

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2025-2026 Regular Session

SB 61 (Cortese)
Version: March 26, 2025
Hearing Date: April 8, 2025
Fiscal: No
Urgency: No
ID

SUBJECT

Private works of improvement: retention payments

DIGEST

This bill prohibits an owner, direct contractor, or a subcontractor of a private work of improvement from withholding a retention payment from a direct contractor or subcontractor of more than five percent, except as specified.

EXECUTIVE SUMMARY

A private work of improvement is work to construct, alter, repair, demolish, or remove buildings, bridges, and other structures, or to conduct other work on real property like leveling, grading, or landscaping, that is contracted for by a private entity. Often, the owner of a private work of improvement project contracts with a direct contractor for the work, and the direct contractor contracts with subcontractors for completion of specific components of the project. To guarantee that the work contracted for will be performed, an owner and a direct contractor contracting for subcontract work often require the contractor or subcontractor to obtain a performance bond. In addition, owners often require a retention from the contract amount for the project to ensure that the work contracted for is completed satisfactorily. Retentions withheld from payments from a direct contractor or a subcontractor can be 10% of the payment or contract price or more, and thus can put financial strain on the contractor who has to complete the work for only a portion of the contract price. AB 61 attempts to alleviate this financial strain for contractors in private works of improvement by limiting any retention payment withheld to no more than five percent. AB 61 exempts from its requirements direct contractors and subcontractors who require a faithful performance and payment bond that the subcontractor subsequently fails to provide, and it exempts non mixed-use residential works of less than five stories. AB 61 is sponsored by the National Electrical Contractors Association, and is supported by a variety of contractors' and construction trades groups. The Committee has received no timely opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Defines a “work of improvement” as including, but not limited to: construction, alteration, repair, demolition, or removal, in whole or in part, of, or addition to, a building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road; seeding, sodding or planting for landscaping purposes; and filling, leveling, or grading real property. (Civ. Code § 8050.)
- 2) Specifies that a work of improvement is a private work of improvement when it is not contracted for by a public entity. (Civ. Code §§ 8160, 9000.)
- 3) Defines an “admitted surety insurer” as having the meaning provided in Section 995.120 of the Code of Civil Procedure. (Civ. Code § 8002.)
- 4) Defines “direct contractor” as a contractor that has a direct contractual relationship with an owner. (Civ. Code § 8018.)
- 5) Defines “subcontractor” as a contractor that does not have a direct contractual relationship with an owner, and as including a contractor that has a contractual relationship with a direct contractor or with another subcontractor. (Civ. Code § 8046.)
- 6) Specifies that, if any owner withholds a retention from a direct contractor, the owner must pay the retention to the contractor within 45 days after completion of the work of improvement. Specifies that, if a work of improvement ultimately will become the property of a public entity, the owner may condition payment of the retention allocable to that part upon the acceptance of that part of the work by the public entity. Specifies that the owner may withhold from a final payment up to 150% of any disputed amount when there is a good faith dispute between the owner and the direct contractor regarding the retention payment due. (Civ. Code § 8812.)
- 7) Specifies that, if a direct contractor withholds retention from one or more subcontractors, the direct contractor must pay to each subcontractor the subcontractor’s share of the retention payment within 10 days after receiving all or part of a retention payment from the owner. Specifies that the direct contractor must pay the retention payment to a subcontractor if that retention is specifically designated for that particular subcontractor. Specifies that the direct contractor may withhold from the retention payment to a subcontractor up to 150% of the estimated value of the disputed amount when there is a good faith dispute between the direct contractor and the subcontractor. (Civ. Code § 8814.)

