

1 SB237
2 152718-2
3 By Senator Marsh
4 RFD: Fiscal Responsibility and Accountability
5 First Read: 21-FEB-13

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3
4 ENGROSSED

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7 A BILL
8 TO BE ENTITLED
9 AN ACT

10
11 To amend Section 39-2-2, Code of Alabama 1975, and
12 Section 39-2-12, Code of Alabama 1975, as last amended by Act
13 2012-379, 2012 Regular Session, relating to public works
14 contracts; to require pre-bid meetings to be held at least
15 seven days prior to bid opening; to prohibit the modification
16 of specifications within 24 hours of the opening of a bid; to
17 reduce the timeframe for payment of completed work; to remove
18 the provision in current law that provides that the prompt
19 payment provisions will not apply until an awarding authority
20 is in receipt of funds as provided in the contract; to provide
21 for the review and approval of the progress of completed work;
22 to provide procedures for the dispute of a submitted invoice;
23 to provide for the alteration of contract terms upon the
24 discovery of certain material changes in the property where
25 work is to be performed; and to exempt road and bridge
26 projects from the prompt pay contract requirements.

27 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

1 Section 1. Section 39-2-2, Code of Alabama 1975, and
2 Section 39-2-12, Code of Alabama 1975, as last amended by Act
3 2012-379, 2012 Regular Session, are amended to read as
4 follows:

5 "§39-2-2.

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

1 respond to any solicitation for bids after the receipt of
2 three such solicitations, the listing may be canceled. With
3 the exception of the Department of Transportation, for all
4 public works contracts involving an estimated amount in excess
5 of five hundred thousand dollars (\$500,000), awarding
6 authorities shall also advertise for sealed bids at least once
7 in three newspapers of general circulation throughout the
8 state. The advertisements shall briefly describe the
9 improvement, state that plans and specifications for the
10 improvement are on file for examination in a designated office
11 of the awarding authority, state the procedure for obtaining
12 plans and specifications, state the time and place in which
13 bids shall be received and opened, and identify whether
14 prequalification is required and where all written
15 prequalification information is available for review. All bids
16 shall be opened publicly at the advertised time and place. No
17 public work as defined in this chapter involving a sum in
18 excess of fifty thousand dollars (\$50,000) shall be split into
19 parts involving sums of fifty thousand dollars (\$50,000) or
20 less for the purpose of evading the requirements of this
21 section.

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

25 "(c) All contracts for public works entered into in
26 violation of this title shall be null, void, and violative of

1 public policy. Anyone who willfully violates this article
2 concerning public works shall be guilty of a Class C felony.

3 "(d) Excluded from the operation of this title shall
4 be contracts with persons who shall perform only
5 architectural, engineering, construction management, program
6 management, or project management services in support of the
7 public works and who shall not engage in actual construction,
8 repair, renovation, or maintenance of the public works with
9 their own forces, by contract, subcontract, purchase order,
10 lease, or otherwise.

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

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

23 "(1) Except for contracts involving the
24 construction, reconstruction, renovation, or replacement of
25 public roads, bridges, and water and sewer facilities, the
26 awarding authority can document to the satisfaction of the
27 State Building Commission that the sole source product,

1 material, system, or service is of an indispensable nature for
2 the improvement, that there are no other viable alternatives,
3 and that only this particular product, material, system, or
4 service fulfills the function for which it is needed.

5 "(2) The sole source specification has been
6 recommended by the architect or engineer of record as an
7 indispensable item for which there is no other viable
8 alternative.

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

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

25 "(h) If a pre-bid meeting is held, the pre-bid
26 meeting shall be held at least seven days prior to the bid

1 opening except when the project has been declared an emergency
2 in accordance with subsection (e).

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

6 "(j) Subsections (h) and (i) shall not apply to
7 projects relating to the construction, installation, repair,
8 renovation, or maintenance of public roads, highways, or
9 bridges.

