



Meeting Date: 08 / 07 / 07

ACTION	TYPE OF ITEM
<input type="checkbox"/> Approved Recommendation	<input checked="" type="checkbox"/> Info/Consent
<input type="checkbox"/> Ord. No(s). _____	<input type="checkbox"/> Report
<input type="checkbox"/> Res. No(s). _____	<input type="checkbox"/> Public Hearing (Info/consent)
<input type="checkbox"/> Other _____	<input type="checkbox"/> Other _____

Prepared By: *MRE* Martin R. Erickson

Agenda Item No. I-1

Reviewed By: City Manager *[Signature]*

City Attorney *[Signature]*

Finance *SW*

Other (Specify)

DATE: July 31, 2007

TO: City Council

FROM: Martin R. Erickson, Legislative Affairs Manager
City Manager's Office

SUBJECT: SB 619 (Midgen) Public Works Projects Small Business Payment Retention Policy Reform

RECOMMENDATION

That City Council execute a letter opposing (unless amended) the adoption of SB 619 (Midgen) Public Works Projects Small Business Payment Retention Policy Reform.

DISCUSSION

SB 619 (Midgen) seeks to alter current local government contracting practices for public works projects by statutorily lowering the industry standard for retention of funds from 10% to 5%. Though undoubtedly well-intended, City staff is concerned that the benefits afforded construction contractors through SB 619's "reforms" are achieved at the expense of the rate-paying public, subcontractors, materials suppliers, and laborers.

On public projects, progress payments are typically made to a general contractor as work progresses. An amount -- typically 10% of the earned value of the work performed -- is withheld from each payment as "retention" for the following primary purposes:

- to repair defective work discovered towards the end of the construction project (typically as a result of facility performance testing);
- to have funds available, pursuant to Sections 3179 through 3214 of the California Civil Code, for payment to subcontractors and materials suppliers which file stop notices at the end of the project because they have not been paid by the general contractor; and
- to have funds available, pursuant to Section 1727(a) of the California Labor Code, to satisfy any civil wage and penalty assessment issued by the State Labor Commissioner for failure on the part of the contractor to pay prevailing wages.

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Oxnard relies upon withheld funds to encourage contractors to repair defective work, pay subcontractors and suppliers, and pay prevailing wages to their laborers. Establishing a retention cap at 5%, as SB 619 sets forth, would leave agencies like Oxnard without adequate funds to assure that defective work is repaired and that subcontractors, suppliers and laborers are paid in accordance with the law. Public agencies would be required to file claims with bonding companies or litigate, both of which are typically lengthy and cumbersome processes.

Currently, Section 10261 of the Public Contract Code states that [State] "Department[s] shall withhold not less than 5% of the contract price until final completion and acceptance of the project." This policy was established to ensure the State had a remedy should a contractor fail to perform. Changing the word "*less*" to "*more*" may seem like a small change, but it has significant ramifications.

City staff is not aware of public entities requiring exorbitant retentions. If this is indeed the case, and a cap is appropriate, staff suggests the cap be set at a reasonable level of 10%, which is customary. With this amendment, public agencies would be better able to assure that projects are well-constructed, with fair wages, without undue costs to ratepayers from litigation. Absent an amendment that would increase the retention cap from 5% to 10%, City staff recommends that the City Council oppose SB 619 for the aforementioned reasons.

FINANCIAL IMPACT

There is no financial impact at this time as this item involves pending State legislation.

Attachment #1 Letter in Opposition to SB 619 (Midgen) Public Contracts: Retention

August 7, 2007

The Honorable Mark Leno
Chair, Assembly Appropriations Committee
State Capitol, Room 2114
Sacramento, CA 95814

RE: SB 619 (Midgen) Public Works Projects Small Business Payment Retention Policy Reform

Dear Assemblyman Leno:

Please be advised that by this letter the City Council of the City of Oxnard opposes SB 619 (Midgen), a bill that would alter current contracting practices for public works projects, and arguably undermine the City's ability to protect the public from construction defects by statutorily lowering the industry standard for retention of funds from 10% to 5%. Oxnard's population of nearly 200,000 represents one-quarter of Ventura County's population.

The City Council is concerned that the benefits afforded construction contractors through SB 619's "reforms", though undoubtedly well-intended, are achieved at the expense of the rate-paying public, subcontractors, materials suppliers, and laborers.

On public projects, progress payments are typically made to a general contractor as work progresses. An amount -- typically 10% of the earned value of the work performed -- is withheld from each payment as "retention" for the following primary purposes:

- to repair defective work discovered towards the end of the construction project (typically as a result of facility performance testing);
- to have funds available, pursuant to Sections 3179 through 3214 of the California Civil Code, for payment to subcontractors and materials suppliers which file stop notices at the end of the project because they have not been paid by the general contractor; and
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ATTACHMENT 1
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The City of Oxnard relies upon withheld funds to encourage contractors to repair defective work, pay subcontractors and suppliers, and pay prevailing wages to their laborers. Establishing a retention cap at 5%, as SB 619 sets forth, would leave agencies like the City of Oxnard without adequate funds to assure that defective work is repaired and that subcontractors, suppliers and laborers are paid in accordance with the law. Public agencies would be required to file claims with bonding companies or litigate, both of which are typically lengthy and cumbersome processes.

One rationale for SB 619 was that public entities are requiring exorbitant retentions. If this is indeed the case, and a cap is appropriate, we would suggest the cap be set at a reasonable level of 10%, which is customary. With this amendment, we believe public agencies would be better able to assure that projects are well-constructed, with fair wages, without undue costs to ratepayers from litigation.

Absent an amendment that would increase the retention cap from 5% to 10%, the City Council must oppose SB 619 for the aforementioned reasons. Therefore, we urge you to vote "no" on the measure, unless amended accordingly, when presented to the Appropriations Committee.

Please do not hesitate to contact Martin R. Erickson, Legislative Affairs Manager at (805) 385-7870 should you have any further questions.

Sincerely,

Dr. Thomas E. Holden
Mayor

Dean Maulhardt
Mayor Pro Tem

John C. Zaragoza
Councilmember

Andrés Herrera
Councilmember

Timothy B. Flynn
Councilman

cc: The Honorable Carole Midgen
Members of the Senate Appropriations Committee
Chuck Nicol, Consultant to Appropriations

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