AMENDED IN SENATE AUGUST 20, 2010

AMENDED IN SENATE JULY 15, 2010

AMENDED IN ASSEMBLY MAY 11, 2010

california legislature—2009–10 regular session

ASSEMBLY BILL No. 2216

Introduced by Assembly Member Fuentes

February 18, 2010

An act to amend Section 7108.5 of the Business and Professions Code, to amend Section 3252 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 works of improvement.

legislative counsel's digest

AB 2216, as amended, Fuentes. Works of improvement: progress payments: notice: retention proceeds.

(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, 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, 2011, 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*.

(3) 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, 2015,* prohibit retention proceeds from exceeding 5% of the payment, as specified, for those contracts entered into on or after January 1, 2011, between a public entity, as defined, and an original contractor, between an original contractor and a subcontractor, and between all subcontractors thereunder.

(4) 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~~, until January 1, 2015,~~ instead~~,~~ prohibit progress payments upon these contracts from being made in excess of 100% of the percentage of actual work completed, and would require 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:

SECTION 1. Section 7108.5 of the Business and Professions Code is amended to read:

7108.5. (a) A prime contractor or subcontractor shall pay to any subcontractor, not later than seven days after receipt of each progress payment, unless otherwise agreed to in writing, the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor's interest therein.

In the event that there is a good faith dispute over all or any portion of the amount due on a progress payment from the prime contractor or subcontractor to a subcontractor, then the prime contractor or subcontractor may withhold no more than 150 percent of the disputed amount.

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

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

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

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

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

3252. (a) 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, a claimant shall give the 20-day public works preliminary bond notice as provided in Section 3098.

(b) (1) On and after January 1, 1995, and before January 1, 2011, if the 20-day public work preliminary bond notice was not given as provided in Section 3098, a claimant may enforce a claim by giving written notice to the surety and the bond principal as provided in Section 3227 within 15 days after recordation of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety and the bond principal is extended to 75 days after completion of the work of improvement.

(2) On and after January 1, 2011, if the 20-day public works preliminary bond notice was not given as provided in Section 3098, a claimant may enforce a claim by giving written notice to the surety and bond principal, as provided in Section 3227, prior to completion, as defined in Section 3086, of the project, or recordation of a notice of completion.

(c) This section shall not apply to a laborer, or any other person exempt from the requirement of giving a preliminary notice under Section 3098.

SEC. 3. Section 7201 is added to the Public Contract Code, to read:

7201. (a) (1) This section shall apply with respect to all contracts entered into on or after January 1, 2011, between a public entity and an original contractor, between an original contractor and a subcontractor, and between all subcontractors thereunder, relating to the construction of any public work of improvement.

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

(3) For purposes of this section, "public entity" means the state, including every state agency, office, department, division, bureau, board, or commission, the California State University, the University of California, a city, county, city and county, including chartered cities and chartered counties, district, special district, public authority, political subdivision, public corporation, or

nonprofit transit corporation wholly owned by a public agency and formed to carry out the purposes of the public agency.

(b) (1) The retention proceeds withheld from any payment by a public entity from the original contractor, by the original contractor from any subcontractor, and by a subcontractor from any subcontractor thereunder shall not exceed 5 percent of the payment. In no event shall the total retention proceeds withheld exceed 5 percent of the contract price. In a contract between the original contractor and a subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld shall not exceed the percentage specified in the contract between the public entity and the original contractor.

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

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

(4) Notwithstanding any other provision of this subdivision, the retention proceeds withheld from any payment by the awarding entity of a city, county, city and county, including chartered cities and chartered counties, district, special district, public authority, political subdivision, public corporation, or nonprofit transit

corporation wholly owned by a public agency and formed to carry out the purposes of the public agency, from the original contractor, by the original contractor from any subcontractor, and by a subcontractor from any subcontractor thereunder may exceed 5 percent on specific projects where the governing body of the public entity has approved a finding by a majority vote during a properly noticed and normally scheduled public hearing and prior to bid that the project is substantially complex and therefore requires a higher retention amount than 5 percent and the awarding entity includes both this finding and the actual retention amount in the bid documents. In a contract between the original contractor and a subcontractor, and in a contract between a subcontractor and any subcontractor thereunder, the percentage of the retention proceeds withheld shall not exceed the percentage specified in the contract between the department and the original contractor.

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

(d) This section shall remain in effect only until January 1, 2015, and as of that date is repealed.

SEC. 4. Section 10261 of the Public Contract Code is amended to read:

10261. (a) Payments upon contracts shall be made as the department prescribes upon estimates made and approved by the department, but progress payments shall not be made in excess of 100 percent of the percentage of actual work completed plus a like percentage of the value of material delivered on the ground or stored subject to or under the control of the state, and unused, except as otherwise provided in this section. The department shall withhold not more than 5 percent of the contract price until final completion and acceptance of the project. However, at any time after 95 percent of the work has been completed, the department may reduce the funds withheld to an amount not less than 125 percent of the estimated value of the work yet to be completed, as determined by the department, if the reduction has been approved, in writing, by the surety on the performance bond and by the surety on the payment bond. The Controller shall draw his or her warrants upon estimates so made and approved by the department and the Treasurer shall pay them. The funds may be released by electronic transfer if that procedure is requested by the contractor, in writing, and if the public entity has, in place at the time of the request, the mechanism for the transfer.

(b) Notwithstanding this section, when the director of the department has made a finding prior to the bid that a specified project is substantially complex and therefore requires a higher retention amount than 5 percent and the department includes both this finding and the actual retention amount in the bid documents, then payments upon contracts by the department shall be made as the department prescribes upon estimates made and approved by the department, but progress payments shall not be made in excess of 95 percent of the percentage of actual work completed, plus a like percentage of the value of material delivered on the ground or stored, subject to, or under the control of the state, and unused, except as otherwise provided in this section. At any time after 95 percent of the work has been completed, the department may reduce the funds withheld to an amount not less then 125 percent of the estimated value of the work yet to be completed, as determined by the department, if the reduction has been approved, in writing, by the surety on the performance bond and by the surety on the payment bond. The Controller shall draw his or her warrants upon estimates so made and approved by the department and the Treasurer shall pay them with funds appropriated therefor. The funds may be released by electronic transfer if that procedure is requested by the contractor, in writing, and if the public entity has, in place at the time of the request, the mechanism for the transfer.

~~(b)~~

(c) This section shall remain in effect only until January 1, 2015, and as of that date is repealed.

SEC. 5. Section 10261 is added to the Public Contract Code, to read:

10261. (a) On and after January 1, 2015, payments upon contracts shall be made as the department prescribes upon estimates made and approved by the department, but progress payments shall not be made in excess of 95 percent of the percentage of actual work completed plus a like percentage of the value of material delivered on the ground or stored subject to or under the control of the state, and unused, except as otherwise provided in this section. The department shall withhold not less than 5 percent of the contract price until final completion and acceptance of the project. However, at any time after 95 percent of the work has been completed, the department may reduce the funds withheld to an amount not less than 125 percent of the estimated value of the work yet to be completed, as determined by the department, if the reduction has been approved, in writing, by the surety on the performance bond and by the surety on the payment bond. The Controller shall draw his or her warrants upon estimates so made and approved by the department and the Treasurer shall pay them. The funds may be released by electronic transfer if that procedure is requested by the contractor, in writing, and if the public entity has, in place at the time of the request, the mechanism for the transfer.

(b) This section shall become operative on January 1, 2015.

SEC. 6. Section 10262 of the Public Contract Code is amended to read:

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

SEC. 7. Section 10262.5 of the Public Contract Code is amended to read:

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

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

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

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