- 8) Requires that, if the direct contractor gives the owner, or a subcontractor gives the direct contractor, a notice that work that is in dispute has been completed, the owner or direct contractor must notify the party within 10 days whether the disputed work is accepted or rejected. Specifies that, if the disputed work is accepted, the owner or direct contractor must pay the portion of the retention that relates to the disputed work. (Civ. Code § 8816.)
- 9) Specifies that, when an owner or direct contractor does not make a retention payment within the timelines required by (7) and (8), above, the owner or direct contractor is liable to the person to which a retention payment is owed for a penalty of two percent per month on the amount wrongly withheld. Specifies that, in an action for collection of the amount wrongfully withheld, the prevailing party is entitled to costs and reasonable attorney's fees. (Civ. Code § 8818.)
- 10) Specifies that it is against public policy to waive the above provisions relating to retention payments at (6) through (9), above. (Civ. Code § 8820.)
- 11) Exempts from the requirements in (6) through (10), above, a retention payment withheld by a lender pursuant to a construction loan agreement. (Civ. Code § 8822.)

This bill:

- 1) Prohibits, in a private work of improvement, a retention payment withheld from a payment by an owner from the direct contractor, by the direct contractor from a subcontractor, or by a subcontractor from another subcontractor, from exceeding five percent of the payment.
- 2) Prohibits the total retention payments withheld from exceeding five percent of the contract price of the private work of improvement.
- 3) Specifies that any retention payment withheld by a direct contractor from a subcontractor, or by a subcontractor from another subcontractor, may not exceed the percentage specified in the contract between the owner and the direct contractor.
- 4) Specifies that the provisions described in (1) through (3), above, do not apply to a direct contractor or subcontractor if that direct contractor or subcontractor provides written notice to a subcontractor before or at the time that the bid for the contract is requested that a faithful performance and payment bond is required, and the subcontractor subsequently fails to furnish the direct contractor or subcontractor with that bond.
- 5) Specifies that the provisions described in (1) through (3), above, do not apply to an owner, direct contractor, or subcontractor on a residential project that is not mixed-use and does not exceed four stories.

- 6) Specifies that, in any action to enforce the above-described provisions, a court shall award reasonable attorney's fees to the prevailing party.

COMMENTS

1. Author's statement

According to the author:

Excessive retention in private construction projects places an undue financial burden on contractors, threatens workers' benefits, and drives up costs across the industry. SB 61 addresses this long-standing issue by capping retention on private construction projects at 5%, aligning private sector practices with the fair and proven standards already in place for public works.

Contractors are expected to cover 100% of their obligations – including payroll, benefits, and materials – while often receiving only 90% of their earned income until a project's completion. With industry profit margins averaging less than 5%, this outdated practice forces many to rely on costly credit, increasing expenses for developers, property owners, and consumers alike.

By limiting excessive retention, SB 61 ensures that contractors can meet their financial responsibilities, protect workers' healthcare and retirement benefits, and invest in growth opportunities that strengthen California's construction industry. The state's public sector has successfully operated under a 5% retention cap for over a decade with no negative effects, and more than 20 states – including New York, Nevada, Oregon, and Washington – have already recognized the benefits of predictable, equitable retention policies for private projects.

It's time for California to take this step forward. SB 61 will promote fairness, stability, and sustainability in our construction industry while ensuring that workers and businesses alike can thrive.

2. Public works of improvement and retention

A "work of improvement" is work to construct, alter, repair, demolish, or remove buildings, bridges, and other structures, or to conduct work such as leveling, grading, or landscaping real property. (Civ. Code § 8050.) Residential or mixed-use and commercial projects can be a work of improvement. When a work of improvement is contracted for by a public entity, it is considered a public work of improvement, while all other works of improvement are private works of improvement. (Civ. Code §§ 8160, 9000.) Often, works of improvement are quite complex, as they require different tasks and types of construction work be completed for the same project, such as laying a

building's foundation, erecting the building's frame, and installing electrical components. Thus, the owner of the project often contracts with direct contractors for the work, and direct contractors contract with subcontractors for completion of specific components of the project. Because subcontractors work under the direct contractor (or even another subcontractor), they do not have a contractual relationship with the owner.

