payment by the~~
39 ~~owner from the original contractor, or by the original contractor~~
40 ~~from any subcontractor, shall be subject to this section.~~

1 ~~(e) Within 45 days after the date of completion, the retention~~
2 ~~withheld by the owner shall be released. “Date of completion,”~~
3 ~~for purposes of this section, means any of the following:~~

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

6 ~~(2) The date of completion indicated on a valid notice of~~
7 ~~completion recorded pursuant to Section 3093.~~

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

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

16 ~~(A) The liquidated damages owed by the contractor.~~

17 ~~(B) The amounts that may be withheld pursuant to Section 3153.~~

18 ~~(C) One hundred fifty percent of the estimated cost of~~
19 ~~uncompleted contract work, except for those costs that are withheld~~
20 ~~under subparagraph (B):~~

21 ~~(D) One hundred fifty percent of the estimated cost to repair or~~
22 ~~replace contract work that was not performed according to the~~
23 ~~contract, except for those costs that are withheld under~~
24 ~~subparagraph (B) or (C):~~

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

34 ~~(e) If a bona fide dispute exists between a subcontractor and the~~
35 ~~original contractor, the original contractor may withhold from that~~
36 ~~subcontractor with whom the dispute exists its portion of the~~
37 ~~retention proceeds. The amount withheld from the retention~~
38 ~~payment shall not exceed the sum of all of the following:~~

39 ~~(1) The liquidated damages owed by the subcontractor.~~

1 ~~(2) That portion of any mechanic’s lien or stop notice claim by~~
2 ~~the subcontractor for which the subcontractor has already been~~
3 ~~paid.~~

4 ~~(3) One hundred fifty percent of the estimated cost of~~
5 ~~uncompleted subcontract work, except for those costs that are~~
6 ~~withheld under paragraph (2).~~

7 ~~(4) One hundred fifty percent of the estimated cost to repair or~~
8 ~~replace subcontract work that was not performed according to the~~
9 ~~subcontract, except for those costs that are withheld under~~
10 ~~paragraph (2) or (3).~~

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

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

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

32 ~~SEC. 3.— Section 3260.1 of the Civil Code is amended to read:~~

33 ~~3260.1. (a) This section is applicable with respect to all~~
34 ~~contracts entered into on or after January 1, 1992, relating to the~~
35 ~~construction of any private work of improvement.~~

36 ~~(b) Except as otherwise agreed in writing, the owner shall pay~~
37 ~~to the contractor, within 30 days following receipt of a demand~~
38 ~~for payment in accordance with the contract, any progress payment~~
39 ~~due thereunder as to which there is no good faith dispute between~~
40 ~~the parties. In the event of a dispute between the owner and the~~

1 contractor, the owner may withhold from the progress payment
2 an amount not to exceed the sum of both of the following:

- 3 (1) ~~The liquidated damages owed by the contractor.~~
- 4 (2) ~~One hundred fifty percent of the estimated cost of repair or~~
5 ~~replacement of contract work that was not performed according~~
6 ~~to the contract.~~

7 ~~If any amount is wrongfully withheld in violation of this~~
8 ~~subdivision, the contractor shall be entitled to the penalty specified~~
9 ~~in subdivision (g) of Section 3260.~~

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

13 ~~SEC. 4.— Section 7107 of the Public Contract Code is amended~~
14 ~~to read:~~

15 ~~7107. (a) This section is applicable with respect to all contracts~~
16 ~~entered into on or after January 1, 1993, relating to the construction~~
17 ~~of any public work of improvement.~~

18 ~~(b) The retention proceeds withheld from any payment by the~~
19 ~~public entity from the original contractor, or by the original~~
20 ~~contractor from any subcontractor, shall be subject to this section.~~

21 (e) (1) ~~Within 60 days after the date of completion of the work~~
22 ~~of improvement, the retention withheld by the public entity shall~~
23 ~~be released. In the event of a dispute between the public entity and~~
24 ~~the original contractor, the public entity may withhold from the~~
25 ~~final payment an amount not to exceed the sum of all of the~~
26 ~~following:~~

