

1 SB386  
2 154751-3  
3 By Senator Marsh  
4 RFD: Fiscal Responsibility and Accountability  
5 First Read: 20-FEB-14

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8 SYNOPSIS: This bill would require pre-bid meetings to  
9 be held at least seven days prior to bid opening on  
10 any public works contract and would prohibit the  
11 modification of specifications within 24 hours of  
12 the opening of a bid on any public works contract.

13 This bill would reduce the time for payment  
14 of completed work on public contracts by an  
15 awarding authority.

16 This bill would remove the provision in  
17 current law that provides that the prompt payment  
18 provisions will not apply until an awarding  
19 authority is in receipt of funds as provided in the  
20 contract.

21 This bill would provide for the review and  
22 approval of the progress of completed work and  
23 would provide procedures for the dispute of a  
24 submitted invoice.

25 This bill would provide for alteration of  
26 contract terms upon the determination that certain  
27 conditions on the property where work is to be

1 performed under the contract have materially  
2 changed.

3  
4 A BILL  
5 TO BE ENTITLED  
6 AN ACT

7  
8 To amend Section 39-2-2, Code of Alabama 1975, and  
9 Section 39-2-12, Code of Alabama 1975, relating to public  
10 works contracts; to require pre-bid meetings to be held at  
11 least seven days prior to bid opening; to prohibit the  
12 modification of specifications within 24 hours of the opening  
13 of a bid; to reduce the timeframe for payment of completed  
14 work; to remove the provision in current law that provides  
15 that the prompt payment provisions will not apply until an  
16 awarding authority is in receipt of funds as provided in the  
17 contract; to provide for the review and approval of the  
18 progress of completed work; to provide procedures for the  
19 dispute of a submitted invoice; and to provide for the  
20 alteration of contract terms upon the discovery of certain  
21 material changes in the property where work is to be  
22 performed.

23 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

24 Section 1. Section 39-2-2, Code of Alabama 1975, and  
25 Section 39-2-12, Code of Alabama 1975, are amended to read as  
26 follows:

27 "§39-2-2.

1           "(a) Before entering into any contract for a public  
2 works involving an amount in excess of fifty thousand dollars  
3 (\$50,000), the awarding authority shall advertise for sealed  
4 bids. If the awarding authority is the state or a county, or  
5 an instrumentality thereof, it shall advertise for sealed bids  
6 at least once each week for three consecutive weeks in a  
7 newspaper of general circulation in the county or counties in  
8 which the improvement or some part thereof, is to be made. If  
9 the awarding authority is a municipality, or an  
10 instrumentality thereof, it shall advertise for sealed bids at  
11 least once in a newspaper of general circulation published in  
12 the municipality where the awarding authority is located. If  
13 no newspaper is published in the municipality, the awarding  
14 authority shall advertise by posting notice thereof on a  
15 bulletin board maintained outside the purchasing office and in  
16 any other manner and for the length of time as may be  
17 determined. In addition to bulletin board notice, sealed bids  
18 shall also be solicited by sending notice by mail to all  
19 persons who have filed a request in writing with the official  
20 designated by the awarding authority that they be listed for  
21 solicitation on bids for the public works contracts indicated  
22 in the request. If any person whose name is listed fails to  
23 respond to any solicitation for bids after the receipt of  
24 three such solicitations, the listing may be canceled. With  
25 the exception of the Department of Transportation, for all  
26 public works contracts involving an estimated amount in excess  
27 of five hundred thousand dollars (\$500,000), awarding

1 authorities shall also advertise for sealed bids at least once  
2 in three newspapers of general circulation throughout the  
3 state. The advertisements shall briefly describe the  
4 improvement, state that plans and specifications for the  
5 improvement are on file for examination in a designated office  
6 of the awarding authority, state the procedure for obtaining  
7 plans and specifications, state the time and place in which  
8 bids shall be received and opened, and identify whether  
9 prequalification is required and where all written  
10 prequalification information is available for review. All bids  
11 shall be opened publicly at the advertised time and place. No  
12 public work as defined in this chapter involving a sum in  
13 excess of fifty thousand dollars (\$50,000) shall be split into  
14 parts involving sums of fifty thousand dollars (\$50,000) or  
15 less for the purpose of evading the requirements of this  
16 section.

