

AMENDED IN ASSEMBLY JUNE 13, 2011

AMENDED IN ASSEMBLY JUNE 2, 2011

AMENDED IN SENATE MARCH 25, 2011

SENATE BILL

No. 293

Introduced by Senator Padilla

February 14, 2011

An act to amend Section 7108.5 of the Business and Professions Code, to amend Sections 3252, 8612, 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 payment bonds.

LEGISLATIVE COUNSEL'S DIGEST

SB 293, as amended, Padilla. Payment bonds: laborers.

(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 the head of each state agency to annually submit a report to the Legislature on the number and dollar volume of written complaints received from subcontractors and prime contractors on contracts in excess of \$300,000 relating to violations of specified provisions.~~

~~This bill would make this reporting requirement inoperative on September 1, 2016, and would specify how the reports shall be submitted.~~

~~(3)~~

~~(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, as specified.~~

~~(4)~~

~~(3) Existing law, operative July 1, 2012, generally requires a claimant to give a preliminary notice to specified persons before asserting a claim against a payment bond in a private or public work of improvement and exempts a laborer, as defined, from this notice requirement. Other provisions of existing law, also operative July 1, 2012, require a claimant to give a preliminary notice to enforce his or her claim against a payment bond, and allow the claimant, if he or she did not give a preliminary notice, to enforce his or her claim by giving written notice to the surety and bond principal.~~

~~This bill would specify that the latter provisions, requiring a preliminary notice to enforce a claim against a payment bond and setting forth the claim procedure when a preliminary notice has not been given, do not apply to a laborer, as specified.~~

~~(5)~~

~~(4) 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, until January 1, 2016, 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.

(6)

(5) 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 instead prohibit progress payments upon these contracts from being made in excess of 100% of the percentage of actual work completed, and would permit the Department of General Services to withhold not more than 5% of the contract price until final completion and acceptance of the project, except as specified.

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 7108.5 of the Business and Professions
2 Code is amended to read:
3 7108.5. (a) A prime contractor or subcontractor shall pay to
4 any subcontractor, not later than seven days after receipt of each
5 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.~~ ~~subdivision~~ *therein*. In the event
9 that there is a good faith dispute over all or any portion of the
10 amount due on a progress payment from the prime contractor or
11 subcontractor to a subcontractor, the prime contractor or

1 subcontractor may withhold no more than 150 percent of the
2 disputed amount.

3 (b) Any violation of this section shall constitute a cause for
4 disciplinary action and shall subject the licensee to a penalty,
5 payable to the subcontractor, of 2 percent of the amount due per
6 month for every month that payment is not made.

7 (c) In any action for the collection of funds wrongfully withheld,
8 the prevailing party shall be entitled to his or her attorney's fees
9 and costs.

10 (d) The sanctions authorized under this section shall be separate
11 from, and in addition to, all other remedies, either civil,
12 administrative, or criminal.

13 (e) This section applies to all private works of improvement
14 and to all public works of improvement, except where Section
15 10262 of the Public Contract Code applies.

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

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

22 (b) (1) On and after January 1, 1995, and before January 1,
23 2012, if the 20-day public work preliminary bond notice was not
24 given as provided in Section 3098, a claimant may enforce a claim
25 by giving written notice to the surety and the bond principal as
26 provided in Section 3227 within 15 days after recordation of a
27 notice of completion. If no notice of completion has been recorded,
28 the time for giving written notice to the surety and the bond
29 principal is extended to 75 days after completion of the work of
30 improvement.

31 (2) On and after January 1, 2012, if the 20-day public work
32 preliminary bond notice was not given as provided in Section 3098,
33 a claimant may enforce a claim by giving written notice to the
34 surety and bond principal, as provided in Section 3227, prior to
35 completion *of the project*, as defined in Section 3086, ~~of the project~~,
36 or recordation of a notice of completion.

37 SEC. 3. Section 8612 of the Civil Code is amended to read:

38 8612. (a) In order to enforce a claim against a payment bond
39 under this title, a claimant shall give the preliminary notice
40 provided in Chapter 2 (commencing with Section 8200).

1 (b) If preliminary notice was not given as provided in Chapter
2 2 (commencing with Section 8200), a claimant may enforce a
3 claim by giving written notice to the surety and the bond principal
4 within 15 days after recordation of a notice of completion. If no
5 notice of completion has been recorded, the time for giving written
6 notice to the surety and the bond principal is extended to 75 days
7 after completion of the work of improvement.