Owners and direct contractors contracting for subcontract work often require the contractor or subcontractor to obtain a performance bond, which guarantees that the work contracted for will be performed. In a performance bond, the contractor obtains the bond from a surety, and if the contractor fails to perform the work contracted for, the surety will be responsible for ensuring the work is completed. While performance bonds are required in public works of improvement, they are not required for private works of improvement. However, according to the author, they are nonetheless commonplace in today's construction industry.

In addition, owners also often require a retention from the contract amount for the project to ensure that the work contracted for is completed satisfactorily. Retentions are specified amounts withheld from payments under the contract until the work is completed in order to ensure the work is completed as contracted. When the work is completed satisfactorily to the party contracting for the work, the contracting party pays the withheld amount to the contractor. Thus, retention payments work to encourage contractors to complete the work in order to receive full payment, and to provide some insurance to the party contracting for the work in case the work is not completed.

3. Current state laws regulating retention payments

Works of improvement typically include progress payments to the contractors involved as various stages of the work is being completed. California law requires that an owner of a private work of improvement pay a direct contractor a progress payment for the work completed within 30 days after the direct contractor demands the progress payment pursuant to the contract, unless the parties agree in writing otherwise. (Civ. Code § 8800.) If there is a good faith dispute between the owner and the direct contractor regarding the progress payment, the owner may withhold up to 150% of the disputed amount. An owner that violates those requirements or pays a direct contractor late is liable for a penalty of two percent per month of the amount of the payment wrongfully withheld.

If an owner or a direct contractor withholds a retention payment, California law also outlines specific requirements for that retention payment. When an owner withholds a retention from a direct contractor, the owner must pay the retention within 45 days after the completion of the work of improvement, unless there is a good faith dispute regarding the retention payment due. (Civ. Code § 8812.) If a direct contractor

withholds a retention from a subcontractor, the direct contractor must pay the retention due to the subcontractor within 10 days after receiving all or part of a retention payment the direct contractor receives from the owner. (Civ. Code § 8814.) Like with progress payments, an owner or a direct contractor may withhold from a retention payment up to 150% of a disputed amount when a good faith dispute exists between the owner and direct contractor or the direct contractor and the subcontractor. When work on the project is in dispute, and the direct contractor or subcontractor completes the work, the owner or direct contractor must notify the contractor that completed the work within 10 days whether the work is accepted or rejected. (Civ. Code § 8816.) If the owner or direct contractor accepts the disputed work, they must pay the portion of the retention that relates to the disputed work within 10 days.

When an owner or direct contractor does not make a retention payment within the timelines required, they are liable to the party to which the payment is owed for a penalty of two percent per month of the amount wrongfully withheld. (Civ. Code § 8818.) If the party due payment brings a civil action to collect the amount wrongfully withheld, the prevailing party is entitled to the costs of the action and their reasonable attorney's fees. Any waiver by contract of the provisions relating to retention payments is void as against public policy. (Civ. Code § 8820.)

4. SB 61 proposes to limit retention payments to five percent in private works of improvement

According to the author, retention payments of 10% are standard across the construction industry in California. This high retention places financial strain on direct contractors and subcontractors, as it requires contractors to obtain lines of credit in order to pay their costs while waiting for full payment under the contract. The author further asserts that high retention payments place financial strain on contractors because contractors often operate with less than a five percent profit margin, meaning that the retention does not simply amount to their profit, but also accounts for part of what they need to cover their expenses. Expenses on such a contract may include materials, as well as employee wages and required employee benefits payments and contributions. The contractor must make these payments, regardless of whether they have received payment for the work under the contract. Excessively high retention payments thus may impose on the contractor additional costs just to cover the contractor's expenses, and also may risk the timely payments contractors must make for their workers' wages and benefits contributions.

To help alleviate this potential financial strain and prevent excessive retentions, SB 61 proposes to limit retention payments for a private work of improvement to five percent. This limitation would apply to any retention payment withheld from a progress payment under a contract for the work, as well as to the total amount of retention withheld from the contract price. SB 61 also would prohibit any retention withheld by

the direct contractor or a subcontractor from being a greater percentage than the percentage of retention withheld by the owner from the direct contractor.

