

AMENDED IN SENATE AUGUST 30, 2010

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 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.

(5) *The bill would incorporate additional changes made by SB 189 contingent upon the enactment of that bill.*

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.
9 In the event that there is a good faith dispute over all or any
10 portion of the amount due on a progress payment from the prime
11 contractor or subcontractor to a subcontractor, then the prime
12 contractor or subcontractor may withhold no more than 150 percent
13 of the disputed amount.
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.
18 (c) In any action for the collection of funds wrongfully withheld,
19 the prevailing party shall be entitled to his or her attorney’s fees
20 and costs.
21 (d) The sanctions authorized under this section shall be separate
22 from, and in addition to, all other remedies, either civil,
23 administrative, or criminal.
24 (e) This section applies to all private works of improvement
25 and to all public works of improvement, except where Section
26 10262 of the Public Contract Code applies.
27 SEC. 2. Section 3252 of the Civil Code is amended to read:

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

6 (b) (1) On and after January 1, 1995, and before January 1,
 7 2011, if the 20-day public work preliminary bond notice was not
 8 given as provided in Section 3098, a claimant may enforce a claim
 9 by giving written notice to the surety and the bond principal as
 10 provided in Section 3227 within 15 days after recordation of a
 11 notice of completion. If no notice of completion has been recorded,
 12 the time for giving written notice to the surety and the bond
 13 principal is extended to 75 days after completion of the work of
 14 improvement.

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

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

24 *SEC. 2.3. Section 3252 of the Civil Code is amended to read:*

25 3252. (a) With regard to a contract entered into on or after
 26 January 1, 1995, in order to enforce a claim upon any payment
 27 bond given in connection with a public work, a claimant shall give
 28 the 20-day public works preliminary bond notice as provided in
 29 Section 3098.

30 (b) ~~On and after January 1, 1995, and before January 1,~~
 31 ~~2011, with regard to a project completed on or before December~~
 32 ~~31, 2010, if the 20-day public work preliminary bond notice was~~
 33 ~~not given as provided in Section 3098, a claimant may enforce a~~
 34 ~~claim by giving written notice to the surety and the bond principal~~
 35 ~~as provided in Section 3227 within 15 days after recordation of a~~
 36 ~~notice of completion. If no notice of completion has been recorded,~~
 37 ~~the time for giving written notice to the surety and the bond~~
 38 ~~principal is extended to 75 days after completion of the work of~~
 39 ~~improvement.~~

1 (c) Commencing January 1, 2011, and except as provided in
2 subdivision (b), if the 20-day public works preliminary bond notice
3 was not given as provided in Section 3098, a claimant may enforce
4 a claim by giving written notice to the surety and bond principal,
5 as provided in Section 3227, prior to completion, as defined in
6 Section 3086, of the project, or recordation of notice of completion,
7 whichever is later. Prior to completion or recordation of a notice
8 of completion, every public entity shall provide written notice of
9 pending completion to each subcontractor that has provided a
10 20-day preliminary bond notice as provided in Section 3098.

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

14 (e) This section shall remain in effect only until July 1, 2012,
15 and as of that date is repealed.

16 SEC. 2.5. Section 9560 is added to the Civil Code, to read:

17 9560. (a) In order to enforce a claim against a payment bond,
18 a claimant shall give the preliminary notice provided in Chapter
19 3 (commencing with Section 9300).

20 (b) If preliminary notice was not given as provided in Chapter
21 3 (commencing with Section 9300), a claimant may enforce a claim
22 by giving written notice to the surety and the bond principal prior
23 to completion of the work of improvement, or recordation of notice
24 of completion, whichever is later.

25 (c) Prior to completion of a work of improvement or recordation
26 of a notice of completion, a public entity shall give notice of
27 pending completion to each subcontractor that has given
28 preliminary notice as provided in Chapter 3 (commencing with
29 Section 9300). The notice of pending completion shall comply with
30 the requirements of Chapter 2 (commencing with Section 8100)
31 of Title 1.

32 (d) This section shall not apply to a laborer, or any other person
33 exempt from the requirement of giving a preliminary notice under
34 Chapter 3 (commencing with Section 9300).

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

37 7201. (a) (1) This section shall apply with respect to all
38 contracts entered into on or after January 1, 2011, between a public
39 entity and an original contractor, between an original contractor

1 and a subcontractor, and between all subcontractors thereunder,
2 relating to the construction of any public work of improvement.

3 (2) Under no circumstances shall any provision of this section
4 be construed to limit the ability of any public entity to withhold
5 150 percent of the value of any disputed amount of work from the
6 final payment, as provided for in subdivision (c) of Section 7107.
7 In the event of a good faith dispute, nothing in this section shall
8 be construed to require a public entity to pay for work that is not
9 approved or accepted in accordance with the proper plans or
10 specifications.

11 (3) For purposes of this section, “public entity” means the state,
12 including every state agency, office, department, division, bureau,
13 board, or commission, the California State University, the
14 University of California, a city, county, city and county, including
15 chartered cities and chartered counties, district, special district,
16 public authority, political subdivision, public corporation, or
17 nonprofit transit corporation wholly owned by a public agency
18 and formed to carry out the purposes of the public agency.