8 (c) Pursuant to Section 8200, this section shall not apply to a
9 laborer, as defined under Section 8024.

10 (d) This section shall become operative on July 1, 2012.

11 SEC. 4. Section 9560 of the Civil Code is amended to read:

12 9560. (a) In order to enforce a claim against a payment bond,
13 a claimant shall give the preliminary notice provided in Chapter
14 3 (commencing with Section 9300).

15 (b) If preliminary notice was not given as provided in Chapter
16 3 (commencing with Section 9300), a claimant may enforce a
17 claim by giving written notice to the surety and bond principal
18 within 15 days after recordation of a notice of completion. If no
19 notice of completion has been recorded, the time for giving written
20 notice to the surety and the bond principal is extended to 75 days
21 after completion of the work of improvement.

22 (c) Pursuant to Section 9300, this section shall not apply to a
23 laborer, as defined under Section 8024.

24 (d) This section shall become operative on July 1, 2012.

25 SEC. 5. Section 7201 is added to the Public Contract Code, to
26 read:

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

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

1 (3) For purposes of this section, “public entity” means the state,
2 including every state agency, office, department, division, bureau,
3 board, or commission, the California State University, the
4 University of California, a city, county, city and county, including
5 ~~chartered charter~~ cities and ~~chartered charter~~ counties, district,
6 special district, public authority, political subdivision, public
7 corporation, or nonprofit transit corporation wholly owned by a
8 public agency and formed to carry out the purposes of the public
9 agency.

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

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

27 (3) Notwithstanding any other provision of this subdivision, the
28 retention proceeds withheld from any payment by an awarding
29 entity set forth in paragraphs (1) to (5), inclusive, of subdivision
30 (a) of Section 10106, from the original contractor, by the original
31 contractor from any subcontractor, and by a subcontractor from
32 any subcontractor thereunder, may exceed 5 percent on specific
33 projects where the director of the department has made a finding
34 prior to the bid that the project is substantially complex and
35 therefore requires a higher retention amount than 5 percent and
36 the department includes both this finding and the actual retention
37 amount in the bid documents. In a contract between the original
38 contractor and a subcontractor, and in a contract between a
39 subcontractor and any subcontractor thereunder, the percentage
40 of the retention proceeds withheld shall not exceed the percentage

1 specified in the contract between the department and the original
2 contractor.

3 (4) Notwithstanding any other provision of this subdivision, the
4 retention proceeds withheld from any payment by the awarding
5 entity of a city, county, city and county, including ~~chartered~~ *charter*
6 ~~cities and chartered~~ *charter* counties, district, special district, public
7 authority, political subdivision, public corporation, or nonprofit
8 transit corporation wholly owned by a public agency and formed
9 to carry out the purposes of the public agency, from the original
10 contractor, by the original contractor from any subcontractor, and
11 by a subcontractor from any subcontractor thereunder, may exceed
12 5 percent on specific projects where the governing body of the
13 public entity has approved a finding by a majority vote during a
14 properly noticed and normally scheduled public hearing and prior
15 to bid that the project is substantially complex and therefore
16 requires a higher retention amount than 5 percent and the awarding
17 entity includes both this finding and the actual retention amount
18 in the bid documents. In a contract between the original contractor
19 and a subcontractor, and in a contract between a subcontractor and
20 any subcontractor thereunder, the percentage of the retention
21 proceeds withheld shall not exceed the percentage specified in the
22 contract between the department and the original contractor.

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

25 (d) This section shall remain in effect only until January 1, 2016,
26 and as of that date is repealed, unless a later enacted statute, that
27 is enacted before January 1, 2016, deletes or extends that date.