17 "(b) An awarding authority may let contracts for  
18 public works involving fifty thousand dollars (\$50,000) or  
19 less with or without advertising or sealed bids.

20 "(c) All contracts for public works entered into in  
21 violation of this title shall be null, void, and violative of  
22 public policy. Anyone who willfully violates this article  
23 concerning public works shall be guilty of a Class C felony.

24 "(d) Excluded from the operation of this title shall  
25 be contracts with persons who shall perform only  
26 architectural, engineering, construction management, program  
27 management, or project management services in support of the

1 public works and who shall not engage in actual construction,  
2 repair, renovation, or maintenance of the public works with  
3 their own forces, by contract, subcontract, purchase order,  
4 lease, or otherwise.

5 "(e) In case of an emergency affecting public  
6 health, safety, or convenience, as declared in writing by the  
7 awarding authority, setting forth the nature of the danger to  
8 the public health, safety, or convenience which would result  
9 from delay, contracts may be let to the extent necessary to  
10 meet the emergency without public advertisement. The action  
11 and the reasons for the action taken shall immediately be made  
12 public by the awarding authority upon request.

13 "(f) No awarding authority may specify in the plans  
14 and specifications for the improvement the use of materials,  
15 products, systems, or services by a sole source unless all of  
16 the following requirements are met:

17 "(1) Except for contracts involving the  
18 construction, reconstruction, renovation, or replacement of  
19 public roads, bridges, and water and sewer facilities, the  
20 awarding authority can document to the satisfaction of the  
21 State Building Commission that the sole source product,  
22 material, system, or service is of an indispensable nature for  
23 the improvement, that there are no other viable alternatives,  
24 and that only this particular product, material, system, or  
25 service fulfills the function for which it is needed.

26 "(2) The sole source specification has been  
27 recommended by the architect or engineer of record as an

1 indispensable item for which there is no other viable  
2 alternative.

3 "(3) All information substantiating the use of a  
4 sole source specification, including the recommendation of the  
5 architect or engineer of record, shall be documented and made  
6 available for examination in the office of the awarding  
7 authority at the time of advertisement for sealed bids.

8 "(g) In the event of a proposed public works  
9 project, acknowledged in writing by the Alabama Homeland  
10 Security Department as (1) having a direct impact on the  
11 security or safety of persons or facilities and (2) requiring  
12 confidential handling for the protection of such persons or  
13 facilities, contracts may be let without public advertisement  
14 but with the taking of informal bids otherwise consistent with  
15 the requirements of this title and the requirements of  
16 maintaining confidentiality. Records of bidding and award  
17 shall not be disclosed to the public, and shall remain  
18 confidential.

19 "(h) If a pre-bid meeting is held, the pre-bid  
20 meeting shall be held at least seven days prior to the bid  
21 opening except when the project has been declared an emergency  
22 in accordance with subsection (e).

23 "(i) Specifications for a proposed public works  
24 project may not be modified within 24 hours of the bid  
25 opening.

26 "§39-2-12.

1           "(a) As used in this section the following words  
2 shall have the meanings ascribed to them as follows:

3           "(1) CONTRACTOR. Any natural person, partnership,  
4 company, firm, corporation, association, limited liability  
5 company, cooperative, or other legal entity licensed by the  
6 Alabama State Licensing Board for General Contractors.

7           "(2) NONRESIDENT CONTRACTOR. A contractor which is  
8 neither a. organized and existing under the laws of the State  
9 of Alabama, nor b. maintains its principal place of business  
10 in the State of Alabama. A nonresident contractor which has  
11 maintained a permanent branch office within the State of  
12 Alabama for at least five continuous years shall not  
13 thereafter be deemed to be a nonresident contractor so long as  
14 the contractor continues to maintain a branch office within  
15 Alabama.

16           "(3) RETAINAGE. That money belonging to the  
17 contractor which has been retained by the awarding authority  
18 conditioned on final completion and acceptance of all work in  
19 connection with a project or projects by the contractor.

