

ASSEMBLY BILL

No. 536

Introduced by Assembly Member Wagner

February 20, 2013

An act to amend Section 7108.5 of the Business and Professions Code, to amend Sections 8800, 8802, 8812, 8814, and 8818 of the Civil Code, and to amend Sections 7107 and 10262.5 of the Public Contract Code, relating to contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 536, as introduced, Wagner. Contractors: payments.

Existing law allows specified persons to withhold for a contractor or subcontractor no more than 150% of the disputed amount if there is a good faith dispute over the amount due on a contract payment.

This bill would exclude specified amounts from being considered disputed amounts and would provide that the authorized withholding is not wrongfully withheld.

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:
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

1 subcontractor's interest therein. In the event that there is a good
2 faith dispute over all or any portion of the amount due on a progress
3 payment from the prime contractor or subcontractor to a
4 subcontractor, the prime contractor or subcontractor may withhold
5 no more than 150 percent of the disputed amount.

6 (b) Any violation of this section shall constitute a cause for
7 disciplinary action and shall subject the licensee to a penalty,
8 payable to the subcontractor, of 2 percent of the amount due per
9 month for every month that payment is not made. *The amount*
10 *withheld pursuant to subdivision (a) is not a violation of this*
11 *section and is not an amount due for purposes of this section.*

12 (c) In any action for the collection of funds wrongfully withheld,
13 the prevailing party shall be entitled to his or her attorney's fees
14 and costs. *The amount withheld pursuant to subdivision (a) is not*
15 *wrongfully withheld.*

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

19 (e) This section applies to all private works of improvement
20 and to all public works of improvement, except where Section
21 10262 of the Public Contract Code applies.

22 (f) *For purposes of this section, a "disputed amount" shall not*
23 *include any of the following:*

24 (1) *Any amount in excess of liquidated damages owed by the*
25 *subcontractor.*

26 (2) *Any amount in excess of what the prime contractor or*
27 *subcontractor is allowed by law to withhold from the subcontractor*
28 *on account of a mechanics lien being recorded or a stop payment*
29 *notice being served for labor, services, equipment, or materials*
30 *allegedly provided to the project.*

31 (3) *The amount of any claim for additional compensation arising*
32 *out of alleged extra work performed by the subcontractor or an*
33 *alleged breach of contract by the prime contractor or*
34 *subcontractor.*

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

36 8800. (a) Except as otherwise agreed in writing by the owner
37 and direct contractor, the owner shall pay the direct contractor,
38 within 30 days after notice demanding payment pursuant to the
39 contract is given, any progress payment due as to which there is
40 no good faith dispute between them. The notice given shall comply

1 with the requirements of Chapter 2 (commencing with Section
2 8100) of Title 1.

3 (b) If there is a good faith dispute between the owner and direct
4 contractor as to a progress payment due, the owner may withhold
5 from the progress payment an amount not in excess of 150 percent
6 of the disputed amount.

7 (c) An owner that violates this section is liable to the direct
8 contractor for a penalty of 2 percent per month on the amount
9 wrongfully withheld, in place of any interest otherwise due. In an
10 action for collection of the amount wrongfully withheld, the
11 prevailing party is entitled to costs and a reasonable attorney's fee.
12 *The amount withheld pursuant to subdivision (b) is not a violation*
13 *of this section and is not wrongfully withheld.*

14 (d) This section does not supersede any requirement of Article
15 2 (commencing with Section 8810) relating to the withholding of
16 a retention.

17 (e) *For purposes of this section, a "disputed amount" shall not*
18 *include any of the following:*

19 (1) *Any amount in excess of liquidated damages owed by the*
20 *direct contractor.*

21 (2) *Any amount in excess of what the owner is allowed by law*
22 *to withhold from the direct contractor on account of a mechanics*
23 *lien being recorded or a stop payment notice being served for*
24 *labor, services, equipment, or materials allegedly provided to the*
25 *project.*

26 (3) *The amount of any claim for additional compensation arising*
27 *out of alleged extra work performed by the direct contractor or*
28 *an alleged breach of contract by the owner.*

29 SEC. 3. Section 8802 of the Civil Code is amended to read:

30 8802. (a) This section applies to a contract between a public
31 utility and a direct contractor for all or part of a work of
32 improvement.