SB 61 includes multiple exemptions from its limitation on retention payments. The first exemption would allow a direct contractor or subcontractor to withhold more than five percent in a retention payment when they requested, in writing, at or before requesting bids for the subcontracted work, that the subcontractor must obtain a faithful performance and payment bond, and the subcontractor subsequently fails to obtain such a bond. Additionally, SB 61 exempts residential projects that are not mixed-use and do not exceed four stories.

5. SB 61's proposal mirrors current law for public works of improvement and would align California with 21 other states that limit retention payments

SB 61's limitation mirrors a limitation on retention payments that already exists for public works of improvement. Under Public Contract Code section 7201, a public entity may not withhold a retention payment of more than five percent of the payment or contract price for a public work of improvement. (Pub. Contract Code § 7201(b).) SB 61's language mirrors almost exactly that provision. Under Public Contract Code section 7202, the Department of Transportation is prohibited from withholding any retention payments whatsoever on a transportation project. (Pub. Contract Code § 7202.)

Additionally, at least 21 other states place limitations on the amount of a retention payment that may be withheld in construction contracts. Colorado, Connecticut, Idaho, Kansas, Maryland, Massachusetts, Minnesota, Montana, Nevada, New York, Oregon, Rhode Island, Utah, and Washington all have various laws that cap retention payments at five percent.¹

6. Enforcement and public policy considerations regarding SB 61

If an owner or a direct contractor violates the provisions of SB 61, the contractor from whom excessive retention was withheld could bring an action arising out of the contract dispute and required retention payment. Because a retention payment greater than five percent would be against the provisions of SB 61 and unlawful, any contract provision that provides for such a retention would be void and unenforceable in court. Moreover, under current statutory provisions, any waiver of the requirements of SB 61 would be void as against public policy, thereby prohibiting parties from contracting around SB 61's five percent limit. Additionally, in any civil action brought to enforce its provisions,

¹ See Colo. Rev. Stat. § 38-46-103; Conn. Gen. Stat. § 42-158k; Idaho Code § 29-115; Kan. Stat. § 16-1804; Md. Code, Real Prop. § 9-304; Mass. Gen. Laws Code 149 § 29F; Minn. Stat. § 337.10.4(b); Mont. Code Ann. § 28-2-2110; Nev. Rev. Stat. § 624.609; N.Y. Gen. Bus. L. § 756-c; OR. Rev. Stat. § 701.420(1); RI. Gen. Laws § 37-12-10.1(a); Utah Code Ann. § 13-8-5; Wash. Rev. Code § 60:30.010.

SB 61 provides that a court must award reasonable attorney's fees to the prevailing party.

SB 61's provisions prescribe how two private parties may contract with each other regarding private works of improvement. However, its provisions are prospective and only apply to contracts entered into after the bill's effective date. Moreover, while two parties on equal footing may be able to negotiate over every aspect and provision of a contract, in practice many parties entering into a contract do not negotiate with equal power or leverage. In the construction context, owners on large projects and developments solicit bids from contractors, and select the best bid. Thus, contractors bidding on the project are competing with other contractors for the project, and may not be able to negotiate with the owner on every provision in the project's contract without risking losing the project to another contractor. This may be particularly true if some provisions of such contracts are essentially industry standard – that is, required by every project owner across the board. This scenario, along with the fact that a contractor or subcontractor may be much smaller and have fewer resources than a project owner or direct contractor, means that the parties contracting on a work of improvement may not be negotiating from equal positions of power and leverage.

Moreover, California may determine that certain contracts or contract provisions are in the public's interest to prohibit as a matter of public policy. The Legislature regularly makes such public policy determinations.² The Legislature has already done so in the context of retention payments as well, as the provisions described in Section 3 already impose limitations on when retention payments may be paid, and the Legislature has already limited the allowable amounts of retention payments in the public works of improvement context. Thus, to the extent SB 61 limits two parties' freedom of contract, there are numerous rationales and public policy justifications for doing so.