20           "(b) Unless otherwise provided in the  
21 specifications, partial payments shall be made as the work  
22 progresses at the end of each calendar month, but in no case  
23 later than ~~45~~ 35 days after the ~~acceptance by the~~ awarding  
24 authority designee has signed the pay authorization which  
25 recognizes that the estimate and terms of the contract  
26 providing for partial payments have been fulfilled. The  
27 contract between the contractor and the awarding authority



1 shall designate a person to review the progress of completed  
2 work. The designated person shall review completed work within  
3 10 days and then submit the invoice to the awarding authority  
4 for payment. In the event of an error or dispute, the  
5 designated person shall submit, within 10 days from the  
6 completion of the work, in writing to the contractor the  
7 reason for the disapproval of the invoice and specify  
8 procedures for dispute resolution of the submitted invoice. In  
9 preparing estimates, the material delivered on the site,  
10 materials suitably stored and insured off-site, and  
11 preparatory work done may be taken into consideration. If the  
12 amount due by the awarding authority is not in dispute and the  
13 amount payable is not paid within the above ~~45-day~~ 35-day  
14 period, the contractor to whom payment is due shall also be  
15 entitled to interest from the awarding authority at the rate  
16 assessed for underpayment of taxes under Section 40-1-44(a),  
17 on the unpaid balance due. Any agreement to increase the  
18 ~~45-day~~ 35-day period for payment after the execution of the  
19 contract is not enforceable. Interest payments shall not be  
20 due on payments made after the ~~45-day~~ 35-day period because of  
21 administrative or processing delays at the close of the fiscal  
22 year or delays resulting from official and announced closures  
23 by the awarding authority. The provisions in this subsection  
24 shall not apply to contracts administered by the Alabama  
25 Building Commission, regardless of the source of the funds to  
26 be utilized to fulfill the awarding authority's obligation  
27 under the contract.

1           "(c) In making the partial payments, there shall be  
2 retained not more than five percent of the estimated amount of  
3 work done and the value of materials stored on the site or  
4 suitably stored and insured off-site, and after 50 percent  
5 completion has been accomplished, no further retainage shall  
6 be withheld. The retainage as set out above shall be held  
7 until final completion and acceptance of all work covered by  
8 the contract unless the escrow or deposit arrangement  
9 described in subsections (f) and (g) is utilized. Provided,  
10 however, no retainage shall be withheld on contracts entered  
11 into by the Alabama Department of Transportation for the  
12 construction or maintenance of public highways, bridges, or  
13 roads.

14           "(d) In addition to other requirements, a  
15 nonresident contractor shall satisfy the awarding authority  
16 that he or she has paid all taxes due and payable to the State  
17 of Alabama or any political subdivision thereof prior to  
18 receiving final payment for contract work. When maintenance  
19 periods are included in the contract covering highways and  
20 bridges or similar structures, the periods shall be considered  
21 a component part of the contract. On completion and acceptance  
22 of each separate building, public work, or other division of  
23 the contract on which a price is stated separately in the  
24 contract or can be separately ascertained, payment may be made  
25 in full, including the retained percentage thereof, less  
26 authorized deductions. Nothing in this section shall be  
27 interpreted to require the awarding authority to make full

1 payment on an item of work when the item of work is an  
2 integral part of a complete improvement.

3 "(e) In lieu of the retained amounts provided for in  
4 subsection (c) of this section, the awarding authority may  
5 provide in the specifications or contracts an alternate  
6 procedure for the maintenance of an escrow account as provided  
7 in subsection (f) or the depositing of security as provided in  
8 subsection (g).

9 "(f) An escrow account, established pursuant to an  
10 escrow agreement, shall be entered into only on the following  
11 conditions:

12 "(1) If the contractor shall have entered into more  
13 than one construction contract allowing for the maintenance of  
14 escrow accounts, the contractor may elect to combine the  
15 amounts held in lieu of retainage under each contract into one  
16 or more escrow accounts or may elect to establish a separate  
17 escrow account for each contract.

