

AMENDED IN SENATE APRIL 26, 1995

**SENATE BILL**

**No. 1286**

**Introduced by Senator Mountjoy**

February 24, 1995

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An act to ~~add Sections 3319 and 3320 to~~ amend Section 2782.5 of, and to add Sections 3319 and 3320 to, the Civil Code, relating to works of improvement.

LEGISLATIVE COUNSEL'S DIGEST

SB 1286, as amended, Mountjoy. Works of improvement.

*(1) Under existing law, nothing contained in specified provisions of existing law shall prevent a party to a construction contract and the owner or other party for whose account the construction contract is being performed from negotiating and expressly agreeing with respect to the allocation, release, liquidation, exclusion, or limitation as between the parties of any liability for design defects or of the promise to the promisor arising out of or relating to the construction contract. Existing case law requires that such a provision is subject to the common law tests of public policy and conscience.*

*This bill would provide that nothing contained in any provision of statutory or common law, including the doctrine of unconscionability of contract, shall prevent this negotiation and express agreement.*

*(2) Existing law provides generally for damages for the breach of contract.*

*This bill would provide that, except as otherwise agreed in writing, for contracts for public or private works of*

improvement the public agency or project owner shall pay to the prime design professional, as specified, any progress payment within 30 days of receipt of a written demand to pay and the final retention payment within 45 days of receipt of a written demand to pay, as specified. The bill would provide, however, that the public agency or project owner may withhold any portion of the amount due to which there is a good faith dispute. The bill would provide for a specified penalty for the violation of its provisions and provide that this penalty shall be separate from, and in addition to, the design professionals' liens, mechanic's liens, and stop notices for works of improvement, as specified. The bill would provide that the prevailing party in an action to collect amounts withheld in violation of this provision shall be entitled to his or her reasonable attorney's fees and costs. The bill would require contracts to which it applies to disclose the payment terms and penalties required by this provision. The bill would provide that it shall not apply to any contract for a work of improvement relating to single-family, owner-occupied residence where the construction costs are less than \$100,000 or to specified state agency contracts.

The bill would further provide for a similar provision applicable to contracts between the prime design professional and subconsultant design professionals, 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 2782.5 of the Civil Code is*  
 2 *amended to read:*  
 3 2782.5. ~~Nothing contained in Section 2782~~  
 4 *Notwithstanding any other provision of statutory or*  
 5 *common law, including the doctrine of unconscionability*  
 6 *of contract, nothing shall prevent a party to a*  
 7 *construction contract and the owner or other party for*  
 8 *whose account the construction contract is being*  
 9 *performed from negotiating and expressly agreeing with*  
 10 *respect to the allocation, release, liquidation, exclusion, or*  
 11 *limitation as between the parties of any liability (a) for*



1 design defects, or (b) of the promisee to the promisor  
2 arising out of or relating to the construction contract.

3 *SEC. 2.* Section 3319 is added to the Civil Code, to  
4 read:

5 3319. (a) ~~For~~ *Except as otherwise agreed in writing,*  
6 *for* contracts for public or private works of improvement,  
7 entered into on or after January 1, 1996, the public agency  
8 or the project owner shall pay to the prime design  
9 professional any progress payment within 30 days of  
10 receipt of a written demand for payment in accordance  
11 with the contract, and the final retention payment within  
12 45 days of receipt of a written demand for payment in  
13 accordance with the contract. If the public agency or  
14 project owner disputes in good faith any portion of the  
15 amount due, it may withhold from the payment an  
16 amount not to exceed 150 percent of the disputed  
17 amount. The disputed amount withheld shall not be  
18 subject to any penalties authorized by this section.

19 (b) If any amount is wrongfully withheld in violation  
20 of this section, the prime design professional shall be  
21 entitled to a penalty of 1<sup>1</sup>/<sub>2</sub> percent of the improperly  
22 withheld amount, in lieu of any interest otherwise due,  
23 per month for every month that payment is not made, not  
24 to exceed 12 percent of the total amount due. In any  
25 action for the collection of amounts withheld in violation  
26 of this section, the prevailing party shall be entitled to his  
27 or her reasonable attorney's fees and costs.

28 (c) For purposes of this section:

29 (1) "Design professional" means a person licensed as  
30 an architect pursuant to Chapter 3 (commencing with  
31 Section 5500) of Division 3 of the Business and Professions  
32 Code, registered as a professional engineer pursuant to  
33 Chapter 7 (commencing with Section 6700) of Division  
34 3 of the Business and Professions Code, or licensed as a  
35 land surveyor pursuant to Chapter 15 (commencing with  
36 Section 8700) of Division 3 of the Business and Professions  
37 Code.