10 "§39-2-12.

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

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

17 "(2) NONRESIDENT CONTRACTOR. A contractor which is
18 neither a. organized and existing under the laws of the State
19 of Alabama, nor b. maintains its principal place of business
20 in the State of Alabama. A nonresident contractor which has
21 maintained a permanent branch office within the State of
22 Alabama for at least five continuous years shall not
23 thereafter be deemed to be a nonresident contractor so long as
24 the contractor continues to maintain a branch office within
25 Alabama.

26 "(3) RETAINAGE. That money belonging to the
27 contractor which has been retained by the awarding authority

1 conditioned on final completion and acceptance of all work in
2 connection with a project or projects by the contractor.

3 "(b) Unless otherwise provided in the
4 specifications, partial payments shall be made as the work
5 progresses at the end of each calendar month, but in no case
6 later than ~~45~~ 35 days after the ~~acceptance by the~~ awarding
7 authority designee has signed the pay authorization which
8 recognizes that the estimate and terms of the contract
9 providing for partial payments have been fulfilled. The
10 contract between the contractor and the awarding agency shall
11 designate a person to review the progress of completed work.
12 The designated person shall review completed work within 10
13 days and then submit the invoice to the awarding agency for
14 payment. In the event of an error or dispute, the designated
15 person shall submit, within 10 days from the completion of the
16 work, in writing to the contractor the reason for the
17 disapproval of the invoice and specify procedures for dispute
18 resolution of the submitted invoice. In preparing estimates,
19 the material delivered on the site, materials suitably stored
20 and insured off-site, and preparatory work done may be taken
21 into consideration. If the amount due by the awarding
22 authority is not in dispute and the amount payable is not paid
23 within the above ~~45-day~~ 35-day period, the contractor to whom
24 payment is due shall also be entitled to interest from the
25 awarding authority at the rate assessed for underpayment of
26 taxes under Section 40-1-44(a), on the unpaid balance due. Any
27 agreement to increase the ~~45-day~~ 35-day period for payment

1 after the execution of the contract is not enforceable.
2 Interest payments shall not be due on payments made after the
3 ~~45-day~~ 35-day period because of administrative or processing
4 delays at the close of the fiscal year or delays resulting
5 from official and announced closures by the awarding
6 authority. The provisions in this subsection shall not apply
7 to contracts administered by the Alabama Building Commission,
8 regardless of the source of the funds to be utilized to
9 fulfill the awarding authority's obligation under the
10 contract, or to contracts entered into by the Alabama
11 Department of Transportation for the construction or
12 maintenance of public highways, bridges, or roads.

13 "(c) In making the partial payments, there shall be
14 retained not more than five percent of the estimated amount of
15 work done and the value of materials stored on the site or
16 suitably stored and insured off-site, and after 50 percent
17 completion has been accomplished, no further retainage shall
18 be withheld. The retainage as set out above shall be held
19 until final completion and acceptance of all work covered by
20 the contract unless the escrow or deposit arrangement
21 described in subsections (f) and (g) is utilized. Provided,
22 however, no retainage shall be withheld on contracts entered
23 into by the Alabama Department of Transportation for the
24 construction or maintenance of public highways, bridges, or
25 roads.

26 "(d) In addition to other requirements, a
27 nonresident contractor shall satisfy the awarding authority

1 that he or she has paid all taxes due and payable to the State
2 of Alabama or any political subdivision thereof prior to
3 receiving final payment for contract work. When maintenance
4 periods are included in the contract covering highways and
5 bridges or similar structures, the periods shall be considered
6 a component part of the contract. On completion and acceptance
7 of each separate building, public work, or other division of
8 the contract on which a price is stated separately in the
9 contract or can be separately ascertained, payment may be made
10 in full, including the retained percentage thereof, less
11 authorized deductions. Nothing in this section shall be
12 interpreted to require the awarding authority to make full
13 payment on an item of work when the item of work is an
14 integral part of a complete improvement.