18 "(2) Only state or national banks chartered within  
19 the State of Alabama or savings and loan associations  
20 domiciled in the State of Alabama may serve as an escrow  
21 agent.

22 "(3) The escrow agent must limit the investment of  
23 funds held in escrow in lieu of retained amounts provided for  
24 in subsection (c) of this section to savings accounts,  
25 certificates of deposit or similar time deposit investments  
26 (which may, at the election of the contractor, be in an amount  
27 in excess of the maximum dollar amount of coverage by the

1 Federal Deposit Insurance Corporation, the Federal Savings &  
2 Loan Insurance Corporation, or other similar agency), U.S.  
3 Treasury Bonds, U.S. Treasury Notes, U.S. Treasury  
4 Certificates of Indebtedness, U.S. Treasury Bills, bonds or  
5 notes of the State of Alabama or bonds of any political  
6 subdivision of the State of Alabama.

7 "(4) As interest on all investments held in escrow  
8 becomes due, it shall be collected by the escrow agent and  
9 paid to the contractor.

10 "(5) The escrow agent shall periodically acknowledge  
11 to the awarding authority and contractor the amount and value  
12 of the escrow account held by the escrow agent, and any  
13 additions to the escrow account by the awarding authority  
14 shall be reported immediately to the contractor. Withdrawals  
15 from the escrow account shall only be made subject to the  
16 written approval of the awarding authority.

17 "(6) Upon default or overpayment, as determined by  
18 the awarding authority, of any contract or contracts subject  
19 to this procedure, and upon the written demand of the awarding  
20 authority, the escrow agent shall within 10 days deliver a  
21 cashier's check to the awarding authority in the amount of the  
22 escrow account balance (subject to the redemption value of  
23 such investments at the time of disbursement) relating to the  
24 contract or contracts in default.

25 "(7) The escrow account may be terminated upon  
26 completion and acceptance of the contract or contracts as  
27 provided in subsections (c) and (i) of this section.

1           "(8) All fees and expenses of the escrow agent shall  
2 be paid by the contractor to the escrow agent and if not paid  
3 shall constitute a lien on the interest accruing to the escrow  
4 account and shall be paid therefrom.

5           "(9) The escrow account shall constitute a specific  
6 pledge to the awarding authority, and the contractor shall  
7 not, except to his surety, otherwise assign, pledge, discount,  
8 sell, or transfer his interest in said escrow account, the  
9 funds in which shall not be subject to levy, garnishment,  
10 attachment, or any other process whatsoever.

11           "(10) The form of the escrow agreement and  
12 provisions thereof in compliance herewith, as well as such  
13 other provisions as the awarding authority shall from time to  
14 time prescribe, shall be subject to written approval of the  
15 awarding authority. The approval of the escrow agreement by  
16 the awarding authority shall authorize the escrow agent to  
17 accept appointment in such capacity.

18           "(11) The awarding authority shall not be liable to  
19 the contractor or his surety for the failure of the escrow  
20 agent to perform under the escrow agreement, or for the  
21 failure of any financial institution to honor investments  
22 issued by it which are held in the escrow account.

23           "(g) The contractor may withdraw the whole or any  
24 part of the retainage upon deposit of securities only in  
25 accordance with the following procedures:

26           "(1) The contractor shall deposit with the State  
27 Treasurer or the municipal or county official holding funds

1 belonging to the contractor, the following readily negotiable  
2 security or any combination thereof in an amount at least  
3 equal to the amount withdrawn, the security shall be accepted  
4 at the time of deposit at market value but not in excess of  
5 par value:

6 "a. U.S. Treasury Bonds, U.S. Treasury Notes, U.S.  
7 Treasury Certificates of Indebtedness, or U.S. Treasury Bills.

8 "b. Bonds or notes of the State of Alabama.

9 "c. Bonds of any political subdivision of the State  
10 of Alabama.

11 "d. Certificates of deposit issued by the Federal  
12 Deposit Insurance Corporation insured banks located in the  
13 State of Alabama. The certificates shall be negotiable and  
14 only in an amount not in excess of the maximum dollar amount  
15 of coverage by the Federal Deposit Insurance Corporation.