19 (b) (1) The retention proceeds withheld from any payment by
20 a public entity from the original contractor, by the original
21 contractor from any subcontractor, and by a subcontractor from
22 any subcontractor thereunder shall not exceed 5 percent of the
23 payment. In no event shall the total retention proceeds withheld
24 exceed 5 percent of the contract price. In a contract between the
25 original contractor and a subcontractor, and in a contract between
26 a subcontractor and any subcontractor thereunder, the percentage
27 of the retention proceeds withheld shall not exceed the percentage
28 specified in the contract between the public entity and the original
29 contractor.

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

36 (3) Notwithstanding any other provision of this subdivision, the
37 retention proceeds withheld from any payment by an awarding
38 entity set forth in paragraphs (1) to (5), inclusive, of subdivision
39 (a) of Section 10106, from the original contractor, by the original
40 contractor from any subcontractor, and by a subcontractor from

1 any subcontractor thereunder may exceed 5 percent on specific
2 projects where the director of the department has made a finding
3 prior to the bid that the project is substantially complex and
4 therefore requires a higher retention amount than 5 percent and
5 the department includes both this finding and the actual retention
6 amount in the bid documents. In a contract between the original
7 contractor and a subcontractor, and in a contract between a
8 subcontractor and any subcontractor thereunder, the percentage
9 of the retention proceeds withheld shall not exceed the percentage
10 specified in the contract between the department and the original
11 contractor.

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

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

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

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

38 10261. (a) Payments upon contracts shall be made as the
39 department prescribes upon estimates made and approved by the
40 department, but progress payments shall not be made in excess of

1 100 percent of the percentage of actual work completed plus a like
2 percentage of the value of material delivered on the ground or
3 stored subject to or under the control of the state, and unused,
4 except as otherwise provided in this section. The department shall
5 withhold not more than 5 percent of the contract price until final
6 completion and acceptance of the project. However, at any time
7 after 95 percent of the work has been completed, the department
8 may reduce the funds withheld to an amount not less than 125
9 percent of the estimated value of the work yet to be completed, as
10 determined by the department, if the reduction has been approved,
11 in writing, by the surety on the performance bond and by the surety
12 on the payment bond. The Controller shall draw his or her warrants
13 upon estimates so made and approved by the department and the
14 Treasurer shall pay them. The funds may be released by electronic
15 transfer if that procedure is requested by the contractor, in writing,
16 and if the public entity has, in place at the time of the request, the
17 mechanism for the transfer.

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

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

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

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

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

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

29 10262. The contractor shall pay to his or her subcontractors,
30 within seven days of receipt of each progress payment, the
31 respective amounts allowed the contractor on account of the work
32 performed by his or her subcontractors, to the extent of each
33 subcontractor's interest therein. The payments to subcontractors
34 shall be based on estimates made pursuant to Section 10261. Any
35 diversion by the contractor of payments received for prosecution
36 of a contract, or failure to reasonably account for the application
37 or use of the payments constitutes ground for actions proscribed
38 in Section 10253, in addition to disciplinary action by the
39 ~~Contractors~~^{Contractors} State License Board. The subcontractor
40 shall notify, in writing, the ~~Contractors~~^{Contractors} State License

1 Board and the department of any payment less than the amount or
2 percentage approved for the class or item of work as set forth in
3 Section 10261.

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

6 10262.5. (a) Notwithstanding any other law, a prime contractor
7 or subcontractor shall pay to any subcontractor, not later than seven
8 days after receipt of each progress payment, the respective amounts
9 allowed the contractor on account of the work performed by the
10 subcontractors, to the extent of each subcontractor's interest
11 therein. In the event that there is a good faith dispute over all or
12 any portion of the amount due on a progress payment from the
13 prime contractor or subcontractor to a subcontractor, then the prime
14 contractor or subcontractor may withhold no more than 150 percent
15 of the disputed amount.

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

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

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

32 *SEC. 8. Section 2.3 of this bill incorporates amendments to*
33 *Section 3252 of the Civil Code proposed by both this bill and SB*
34 *189. It shall only become operative if (1) both bills are enacted*
35 *and become effective on or before January 1, 2011, (2) each bill*
36 *amends Section 3252 of the Civil Code, and (3) this bill is enacted*
37 *after SB 189, in which case Section 2 of this bill shall not become*
38 *operative.*

39 *SEC. 9. Section 2.5 adds Section 9560 to the Civil Code, with*
40 *additional changes as proposed by SB 189. Section 2.5 of this bill*

1 *shall only become operative if (1) this bill and SB 189 are enacted*
2 *and become effective on or before January 1, 2011, (2) SB 189*
3 *repeals Title 15 (commencing with Section 3082) of Part 4 of*
4 *Division 3 of the Civil Code and this bill amends Section 3252 of*
5 *the Civil Code, and (3) this bill is enacted after SB 189, in which*
6 *case Section 2 of this bill shall remain operative only until July 1,*
7 *2012, at which time Section 2.5 shall become operative and Section*
8 *9560 as added to the Civil Code by Section 20.2 of SB 189 shall*
9 *not become operative.*

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