15 "(e) In lieu of the retained amounts provided for in
16 subsection (c) of this section, the awarding authority may
17 provide in the specifications or contracts an alternate
18 procedure for the maintenance of an escrow account as provided
19 in subsection (f) or the depositing of security as provided in
20 subsection (g).

21 "(f) An escrow account, established pursuant to an
22 escrow agreement, shall be entered into only on the following
23 conditions:

24 "(1) If the contractor shall have entered into more
25 than one construction contract allowing for the maintenance of
26 escrow accounts, the contractor may elect to combine the
27 amounts held in lieu of retainage under each contract into one

1 or more escrow accounts or may elect to establish a separate
2 escrow account for each contract.

3 "(2) Only state or national banks chartered within
4 the State of Alabama or savings and loan associations
5 domiciled in the State of Alabama may serve as an escrow
6 agent.

7 "(3) The escrow agent must limit the investment of
8 funds held in escrow in lieu of retained amounts provided for
9 in subsection (c) of this section to savings accounts,
10 certificates of deposit or similar time deposit investments
11 (which may, at the election of the contractor, be in an amount
12 in excess of the maximum dollar amount of coverage by the
13 Federal Deposit Insurance Corporation, the Federal Savings &
14 Loan Insurance Corporation, or other similar agency), U.S.
15 Treasury Bonds, U.S. Treasury Notes, U.S. Treasury
16 Certificates of Indebtedness, U.S. Treasury Bills, bonds or
17 notes of the State of Alabama or bonds of any political
18 subdivision of the State of Alabama.

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

22 "(5) The escrow agent shall periodically acknowledge
23 to the awarding authority and contractor the amount and value
24 of the escrow account held by the escrow agent, and any
25 additions to the escrow account by the awarding authority
26 shall be reported immediately to the contractor. Withdrawals

1 from the escrow account shall only be made subject to the
2 written approval of the awarding authority.

3 "(6) Upon default or overpayment, as determined by
4 the awarding authority, of any contract or contracts subject
5 to this procedure, and upon the written demand of the awarding
6 authority, the escrow agent shall within 10 days deliver a
7 cashier's check to the awarding authority in the amount of the
8 escrow account balance (subject to the redemption value of
9 such investments at the time of disbursement) relating to the
10 contract or contracts in default.

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

14 "(8) All fees and expenses of the escrow agent shall
15 be paid by the contractor to the escrow agent and if not paid
16 shall constitute a lien on the interest accruing to the escrow
17 account and shall be paid therefrom.

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

24 "(10) The form of the escrow agreement and
25 provisions thereof in compliance herewith, as well as such
26 other provisions as the awarding authority shall from time to
27 time prescribe, shall be subject to written approval of the

1 awarding authority. The approval of the escrow agreement by
2 the awarding authority shall authorize the escrow agent to
3 accept appointment in such capacity.

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

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

12 "(1) The contractor shall deposit with the State
13 Treasurer or the municipal or county official holding funds
14 belonging to the contractor, the following readily negotiable
15 security or any combination thereof in an amount at least
16 equal to the amount withdrawn, the security shall be accepted
17 at the time of deposit at market value but not in excess of
18 par value:

19 "a. U.S. Treasury Bonds, U.S. Treasury Notes, U.S.
20 Treasury Certificates of Indebtedness, or U.S. Treasury Bills.

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

22 "c. Bonds of any political subdivision of the State
23 of Alabama.

24 "d. Certificates of deposit issued by the Federal
25 Deposit Insurance Corporation insured banks located in the
26 State of Alabama. The certificates shall be negotiable and

1 only in an amount not in excess of the maximum dollar amount
2 of coverage by the Federal Deposit Insurance Corporation.