16 "e. Certificates of deposit issued by savings and  
17 loan associations located in the State of Alabama, the  
18 accounts of which are insured by the Federal Deposit Insurance  
19 Corporation or the accounts of which are insured by a company  
20 approved by the state Savings and Loan Board and the  
21 certificates shall be made payable with accrued interest on  
22 demand. Any certificate from any of the savings and loan  
23 associations referred to in this paragraph shall not be for an  
24 amount in excess of the maximum dollar amount of coverage of  
25 the Federal Deposit Insurance Corporation.

26 "(2) The agency or department of the state having  
27 jurisdiction over any public works contract shall notify the

1 State Treasurer of the amount of the deposit required and  
2 shall also notify the State Treasurer when to release the  
3 deposit.

4 "(3) The architect or engineer representing any  
5 municipality or county or the chair of any board, commission,  
6 or agency of any municipality or county shall notify the  
7 municipal or county official of the amount of deposit required  
8 and shall also notify the municipal or county official when to  
9 release the deposit.

10 "(4) At the time of deposit of any security, the  
11 security may be endorsed and shall be accompanied by a  
12 conditional assignment to the public body designated as owner  
13 in the contract document, which assignment shall empower the  
14 State Treasurer, or the municipal or county official to  
15 negotiate the security at any time to the extent necessary to  
16 cause the fulfilling of the contract.

17 "(5) Any interest or income due on any security  
18 deposited shall be paid to the contractor. If the deposit is  
19 in the form of coupon bonds, the coupons, as they respectively  
20 become due, shall be delivered to the contractor.

21 "(6) In the event the contractor defaults in the  
22 performance of the contract or any portion of the contract,  
23 the securities deposited by the contractor in lieu of  
24 retainage and all interest, income, and coupons accruing on  
25 the securities, after default, may be sold by the state or any  
26 agency or department of the state, any municipality or county,  
27 or any board, commission, or agency of the municipality or

1 county and the proceeds of the sale shall be used as if the  
2 proceeds represented the retainage provided for under the  
3 contract.

4 "(h) All material and work covered by partial  
5 payments made shall become the sole property of the awarding  
6 authority, but the contractor shall not be relieved from the  
7 sole responsibility for the care and protection of materials  
8 and work upon which payments have been made, and for the  
9 restoration of any damaged work.

10 "(i) (1) Upon the contractor's completion and the  
11 awarding authority's acceptance of all work required, the  
12 awarding authority shall pay the amount due the contractor  
13 upon the contractor's presentation of the following items:

14 "a. A properly executed and duly certified voucher  
15 for payment.

16 "b. A release, if required, of all claims and claims  
17 of lien against the awarding authority arising under and by  
18 virtue of the contract, other than such claims of the  
19 contractor, if any, as may be specifically excepted by the  
20 contractor from the operation of the release in stated amounts  
21 to be set forth therein.

22 "c. Proof of advertisement as provided by law. Upon  
23 proof of advertisement, the prescribed terms of payment shall  
24 not be amended after the terms and specifications have been  
25 published.

26 "(2) Such payment shall become due and owing ~~45~~ 35  
27 days after all the requirements of subdivision (1) are



1 fulfilled, and any agreement to increase the ~~45-day~~ 35-day  
2 period for payment after the execution of the contract is not  
3 enforceable. If the amount payable is not paid as required,  
4 interest on the amount shall be due and owing to the  
5 contractor. Interest shall accrue on the day following the  
6 later date described above and shall be paid ~~from the same~~  
7 ~~fund or source from which the contract principal is paid~~ by  
8 the awarding authority. The interest rate for payments shall  
9 be the legal amount currently assessed for under payment of  
10 taxes under Section 40-1-44 (a).

11 "(3) Except as may be prohibited by Article I,  
12 Section 14 of the Constitution of Alabama of 1901, a  
13 contractor or awarding authority may file a civil action  
14 against the party contractually obligated for the payment or  
15 repayment claimed to recover the amount due plus the interest  
16 accrued in accordance with this chapter. In addition to the  
17 payment of any amounts due plus interest, if applicable, the  
18 court shall award the prevailing party reasonable attorneys'  
19 fees, court costs, and reasonable expenses. This provision  
20 shall not apply to contracts administered by the Alabama  
21 Building Commission, regardless of the source of the funds to  
22 be utilized to fulfill the awarding authority's obligation  
23 under the contract.