27 (A) ~~The liquidated damages owed by the original contractor.~~

28 (B) ~~The amounts that may be withheld pursuant to Section 3186.~~

29 (C) ~~One hundred fifty percent of the estimated cost of~~
30 ~~uncompleted contract work, except for those costs that are withheld~~
31 ~~under subparagraph (B).~~

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

36 (E) ~~One hundred fifty percent of the estimated cost of claims~~
37 ~~made by third parties for which the contractor is obligated to~~
38 ~~indemnify the public entity.~~

39 (F) ~~One hundred fifty percent of the estimated cost to be incurred~~
40 ~~by the public entity as a result of the contractor's abandonment or~~

1 material default of the contract, except for those costs that are
2 withheld under subparagraph (B), (C), or (D):
3 (G) The amounts that may be withheld in accordance with other
4 provisions of law, including Section 1727 of the Labor Code and
5 Section 4110 of this code.
6 (2) For purposes of this subdivision, “completion” means any
7 of the following:
8 (A) The occupation, beneficial use, and enjoyment of a work
9 of improvement, excluding any operation only for testing, startup,
10 or commissioning, by the public agency, or its agent, accompanied
11 by cessation of labor on the work of improvement.
12 (B) The acceptance by the public agency, or its agent, of the
13 work of improvement.
14 (C) After the commencement of a work of improvement, a
15 cessation of labor on the work of improvement for a continuous
16 period of 100 days or more, due to factors beyond the control of
17 the contractor.
18 (D) After the commencement of a work of improvement, a
19 cessation of labor on the work of improvement for a continuous
20 period of 30 days or more, if the public agency files for record a
21 notice of cessation or a notice of completion.
22 (d) Subject to subdivision (e), within seven days from the time
23 that all or any portion of the retention proceeds are received by
24 the original contractor, the original contractor shall pay each of its
25 subcontractors from whom retention has been withheld, each
26 subcontractor’s share of the retention received. However, if a
27 retention payment received by the original contractor is specifically
28 designated for a particular subcontractor, payment of the retention
29 shall be made to the designated subcontractor, if the payment is
30 consistent with the terms of the subcontract.
31 (e) The original contractor may withhold from a subcontractor
32 its portion of the retention proceeds if a bona fide dispute exists
33 between the subcontractor and the original contractor. The amount
34 withheld from the retention payment shall not exceed the sum of
35 all of the following:
36 (1) The liquidated damages owed by the subcontractor.
37 (2) That portion of any stop notice claim by the subcontractor
38 for which the subcontractor has already been paid.

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

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

8 ~~(5) The amounts withheld by the public entity on account of~~
9 ~~acts or omissions of the subcontractor.~~

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

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

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

27 ~~SEC. 5. Section 10262.5 of the Public Contract Code is~~
28 ~~amended to read:~~

29 ~~10262.5. (a) Notwithstanding any other law, a prime contractor~~
30 ~~or subcontractor shall pay to any subcontractor, not later than 10~~
31 ~~days of receipt of each progress payment, the respective amounts~~
32 ~~allowed the contractor on account of the work performed by the~~
33 ~~subcontractors, to the extent of each subcontractor's interest~~
34 ~~therein. In the event that there is a good faith dispute over the~~
35 ~~amount due on a progress payment, the prime contractor or~~
36 ~~subcontractor may withhold from the progress payment an amount~~
37 ~~not to exceed the sum of both of the following:~~

38 ~~(1) The liquidated damages owed by the subcontractor.~~

1 ~~(2) One hundred fifty percent of the estimated cost of repair or~~
 2 ~~replacement of the subcontract work that was not performed~~
 3 ~~according to the subcontract.~~

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

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

14 ~~(c) On or before September 1 of each year, the head of each~~
 15 ~~state agency shall submit to the Legislature a report on the number~~
 16 ~~and dollar volume of written complaints received from~~
 17 ~~subcontractors and prime contractors on contracts in excess of~~
 18 ~~three hundred thousand dollars (\$300,000), relating to violations~~
 19 ~~of this section.~~

