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**AB-2173 Public contracts: payment.** (2021-2022)

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**Assembly Bill No. 2173**

**CHAPTER 121**

An act to amend Section 7201 of, and to amend and repeal Section 10261 of, the Public Contract Code, relating to public contracts.

[ Approved by Governor July 19, 2022. Filed with Secretary of State July 19, 2022. ]

**LEGISLATIVE COUNSEL'S DIGEST**

AB 2173, Petrie-Norris. Public contracts: payment.

Existing law, until January 1, 2023, authorizes the retention proceeds withheld from any payment by an awarding entity, as described, from the original contractor, by the original contractor from any subcontractor, and by a subcontractor from any subcontractor, to exceed 5% on specific projects where the director of the applicable department, as specified, has made, or the governing body of the public entity or designated official of the public entity has approved, a finding prior to the bid that the project is substantially complex and requires a higher retention and the department or public entity includes both this finding and the actual retention amount in the bid documents.

This bill would make these provisions operative indefinitely.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

**THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:**

**SECTION 1.** Section 7201 of the Public Contract Code is amended to read:

**7201.** (a) (1) This section shall apply with respect to all contracts entered into on or after January 1, 2012, 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 charter cities and charter 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 shall 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 in the bid documents details explaining the basis for the finding and the actual retention amount. 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 charter cities and charter 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 or designee, including, but not limited to, a general manager or other director of an appropriate department, has approved a finding, on a project by project basis, 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 in the bid documents details explaining the basis for the finding and the actual retention amount. 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.

(5) Any finding by a public entity that a project is substantially complex shall include a description of the specific project and why it is a unique project that is not regularly, customarily, or routinely performed by the agency or licensed contractors.

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

**SEC. 2.** Section 10261 of the Public Contract Code, as amended by Section 2 of Chapter 37 of the Statutes of 2017, 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 their 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 department has, in place at the time of the request, the mechanism for the transfer.

(b) (1) Notwithstanding subdivision (a), 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 in the bid documents details explaining the basis for the finding and the actual retention amount, then payments upon contracts by the department shall be made as the department prescribes upon estimates made and approved by the department. However, 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 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 their 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 department has, in place at the time of the request, the mechanism for the transfer.

(2) Any finding by the director of a department that a project is substantially complex shall include a description of the specific project and why it is a unique project that is not regularly, customarily, or routinely performed by the agency or licensed contractors.

**SEC. 3.** Section 10261 of the Public Contract Code, as amended by Section 3 of Chapter 37 of the Statutes of 2017, is repealed.