3 "e. Certificates of deposit issued by savings and
4 loan associations located in the State of Alabama, the
5 accounts of which are insured by the Federal Deposit Insurance
6 Corporation or the accounts of which are insured by a company
7 approved by the state Savings and Loan Board and the
8 certificates shall be made payable with accrued interest on
9 demand. Any certificate from any of the savings and loan
10 associations referred to in this paragraph shall not be for an
11 amount in excess of the maximum dollar amount of coverage of
12 the Federal Deposit Insurance Corporation.

13 "(2) The agency or department of the state having
14 jurisdiction over any public works contract shall notify the
15 State Treasurer of the amount of the deposit required and
16 shall also notify the State Treasurer when to release the
17 deposit.

18 "(3) The architect or engineer representing any
19 municipality or county or the chair of any board, commission,
20 or agency of any municipality or county shall notify the
21 municipal or county official of the amount of deposit required
22 and shall also notify the municipal or county official when to
23 release the deposit.

24 "(4) At the time of deposit of any security, the
25 security may be endorsed and shall be accompanied by a
26 conditional assignment to the public body designated as owner
27 in the contract document, which assignment shall empower the

1 State Treasurer, or the municipal or county official to
2 negotiate the security at any time to the extent necessary to
3 cause the fulfilling of the contract.

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

8 "(6) In the event the contractor defaults in the
9 performance of the contract or any portion of the contract,
10 the securities deposited by the contractor in lieu of
11 retainage and all interest, income, and coupons accruing on
12 the securities, after default, may be sold by the state or any
13 agency or department of the state, any municipality or county,
14 or any board, commission, or agency of the municipality or
15 county and the proceeds of the sale shall be used as if the
16 proceeds represented the retainage provided for under the
17 contract.

18 "(h) All material and work covered by partial
19 payments made shall become the sole property of the awarding
20 authority, but the contractor shall not be relieved from the
21 sole responsibility for the care and protection of materials
22 and work upon which payments have been made, and for the
23 restoration of any damaged work.

24 "(i) (1) Upon the contractor's completion and the
25 awarding authority's acceptance of all work required, the
26 awarding authority shall pay the amount due the contractor
27 upon the contractor's presentation of the following items:

1 "a. A properly executed and duly certified voucher
2 for payment.

3 "b. A release, if required, of all claims and claims
4 of lien against the awarding authority arising under and by
5 virtue of the contract, other than such claims of the
6 contractor, if any, as may be specifically excepted by the
7 contractor from the operation of the release in stated amounts
8 to be set forth therein.

9 "c. Proof of advertisement as provided by law. Upon
10 proof of advertisement, the prescribed terms of payment shall
11 not be amended after the terms and specifications have been
12 published.

13 "(2) Such payment shall become due and owing ~~45~~ 35
14 days after all the requirements of subdivision (1) are
15 fulfilled, and any agreement to increase the ~~45-day~~ 35-day
16 period for payment after the execution of the contract is not
17 enforceable. If the amount payable is not paid as required,
18 interest on the amount shall be due and owing to the
19 contractor. Interest shall accrue on the day following the
20 later date described above and shall be paid from the same
21 fund or source from which the contract principal is paid. The
22 interest rate for payments shall be the legal amount currently
23 assessed for under payment of taxes under Section 40-1-44 (a).

24 "(3) Except as may be prohibited by Article I,
25 Section 14 of the Constitution of Alabama of 1901, a
26 contractor or awarding authority may file a civil action
27 against the party contractually obligated for the payment or

1 repayment claimed to recover the amount due plus the interest
2 accrued in accordance with this chapter. In addition to the
3 payment of any amounts due plus interest, if applicable, the
4 court shall award the prevailing party reasonable attorneys'
5 fees, court costs, and reasonable expenses. This provision
6 shall not apply to contracts administered by the Alabama
7 Building Commission, regardless of the source of the funds to
8 be utilized to fulfill the awarding authority's obligation
9 under the contract, or to contracts entered into by the
10 Alabama Department of Transportation for the construction or
11 maintenance of public highways, bridges, or roads.