7. Arguments in support

According to the National Electrical Contractor's Association, which is the sponsor of this bill:

Retention, or retainage, is a long-standing practice in which a portion of progress payments – typically 10% on private projects – is withheld until project completion. Originally intended as a quality assurance measure before the widespread use of bonding, excessive retention creates significant financial strain. Construction firms must meet 100% of their financial obligations – including payroll, taxes, and material costs – while performing on a project, yet they receive only 90% of their earned income. With construction profit margins

² See AB 1076 (Bauer Kahan, Ch. 828, Stats. 2023) (adding Section 16600.1 to the Business and Professions Code, prohibiting noncompete clauses in an employment contract).

averaging less than 5%, many contractors rely on costly credit lines to bridge the gap, ultimately increasing project costs for all stakeholders.

SB 61 seeks to address these challenges by capping retention at 5%, aligning private construction practices with the proven standards already in place for public works projects.

Since 2011, California's public construction sector has successfully implemented a 5% retention cap with no negative impacts. Additionally, over 20 other states — including New York, Nevada, Oregon, and Washington — have adopted similar caps for private projects, recognizing the benefits of predictable and equitable retention policies.

This proposed cap offers several key advantages:

- **Improved Cash Flow** – Contractors can maintain a healthier financial position, ensuring timely payment of benefits, investment in future projects, and sustained business operations.
- **Reduced Financial Strain** – Lower retention decreases reliance on expensive credit lines, alleviating financial pressure and enabling competitive bidding on future projects.
- **Fairness and Predictability** – A standardized retention policy across both public and private sectors creates a level playing field, allowing contractors to plan and manage resources effectively.

This legislation is particularly critical for small businesses and emerging contractors, as excessive retainage disproportionately harms firms with limited access to capital. Additionally, delays in retainage payments can disrupt trust fund contributions, impacting workers' health benefits. By implementing a fair 5% cap, SB 61 supports job creation, strengthens financial stability, and promotes equitable practices throughout the construction industry.

SUPPORT

National Electrical Contractors Association (NECA) (sponsor)

American Council of Engineering Companies of California

American Subcontractors Association-California

Associated General Contractors of California

Associated General Contractors-San Diego Chapter

California Association of Sheet Metal & Air Conditioning Contractors National Association

California Legislative Conference of Plumbing, Heating & Piping Industry

California State Association of Electrical Workers

California State Council of Laborers

California State Pipe Trades Council

D.a. Whitacre Construction INC.

District Council of Iron Workers of the State of California and Vicinity
Finishing Contractors Association of Southern California
International Union of Operating Engineers, Cal-Nevada Conference
Northern California Allied Trades
Northern California Floor Covering Association
Richardson Steel, Inc.
Southern California Glass Management Association (SCGMA)
State Building & Construction Trades Council of California
Tri-co Floors
United Contractors (UCON)
Wall and Ceiling Alliance
Western Painting and Coating Contractors Association
Western States Council Sheet Metal, Air, Rail and Transportation
Western Wall and Ceiling Contractors Association (WWCCA)

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: SB 440 (Ochoa Bogh, 2025) establishes, until January 1, 2030, a claim resolution process for any claim by a contractor in connection with a private work of improvement for various claims, including for payment of an amount that is disputed. SB 440 is currently pending before this Committee.

Prior Legislation:

SB 189 (Lowenthal, Ch. 697, Stats. 2010) established the provisions related to retention payments in private works of improvement that specify the timelines for when retention payments must be paid, and the penalties for an owner or direct contractor's violation of its provisions.

SB 629 (Liu, 2009) would have prohibited retention proceeds withheld from any payment made by the owner to the original contractor from exceeding five percent of the amount of the payment otherwise due under the contract. SB 629 died on concurrence in the Senate.