38 (2) "Prime design professional" means a design  
39 professional with a written contract directly with the  
40 owner.



1 (d) The penalty provided for by this section shall be  
2 separate from, and in addition to, the design professionals'  
3 liens provided by Chapter 8 (commencing with Section  
4 3081.1) of Title 14 of Part 4 of Division 3, mechanic's liens  
5 provided by Chapter 2 (commencing with Section 3109)  
6 of Title 15 of Part 4 of Division 3, and stop notices for both  
7 public and private works provided by Chapter 3  
8 (commencing with Section 3156) of Title 15 of Part 4 of  
9 Division 3.

10 (e) All contracts to which this section applies shall  
11 disclose the payment terms and penalties required under  
12 this section.

13 (f) This section shall not apply to any contract for a  
14 work of improvement relating to a single-family,  
15 owner-occupied residence where the construction costs  
16 are less than one hundred thousand dollars (\$100,000).

17 (g) This section shall not apply to state agency  
18 contracts subject to Sections 926.15 and 926.17 of the  
19 Government Code.

20 ~~SEC. 2.~~

21 *SEC. 3.* Section 3320 is added to the Civil Code, to  
22 read:

23 3320. (a) ~~For~~ *Except as otherwise agreed in writing,*  
24 *for* public and private works of improvement, a prime  
25 design professional shall pay to each subconsultant design  
26 professional the amount due him or her from the  
27 payment received, not later than 15 days after receipt of  
28 each progress payment or final retention payment. If the  
29 prime design professional disputes in good faith any  
30 portion of the amount due, he or she may withhold from  
31 the payment an amount not to exceed 150 percent of the  
32 disputed amount. The disputed amount withheld shall  
33 not be subject to any penalties authorized by this section.

34 (b) If any amount is wrongfully withheld in violation  
35 of this section, the subconsultant design professional shall  
36 be entitled to a penalty of 1<sup>1</sup>/<sub>2</sub> percent of the improperly  
37 withheld amount, in lieu of any interest otherwise due,  
38 per month, for every month that payment is not made,  
39 not to exceed 12 percent of the total amount due. In any  
40 action for the collection of amounts withheld in violation



1 of this section, the prevailing party shall be entitled to his  
2 or her reasonable attorney’s fees and costs.

3 (c) The penalty provided for by this section shall be  
4 separate from, and in addition to, the design professionals’  
5 liens provided by Chapter 8 (commencing with Section  
6 3081.1) of Title 14 of Part 4 of Division 3, mechanic’s liens  
7 provided by Chapter 2 (commencing with Section 3109)  
8 of Title 15 of Part 4 of Division 3, and stop notices for both  
9 public and private works provided by Chapter 3  
10 (commencing with Section 3156) of Title 15 of Part 4 of  
11 Division 3.

12 (d) For purposes of this section:

13 (1) “Design professional” means a person licensed as  
14 an architect pursuant to Chapter 3 (commencing with  
15 Section 5500) of Division 3 of the Business and Professions  
16 Code, registered as a professional engineer pursuant to  
17 Chapter 7 (commencing with Section 6700) of Division  
18 3 of the Business and Professions Code, or licensed as a  
19 land surveyor pursuant to Chapter 15 (commencing with  
20 Section 8700) of Division 3 of the Business and Professions  
21 Code.

22 (2) “Prime design professional” means a design  
23 professional with a written contract directly with the  
24 owner.

25 (3) “Subconsultant design professional” means a  
26 design professional having a written contract with a  
27 prime design professional.

28 (e) Any contract to which this section applies shall  
29 disclose the payment terms and penalties required under  
30 this section.

31 (f) This section shall not apply to any contract for a  
32 work of improvement relating to a single-family,  
33 owner-occupied residence where the construction costs  
34 are less than one hundred thousand dollars (\$100,000).

35 *SEC. 4. The changes made to Section 2782.5 of the*  
36 *Civil Code by this act are intended to limit the legal effect*  
37 *of Viner v. Brockway, 30 Cal. App. 4th 1307, as modified*  
38 *by 31 Cal. App. 4th 746i, so that this decision does not*



1 *apply to contracts entered into on and after January 1,*  
2 *1996.*

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