12 "(j) If the Department of Transportation or a county
13 awarding authority shall determine that there has been
14 overpayment to a contractor on a contract award pursuant to
15 this chapter, the Department of Transportation or the county
16 awarding authority shall provide written notice of the
17 overpayment to the contractor and the contractor shall remit
18 the overpayment to the Department of Transportation or the
19 county awarding authority within 60 days of receipt of the
20 demand. If the contractor fails to remit payment in full of
21 the overpayment within 60 days of receipt of demand, the
22 contractor shall be disqualified from bidding as a prime
23 contractor or from performing work as a subcontractor on any
24 future Department of Transportation contract or county
25 contract for the construction or maintenance of public
26 highways, bridges, or roads until the overpayment is made. The
27 Department of Transportation or county awarding authority

1 shall also be entitled to interest from the contractor at the
2 rate assessed for under payment of taxes under Section 40-1-44
3 (a) beginning on the 61st day after the contractor's receipt
4 of demand.

5 "(k) The contract between the awarding authority and
6 contractor shall contain provisions outlining the source of
7 sufficient funds to be utilized to fulfill the awarding
8 authority's obligations under the contract, including whether
9 the funds are held by the awarding authority at the time of
10 the execution of the contract or whether the funds will become
11 available at a date following the execution of the contract.
12 Should the source of funds for the payment be a grant, award,
13 or direct reimbursement from the state, federal government, or
14 other source which will not become available until after the
15 execution of the contract, this shall be disclosed in the bid
16 document and contract and the provisions of this chapter
17 regarding prompt payment shall not apply until the awarding
18 authority is in receipt of the funds as provided in the
19 contract. Upon such receipt, the ~~45-day~~ 35-day requirement in
20 this chapter shall commence and shall be enforceable as
21 provided herein.

22 "(l) If subsurface or unknown physical conditions
23 are encountered differing materially from those indicated in
24 the contract, the party discovering the differing conditions
25 shall promptly notify all parties to the contract in writing
26 before the affected work is performed and in no event later
27 than 10 days after discovering the condition. Upon the owner's

1 receipt of written notification of materially different
2 conditions, the architect or engineer of record shall
3 investigate. If the architect or engineer determines that the
4 conditions are materially different from the contract and may
5 cause an increase or decrease in the cost or time required for
6 performance of the work under the contract, the architect or
7 engineer shall recommend to the owner that an adjustment of
8 the contract terms be made to adequately reflect the increase
9 or decrease in the cost or time required due to the condition
10 changes. If the architect or engineer determines that
11 materially different conditions do not exist, the architect or
12 engineer shall notify the owner and the contractor in writing
13 stating the reason for the determination.

14 "(l) (m) In the event of a conflict between the
15 provisions of this section and the provisions of any other
16 section of the Code of Alabama 1975, or any agency's or
17 department's rules, regulations, or manuals, this section
18 shall govern.

19 "(m) (n) The provisions of this section shall not
20 apply to any state agency established pursuant to Chapter 1 of
21 Title 33.

22 "(o) The provisions of this section shall not apply
23 to any contract relating to or concerning a declared state or
24 national emergency.

25 "(n) (p) The payment provisions of this section shall
26 not apply to contracts entered into by governmental entities

1 as a result of response and recovery to any of the conditions
2 described in Section 31-9-2(a).

3 "~~(o)~~ (g) The provisions set forth in this section
4 shall apply to all payments, partial or otherwise."

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

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Senate

Read for the first time and referred to the Senate
committee on Fiscal Responsibility and Account-
ability..... 21-FEB-13

Read for the second time and placed on the calen-
dar..... 18-APR-13

Read for the third time and passed as amended 30-APR-13

Yeas 30
Nays 0
Abstaining 1

Patrick Harris
Secretary