

***SB 671 - Procurement Contracts and Construction Contracts - Payments***

**Position:** Letter of Concern

**Committee:** Budget and Taxation Committee

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The Department of General Services (DGS) is providing this Letter of Concern for the Committee's consideration.

Senate Bill 671 would have a significant and indeterminate operational and fiscal impact on DGS, as well as all State agencies and vendors that engage in State procurement. The bill would alter numerous provisions throughout Division II (General Procurement Law) of the State Finance and Procurement Article (SFP), reduce the timeline for the State to review contract invoices, more than double the interest the State pays on late payments, and otherwise increase liability for the State.

This legislation would define the terms "construction contract," "contractor," "lower-tier subcontractor," and "subcontractor" in a significantly more restrictive way than those terms are currently used in law and practice. These new definitions would be applied to more than 100 existing sections of statute throughout SFP Division II (General Procurement Law), having wide-ranging and possibly unintended consequences.

For example, "construction contract" would be defined as a contract between either a contractor and a subcontractor, or a subcontractor and a lower-tier subcontractor, and would not include a contract between a unit of State government and a contractor. This seeks to shift the focus of contractual relations from those between the State and a vendor (prime contractor) to relations between the prime contractor and subcontractors, for which the State does not have privity of relations and which are currently not considered in SFP Division II.

DGS is concerned that the bill shifts regulatory attention into private contractual relationships where the State has no direct contractual rights, increasing uncertainty and, potentially, administrative burden. The State's authority in procurement is based on its contract with the prime contractor. As a result, the State cannot directly enforce requirements against subcontractors. The shift proposed by SB 671, therefore, raises questions about who is responsible for compliance, who defends decisions, and how disputes are handled.

Another concern with the definition of “construction contract” is that it would be defined only as “a contract to perform construction-related services,” which is a distinct type of work that does not include construction work (see existing definitions in SFP §11-101(g)(1) for “construction-related services” and SFP §11-101(f)(1) for “construction”). The proposed definitions of “lower-tier subcontractor” and “subcontractor” would similarly be defined only to apply to construction-related services contracts. Therefore, the bill would exclude the applicability of those terms to construction, information, or commodity procurements. Further, the proposed definition of subcontractor would exclude suppliers of materials.

These proposed definitions would substantially alter dozens of statutory provisions. For example, any statute that requires or prohibits payment or performance security on “construction contracts” (e.g. SFP §17-103) would no longer be applicable to contracts between the State and a contractor, nor to contracts for construction work. Another example is any statute that requires prompt payment to or from a “subcontractor” (e.g., SFP §15-226) would only be applicable to vendors working on construction-related services contracts and exclude suppliers of materials from these protections.

In addition, the bill’s proposed revisions to SFP §15-103 through §15-105 would create unreasonable timelines and expectations for the State, resulting in increased operational burden and expenditures for all State agencies. Specifically, the bill would permit the State 30 days to make payments on invoices, but also require the State to provide notification of withholding within 15 days after the date of the invoice. This would reduce the amount of time agencies have to review invoices for all procurement contracts, substantially increasing the burden on State agencies.

The bill would also more than double the rate of interest paid by the State on late payments, resulting in a potentially significant increase in expenditures for State agencies. Adjusting the timeline for when interest begins accruing from 37 to 60 days may not mitigate these additional costs.

Lastly, Senate Bill 671 would eliminate exceptions under current law for when the State agencies are not liable for interest, including interest accruing while a contract claim is pending and interest paid on unpaid interest. Removing these existing exceptions would significantly increase the State’s potential liability and expenditures.

DGS respectfully requests the Committee’s consideration of these concerns when deliberating on Senate Bill 671.

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