20 ~~SEC. 2. Section 8800 of the Civil Code is amended to read:~~

21 ~~8800. (a) Except as otherwise agreed in writing by the owner~~
 22 ~~and direct contractor, the owner shall pay the direct contractor,~~
 23 ~~within 30 days after notice demanding payment pursuant to the~~
 24 ~~contract is given, any progress payment due as to which there is~~
 25 ~~no good faith dispute between them. The notice given shall comply~~
 26 ~~with the requirements of Chapter 2 (commencing with Section~~
 27 ~~8100) of Title 1.~~

28 ~~(b) If there is a good faith dispute between the owner and direct~~
 29 ~~contractor as to a progress payment due, the owner may withhold~~
 30 ~~from the progress payment an amount not in excess of 150 percent~~
 31 ~~of the disputed amount. the sum of both of the following:~~

- 32 ~~(1) The liquidated damages owed by the contractor.~~
- 33 ~~(2) One hundred fifty percent of the estimated cost of repair or~~
 34 ~~replacement of contract work that was not performed according~~
 35 ~~to the contract.~~

36 ~~(c) An owner that violates this section is liable to the direct~~
 37 ~~contractor for a penalty of 2 percent per month on the amount~~
 38 ~~wrongfully withheld, in place of any interest otherwise due. In an~~
 39 ~~action for collection of the amount wrongfully withheld, the~~
 40 ~~prevailing party is entitled to costs and a reasonable attorney’s fee.~~

1 (d) This section does not supersede any requirement of Article
2 2 (commencing with Section 8810) relating to the withholding of
3 a retention.

4 *SEC. 3. Section 8812 of the Civil Code is amended to read:*

5 8812. (a) If an owner withholds a retention from a direct
6 contractor, the owner shall, within 45 days after completion of the
7 work of improvement, pay the retention to the contractor.

8 (b) If part of a work of improvement ultimately will become
9 the property of a public entity, the owner may condition payment
10 of a retention allocable to that part on acceptance of the part by
11 the public entity.

12 (c) If there is a good faith dispute between the owner and direct
13 contractor as to a retention payment due, the owner may withhold
14 from final payment an amount not in excess of ~~150 percent of the~~
15 ~~disputed amount.~~ *the sum of all of the following:*

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

17 (2) *The amounts that are withheld pursuant to Sections 8470*
18 *and 8522.*

19 (3) *One hundred fifty percent of the estimated cost of*
20 *uncompleted contract work, except for those costs that are withheld*
21 *under paragraph (2).*

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

26 *SEC. 4. Section 8814 of the Civil Code is amended to read:*

27 8814. (a) If a direct contractor has withheld a retention from
28 one or more subcontractors, the direct contractor shall, within 10
29 days after receiving all or part of a retention payment, pay to each
30 subcontractor from whom retention has been withheld that
31 subcontractor's share of the payment.

32 (b) If a retention received by the direct contractor is specifically
33 designated for a particular subcontractor, the direct contractor shall
34 pay the retention payment to the designated subcontractor, if
35 consistent with the terms of the subcontract.

36 (c) If a good faith dispute exists between the direct contractor
37 and a subcontractor, the direct contractor may withhold from the
38 retention to the subcontractor an amount not in excess of ~~150~~
39 ~~percent of the estimated value of the disputed amount.~~ *the sum of*
40 *all of the following:*

- 1 (1) *The liquidated damages owed by the subcontractor.*
- 2 (2) *That portion of any mechanics lien or stop payment notice*
- 3 *claim by the subcontractor for which the subcontractor has already*
- 4 *been paid.*
- 5 (3) *The amount that would have been withheld by the owner*
- 6 *pursuant to Section 8470 or 8522, but for a bond provided by the*
- 7 *direct contractor pursuant to Section 8424 or 8510.*
- 8 (4) *One hundred fifty percent of the estimated cost of*
- 9 *uncompleted subcontract work, except for those costs that are*
- 10 *withheld under paragraph (2).*
- 11 (5) *One hundred fifty percent of the estimated cost to repair or*
- 12 *replace subcontract work that was not performed according to the*
- 13 *subcontract, except for those costs that are withheld under*
- 14 *paragraph (2) or (3).*