28 SEC. 6. 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
33 100 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 95 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) Notwithstanding this section, when the director of the
11 department has made a finding prior to the bid that a specified
12 project is substantially complex and therefore requires a higher
13 retention amount than 5 percent, and the department includes both
14 this finding and the actual retention amount in the bid documents,
15 then payments upon contracts by the department shall be made as
16 the department prescribes upon estimates made and approved by
17 ~~the department, but~~ department. *However*, progress payments shall
18 not be made in excess of 95 percent of the percentage of actual
19 work completed, plus a like percentage of the value of material
20 delivered on the ground or stored, subject to, or under the control
21 of the state, and unused, except as otherwise provided in this
22 section. At any time after 95 percent of the work has been
23 completed, the department may reduce the funds withheld to an
24 amount not less than 125 percent of the estimated value of the
25 work yet to be completed, as determined by the department, if the
26 reduction has been approved, in writing, by the surety on the
27 performance bond and by the surety on the payment bond. The
28 Controller shall draw his or her warrants upon estimates so made
29 and approved by the department and the Treasurer shall pay them
30 with funds appropriated therefor. The funds may be released by
31 electronic transfer if that procedure is requested by the contractor,
32 in writing, and if the public entity has, in place at the time of the
33 request, the mechanism for the transfer.

34 (c) This section shall remain in effect only until January 1, 2016,
35 and as of that date is repealed, unless a later enacted statute, that
36 is enacted before January 1, 2016, deletes or extends that date.

37 SEC. 7. Section 10261 is added to the Public Contract Code,
38 to read:

39 10261. (a) On and after January 1, 2016, payments upon
40 contracts shall be made as the department prescribes upon estimates

1 made and approved by the department, but progress payments shall
2 not be made in excess of 95 percent of the percentage of actual
3 work completed plus a like percentage of the value of material
4 delivered on the ground or stored subject to or under the control
5 of the state, and unused, except as otherwise provided in this
6 section. The department shall withhold not less than 5 percent of
7 the contract price until final completion and acceptance of the
8 project. However, at any time after 95 percent of the work has
9 been completed, the department may reduce the funds withheld to
10 an amount not less than 125 percent of the estimated value of the
11 work yet to be completed, as determined by the department, if the
12 reduction has been approved, in writing, by the surety on the
13 performance bond and by the surety on the payment bond. The
14 Controller shall draw his or her warrants upon estimates so made
15 and approved by the department and the Treasurer shall pay them.
16 The funds may be released by electronic transfer if that procedure
17 is requested by the contractor, in writing, and if the public entity
18 has, in place at the time of the request, the mechanism for the
19 transfer.

20 (b) This section shall become operative on January 1, 2016.

21 SEC. 8. Section 10262 of the Public Contract Code is amended
22 to read:

23 10262. The contractor shall pay to his or her subcontractors,
24 within seven days of receipt of each progress payment, the
25 respective amounts allowed the contractor on account of the work
26 performed by his or her subcontractors, to the extent of each
27 subcontractor's interest therein. The payments to subcontractors
28 shall be based on estimates made pursuant to Section 10261. Any
29 diversion by the contractor of payments received for prosecution
30 of a contract, or failure to reasonably account for the application
31 or use of the payments constitutes ground for actions proscribed
32 in Section 10253, in addition to disciplinary action by the
33 Contractors' State License Board. The subcontractor shall notify,
34 in writing, the Contractors' State License Board and the department
35 of any payment less than the amount or percentage approved for
36 the class or item of work as set forth in Section 10261.

37 SEC. 9. Section 10262.5 of the Public Contract Code is
38 amended to read:

39 10262.5. (a) Notwithstanding any other law, a prime contractor
40 or subcontractor shall pay to any subcontractor, not later than seven

1 days after receipt of each progress payment, the respective amounts
2 allowed the contractor on account of the work performed by the
3 subcontractors, to the extent of each subcontractor's interest
4 therein. In the event that there is a good faith dispute over all or
5 any portion of the amount due on a progress payment from the
6 prime contractor or subcontractor to a subcontractor, then the prime
7 contractor or subcontractor may withhold no more than 150 percent
8 of the disputed amount.

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

14 (b) This section shall not be construed to limit or impair any
15 contractual, administrative, or judicial remedies otherwise available
16 to a contractor or a subcontractor in the event of a dispute involving
17 late payment or nonpayment by a contractor or deficient
18 subcontract performance or nonperformance by a subcontractor.

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

25 ~~(d) (1) The requirement for submitting a report imposed under~~
26 ~~subdivision (e) is inoperative on September 1, 2016, pursuant to~~
27 ~~Section 10231.5 of the Government Code.~~

28 ~~(2) A report submitted pursuant to subdivision (e) shall be~~
29 ~~submitted in compliance with Section 9795 of the Government~~
30 ~~Code.~~