33 (b) Unless the direct contractor and a subcontractor otherwise
34 agree in writing, within 21 days after receipt of a progress payment
35 from the public utility the direct contractor shall pay the
36 subcontractor the amount allowed the direct contractor on account
37 of the work performed by the subcontractor to the extent of the
38 subcontractor's interest in the work. If there is a good faith dispute
39 over all or part of the amount due on a progress payment from the
40 direct contractor to a subcontractor, the direct contractor may

1 withhold an amount not in excess of 150 percent of the disputed
2 amount.

3 (c) A direct contractor that violates this section is liable to the
4 subcontractor for a penalty of 2 percent of the disputed amount
5 due per month for every month that payment is not made. In an
6 action for collection of the amount wrongfully withheld, the
7 prevailing party is entitled to costs and a reasonable attorney's fee.
8 *The amount withheld pursuant to subdivision (b) is not a violation*
9 *of this section and is not wrongfully withheld.*

10 (d) This section does not limit or impair a contractual,
11 administrative, or judicial remedy otherwise available to a
12 contractor or subcontractor in a dispute involving late payment or
13 nonpayment by the contractor or deficient performance or
14 nonperformance by the subcontractor.

15 (e) *For purposes of this section, a "disputed amount" shall not*
16 *include any of the following:*

17 (1) *Any amount in excess of liquidated damages owed by the*
18 *subcontractor.*

19 (2) *Any amount in excess of what the direct contractor is allowed*
20 *by law to withhold from the subcontractor on account of a*
21 *mechanics lien being recorded or a stop payment notice being*
22 *served for labor, services, equipment, or materials allegedly*
23 *provided to the project.*

24 (3) *The amount of any claim for additional compensation arising*
25 *out of alleged extra work performed by the subcontractor or an*
26 *alleged breach of contract by the direct contractor.*

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

28 8812. (a) If an owner withholds a retention from a direct
29 contractor, the owner shall, within 45 days after completion of the
30 work of improvement, pay the retention to the contractor.

31 (b) If part of a work of improvement ultimately will become
32 the property of a public entity, the owner may condition payment
33 of a retention allocable to that part on acceptance of the part by
34 the public entity.

35 (c) If there is a good faith dispute between the owner and direct
36 contractor as to a retention payment due, the owner may withhold
37 from final payment an amount not in excess of 150 percent of the
38 disputed amount. *This withheld amount shall not be considered*
39 *wrongfully withheld.*

1 (d) For purposes of this section, a “disputed amount” shall not
2 include any of the following:

3 (1) Any amount in excess of liquidated damages owed by the
4 direct contractor.

5 (2) Any amount in excess of what the owner is allowed by law
6 to withhold from the direct contractor on account of a mechanics
7 lien being recorded or a stop payment notice being served for
8 labor, services, equipment, or materials allegedly provided to the
9 project.

10 (3) The amount of any claim for additional compensation arising
11 out of alleged extra work performed by the direct contractor or
12 an alleged breach of contract by the owner.

13 SEC. 5. Section 8814 of the Civil Code is amended to read:

14 8814. (a) If a direct contractor has withheld a retention from
15 one or more subcontractors, the direct contractor shall, within 10
16 days after receiving all or part of a retention payment, pay to each
17 subcontractor from whom retention has been withheld that
18 subcontractor’s share of the payment.

19 (b) If a retention received by the direct contractor is specifically
20 designated for a particular subcontractor, the direct contractor shall
21 pay the retention payment to the designated subcontractor, if
22 consistent with the terms of the subcontract.

23 (c) If a good faith dispute exists between the direct contractor
24 and a subcontractor, the direct contractor may withhold from the
25 retention to the subcontractor an amount not in excess of 150
26 percent of the estimated value of the disputed amount. *This*
27 *withheld amount shall not be considered wrongfully withheld.*

28 (d) For purposes of this section, a “disputed amount” shall not
29 include any of the following:

30 (1) Any amount in excess of liquidated damages owed by the
31 subcontractor.

32 (2) Any amount in excess of what the direct contractor is allowed
33 by law to withhold from the subcontractor on account of a
34 mechanics lien being recorded or a stop payment notice being
35 served for labor, services, equipment, or materials allegedly
36 provided to the project.

37 (3) The amount of any claim for additional compensation arising
38 out of alleged extra work performed by the subcontractor or an
39 alleged breach of the subcontract by the direct contractor.

40 SEC. 6. Section 8818 of the Civil Code is amended to read:

1 8818. If an owner or direct contractor does not make a retention
2 payment within the time required by this article:

3 (a) The owner or direct contractor is liable to the person to which
4 payment is owed for a penalty of 2 percent per month on the
5 amount wrongfully withheld, in place of any interest otherwise
6 due.