24 "(j) If the Department of Transportation or a county  
25 awarding authority shall determine that there has been  
26 overpayment to a contractor on a contract award pursuant to  
27 this chapter, the Department of Transportation or the county

1       awarding authority shall provide written notice of the  
2       overpayment to the contractor and the contractor shall remit  
3       the overpayment to the Department of Transportation or the  
4       county awarding authority within 60 days of receipt of the  
5       demand. If the contractor fails to remit payment in full of  
6       the overpayment within 60 days of receipt of demand, the  
7       contractor shall be disqualified from bidding as a prime  
8       contractor or from performing work as a subcontractor on any  
9       future Department of Transportation contract or county  
10      contract for the construction or maintenance of public  
11      highways, bridges, or roads until the overpayment is made. The  
12      Department of Transportation or county awarding authority  
13      shall also be entitled to interest from the contractor at the  
14      rate assessed for under payment of taxes under Section 40-1-44  
15      (a) beginning on the 61st day after the contractor's receipt  
16      of demand.

17               "(k) The contract between the awarding authority and  
18      contractor shall contain provisions outlining the source of  
19      sufficient funds to be utilized to fulfill the awarding  
20      authority's obligations under the contract, including whether  
21      the funds are held by the awarding authority at the time of  
22      the execution of the contract or whether the funds will become  
23      available at a date following the execution of the contract.  
24      ~~Should the source of funds for the payment be a grant, award,~~  
25      ~~or direct reimbursement from the state, federal government, or~~  
26      ~~other source which will not become available until after the~~  
27      ~~execution of the contract, this shall be disclosed in the~~

1 contract and the provisions of this chapter regarding prompt  
2 payment shall not apply until the awarding authority is in  
3 receipt of the funds as provided in the contract. Upon such  
4 receipt, the 45-day requirement in this chapter shall commence  
5 and shall be enforceable as provided herein.

6 "(l) If subsurface or unknown physical conditions  
7 are encountered differing materially from those indicated in  
8 the contract, the party discovering the differing conditions  
9 shall promptly notify all parties to the contract in writing  
10 before the affected work is performed and in no event later  
11 than 10 days after discovering the condition. Upon the owner's  
12 receipt of written notification of materially different  
13 conditions, the architect or engineer of record shall  
14 investigate. If the architect or engineer determines that the  
15 conditions are materially different from the contract and may  
16 cause an increase or decrease in the cost or time required for  
17 performance of the work under the contract, the architect or  
18 engineer shall recommend to the owner that an adjustment of  
19 the contract terms be made to adequately reflect the increase  
20 or decrease in the cost or time required due to the condition  
21 changes. If the architect or engineer determines that  
22 materially different conditions do not exist, the architect or  
23 engineer shall notify the owner and the contractor in writing  
24 stating the reason for the determination.

25 "(l)(m) In the event of a conflict between the  
26 provisions of this section and the provisions of any other  
27 section of the Code of Alabama 1975, or any agency's or

1 department's rules, regulations, or manuals, this section  
2 shall govern.

3 ~~"(m) (n)~~ The provisions of this section shall not  
4 apply to any state agency established pursuant to Chapter 1 of  
5 Title 33.

6 "(o) This section shall not apply to any contract  
7 relating to or concerning a declared state or national  
8 emergency.

9 ~~"(n) (p)~~ The payment provisions of this section shall  
10 not apply to contracts entered into by governmental entities  
11 as a result of response and recovery to any of the conditions  
12 described in Section 31-9-2(a).

13 ~~"(o) (q)~~ The provisions set forth in this section  
14 shall apply to all payments, partial or otherwise."

15 Section 2. This act shall become effective on the  
16 first day of the third month following its passage and  
17 approval by the Governor, or its otherwise becoming law.