

AMENDED IN ASSEMBLY MAY 14, 2009

AMENDED IN ASSEMBLY MAY 5, 2009

AMENDED IN ASSEMBLY APRIL 13, 2009

CALIFORNIA LEGISLATURE—2009—10 REGULAR SESSION

ASSEMBLY BILL

No. 396

Introduced by Assembly Member Fuentes

February 23, 2009

An act to amend Sections 3186 and 3252 of the Civil Code, and to amend Section 10261 of, and to add Section 7201 to, the Public Contract Code, relating to works of improvement.

LEGISLATIVE COUNSEL'S DIGEST

AB 396, as amended, Fuentes. Works of improvement: liens.

(1) Existing law provides that all persons and laborers of every class, except for an original contractor, performing labor upon, bestowing skill or other necessary services on, furnishing materials or leasing equipment to be used or consumed in, or furnishing appliances, teams, or power contributing to, a public work of improvement may serve a stop notice upon the public entity responsible for the public work, as specified. Existing law imposes a duty on a public entity to withhold money or bonds due or to become due to the original contractor in an amount sufficient to answer the claim stated in the stop notice and to provide for the public entity's reasonable cost of any litigation on the matter, as specified.

This bill would qualify the requirement that the public entity withhold money or bonds sufficient to provide for reasonable litigation costs to make it applicable only if the original contractor fails to promptly accept a tender of defense of the public entity in the litigation.

(2) Existing law requires that a 20-day public work preliminary bond notice be given under specified circumstances. If the notice is not given, a claimant may enforce a claim by giving written notice to the surety and the bond principal 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.

This bill would provide, instead, if no notice is given, a claimant may enforce a claim by giving written notice to the surety and the bond principal prior to the completion of the project or recordation of a notice of completion.

(3) Existing law imposes a penalty of 2% per month on funds that are improperly withheld in a contract dispute relating to public and private works of improvement, as specified. Existing law requires any person or corporation that has contracted to do business with a public utility to pay any subcontractor within 15 working days of receipt of each progress payment from the public utility, except as specified. Existing law also requires a state agency or an owner that fails to make any progress payment within 30 days after receipt of the payment request to pay interest at the rate of 10% per year.

This bill would state the intent of the Legislature to reconsider prompt payment statutes regarding public and private works of improvement to aid in their clarity and application.

(4) Existing law provides that in a contract between 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 require that retention proceeds not exceed ~~an unspecified percentage~~ 5% of the payment, as specified, for all contracts entered into on or after January 1, 2010, between a public entity, as defined, and an original contractor, between an original contractor and a subcontractor, and between all subcontractors thereunder.

(5) Existing law requires the Department of General Services to withhold not less than 5% of the contract price for a public work of improvement until final completion and acceptance of the project.

This bill would require the Department of General Services to withhold not more than ~~an unspecified percentage~~ 5% of the contract price until final completion and acceptance of the project.

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. It is the intent of the Legislature to reconsider
2 prompt payment statutes regarding public and private works of
3 improvement to aid in their clarity and application.

4 SEC. 2. Section 3186 of the Civil Code is amended to read:

5 3186. It shall be the duty of the public entity, upon receipt of
6 a stop notice pursuant to this chapter, to withhold from the original
7 contractor, or from any person acting under his or her authority,
8 money or bonds, if bonds are to be issued in payment for the work
9 of improvement, that are due or to become due to that contractor
10 in an amount sufficient to (a) answer the claim stated in the stop
11 notice and (b) provide for the public entity's reasonable cost of
12 any litigation thereunder, if the original contractor fails to promptly
13 accept a tender of defense of the public entity in the litigation. The
14 public entity may satisfy this duty by refusing to release money
15 held in escrow pursuant to Section 10263 or 22300 of the Public
16 Contract Code.

17 SEC. 3. Section 3252 of the Civil Code is amended to read:

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

23 (b) 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 prior to the completion of the project,
27 as defined in Section 3086, or recordation of a notice of
28 completion.

29 SEC. 4. Section 7201 is added to the Public Contract Code, to
30 read:

31 7201. (a) (1) This section shall apply with respect to all
32 contracts entered into on or after January 1, 2010, between a public
33 entity and an original contractor, between an original contractor
34 and a subcontractor, and between all subcontractors thereunder,
35 relating to the construction of any public work of improvement.

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

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

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

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

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

37 SEC. 5. Section 10261 of the Public Contract Code is amended
38 to read:

39 10261. Payments upon contracts shall be made as the
40 department prescribes upon estimates made and approved by the

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

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