7 (b) In an action for collection of the amount wrongfully
8 withheld, the prevailing party is entitled to costs and reasonable
9 attorney's fees.

10 (c) *Amounts authorized to be withheld pursuant to this article*
11 *are not a payment required to be made and are not wrongfully*
12 *withheld.*

13 SEC. 7. 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 (c) Within 60 days after the date of completion of the work of
22 improvement, the retention withheld by the public entity shall be
23 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 150 percent of the disputed
26 amount. For purposes of this subdivision, "completion" means any
27 of the following:

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

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

34 (3) After the commencement of a work of improvement, a
35 cessation of labor on the work of improvement for a continuous
36 period of 100 days or more, due to factors beyond the control of
37 the contractor.

38 (4) After the commencement of a work of improvement, a
39 cessation of labor on the work of improvement for a continuous

1 period of 30 days or more, if the public agency files for record a
2 notice of cessation or a notice of completion.

3 (d) Subject to subdivision (e), within seven days from the time
4 that all or any portion of the retention proceeds are received by
5 the original contractor, the original contractor shall pay each of its
6 subcontractors from whom retention has been withheld, each
7 subcontractor's share of the retention received. However, if a
8 retention payment received by the original contractor is specifically
9 designated for a particular subcontractor, payment of the retention
10 shall be made to the designated subcontractor, if the payment is
11 consistent with the terms of the subcontract.

12 (e) The original contractor may withhold from a subcontractor
13 its portion of the retention proceeds if a bona fide dispute exists
14 between the subcontractor and the original contractor. The amount
15 withheld from the retention payment shall not exceed 150 percent
16 of the estimated value of the disputed amount.

17 (f) In the event that retention payments are not made within the
18 time periods required by this section, the public entity or original
19 contractor withholding the unpaid amounts shall be subject to a
20 charge of 2 percent per month on the improperly withheld amount,
21 in lieu of any interest otherwise due. Additionally, in any action
22 for the collection of funds wrongfully withheld, the prevailing
23 party shall be entitled to attorney's fees and costs. *Amounts*
24 *authorized to be withheld pursuant to this section are not a*
25 *payment required to be made and are not wrongfully withheld.*

26 (g) If a state agency retains an amount greater than 125 percent
27 of the estimated value of the work yet to be completed pursuant
28 to Section 10261, the state agency shall distribute undisputed
29 retention proceeds in accordance with subdivision (c). However,
30 notwithstanding subdivision (c), if a state agency retains an amount
31 equal to or less than 125 percent of the estimated value of the work
32 yet to be completed, the state agency shall have 90 days in which
33 to release undisputed retentions.

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

36 (i) *For purposes of this section, a "disputed amount" shall not*
37 *include any of the following:*

38 (1) *Any amount in excess of liquidated damages owed by the*
39 *original contractor.*

1 (2) *Any amount in excess of what the public entity is allowed*
2 *by law to withhold from the original contractor on account of a*
3 *stop payment notice being served for labor, services, equipment,*
4 *or materials allegedly provided to the project.*

5 (3) *The amount of any claim for additional compensation arising*
6 *out of alleged extra work performed by the original contractor or*
7 *an alleged breach of contract by the public entity.*

8 SEC. 8. Section 10262.5 of the Public Contract Code is
9 amended to read:

10 10262.5. (a) (1) Notwithstanding any other law, a prime
11 contractor or subcontractor shall pay to any subcontractor, not later
12 than seven days after receipt of each progress payment, the
13 respective amounts allowed the contractor on account of the work
14 performed by the subcontractors, to the extent of each
15 subcontractor's interest therein. In the event that there is a good
16 faith dispute over all or any portion of the amount due on a progress
17 payment from the prime contractor or subcontractor to a
18 subcontractor, then the prime contractor or subcontractor may
19 withhold no more than 150 percent of the disputed amount.

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21 (2) 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. *The amount*
26 *withheld pursuant to paragraph (1) is not a violation of this section*
27 *and is not wrongfully withheld.*

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

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

39 (d) *For purposes of this section, a "disputed amount" shall not*
40 *include any of the following:*

1 (1) Any amount in excess of liquidated damages owed by the
2 subcontractor.

3 (2) Any amount in excess of what the prime contractor or
4 subcontractor is allowed by law to withhold from the subcontractor
5 on account of a stop payment notice being served for labor,
6 services, equipment, or materials allegedly provided to the project.

7 (3) The amount of any claim for additional compensation arising
8 out of alleged extra work performed by the subcontractor or an
9 alleged breach of the subcontract by the prime contractor or
10 subcontractor.

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