

1 HB71
2 140919-4
3 By Representative Roberts
4 RFD: Commerce and Small Business
5 First Read: 07-FEB-12
6 PFD: 01/23/2012

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ENROLLED, An Act,

To amend Section 39-2-12 of the Code of Alabama 1975, relating to timely execution of public works contracts; to prohibit an awarding authority from contractually increasing the time for payment for completing work beyond a certain number of days; to provide for interest of one percent per month to be added on any dollar amount approved and unpaid for each month; to require certification and proof of certification of the availability of funds by the awarding authority to pay contractors for the work under the contract; to provide that a contractor that is not paid should be entitled to recover reasonable attorney's fees, costs, and reasonable expenses in connection with the nonpayment.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. ~~Sections~~ Section 39-2-12 and ~~41-16-3~~ of the Code of Alabama 1975, ~~are~~ is amended to read as follows:

"§39-2-12.

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

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

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

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

14 "(b) Unless otherwise provided in the
15 specifications, partial payments shall be made as the work
16 progresses at the end of each calendar month, ~~or as soon~~
17 ~~thereafter as practicable, on the estimates made and approved~~
18 ~~by the awarding authority~~ but in no case later than 45 days
19 after the acceptance by the awarding authority that the
20 estimate and terms of the contract providing for partial
21 payments have been fulfilled. In preparing estimates, the
22 material delivered on the site, materials suitably stored and
23 insured off-site, and preparatory work done may be taken into
24 consideration. If the amount due by the awarding authority is
25 not in dispute and the amount payable is not paid within the

1 above 45-day period, the contractor to whom payment is due
2 shall also be entitled to interest from the awarding authority
3 at the rate of one percent per month (12 percent per annum) at
4 the rate assessed for underpayment of taxes under Section
5 40-1-44(a), Code of Alabama, 1975 on the unpaid balance due.
6 Any agreement to increase the 45-day period for payment after
7 the execution of the contract is not enforceable. Interest
8 payments shall not be due on payments made after the 45-day
9 period because of administrative or processing delays at the
10 close of the fiscal year. The provisions in this subsection
11 shall not apply to contracts administered by the Alabama
12 Building Commission, regardless of the source of the funds to
13 be utilized to fulfill the awarding authority's obligation
14 under the contract.

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

1 construction or maintenance of public highways, bridges, or
2 roads.

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

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

1 "(f) An escrow account, established pursuant to an
2 escrow agreement, shall be entered into only on the following
3 conditions:

4 "(1) If the contractor shall have entered into more
5 than one construction contract allowing for the maintenance of
6 escrow accounts, the contractor may elect to combine the
7 amounts held in lieu of retainage under each contract into one
8 or more escrow accounts or may elect to establish a separate
9 escrow account for each contract.

10 "(2) Only state or national banks chartered within
11 the State of Alabama or savings and loan associations
12 domiciled in the State of Alabama may serve as an escrow
13 agent.

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

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

4 "(5) The escrow agent shall periodically acknowledge
5 to the awarding authority and contractor the amount and value
6 of the escrow account held by the escrow agent, and any
7 additions to the escrow account by the awarding authority
8 shall be reported immediately to the contractor. Withdrawals
9 from the escrow account shall only be made subject to the
10 written approval of the awarding authority.

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

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

22 "(8) All fees and expenses of the escrow agent shall
23 be paid by the contractor to the escrow agent and if not paid
24 shall constitute a lien on the interest accruing to the escrow
25 account and shall be paid therefrom.

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

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

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

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

22 "(1) The contractor shall deposit with the State
23 Treasurer or the municipal or county official holding funds
24 belonging to the contractor, the following readily negotiable
25 security or any combination thereof in an amount at least

1 equal to the amount withdrawn, the security shall be accepted
2 at the time of deposit at market value but not in excess of
3 par value:

4 "a. U.S. Treasury Bonds, U.S. Treasury Notes, U.S.
5 Treasury Certificates of Indebtedness, or U.S. Treasury Bills.

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

7 "c. Bonds of any political subdivision of the State
8 of Alabama.

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

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

24 "(2) The agency or department of the state having
25 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

1 agency or department of the state, any municipality or county,
2 or any board, commission, or agency of the municipality or
3 county and the proceeds of the sale shall be used as if the
4 proceeds represented the retainage provided for under the
5 contract.

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

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

16 "a. A properly executed and duly certified voucher
17 for payment.

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

24 "c. Proof of advertisement as provided by law. Upon
25 proof of advertisement, the prescribed terms of payment shall

1 not be amended after the terms and specifications have been
2 published.

3 "(2) Such payment shall become due and owing ~~40~~ 45
4 days after all the requirements of subdivision (1) are
5 fulfilled, and any agreement to increase the 45-day period for
6 payment after the execution of the contract is not
7 enforceable. If the ~~awarding authority fails to make payment,~~
8 amount payable is not paid as required, interest on the amount
9 shall be due and owing to the contractor. ~~The interest rate~~
10 ~~shall be the legal amount currently charged by the State of~~
11 ~~Alabama Department of Revenue.~~ Interest shall accrue on the
12 day following the later date described above and shall be paid
13 from the same fund or source from which the contract principal
14 is paid. The interest rate for payments made by the state
15 shall be the legal amount currently charged by the State
16 Department of Revenue assessed for under payment of taxes
17 under Section 40-1-44 (a) , Code of Alabama, 1975 and for
18 payments made by all other entities, shall be at the rate of
19 one percent per month (12 percent per annum) on the unpaid
20 balance due.

21 "(3) Except as may be prohibited by Article I,
22 Section 14 of the Constitution of Alabama of 1901, a
23 contractor or awarding authority may file a civil action
24 against the party contractually obligated for the payment or
25 repayment claimed to recover the amount due plus the interest

1 accrued in accordance with this chapter. In addition to the
2 payment of any amounts due plus interest, if applicable, the
3 court shall award the prevailing party reasonable attorneys'
4 fees, court costs, and reasonable expenses. This provision
5 shall not apply to contracts administered by the Alabama
6 Building Commission, regardless of the source of the funds to
7 be utilized to fulfill the awarding authority's obligation
8 under the contract.

9 "(j) If the Department of Transportation or a county
10 awarding authority shall determine that there has been
11 overpayment to a contractor on a contract award pursuant to
12 this chapter, the Department of Transportation or the county
13 awarding authority shall provide written notice of the
14 overpayment to the contractor and the contractor shall remit
15 the overpayment to the Department of Transportation or the
16 county awarding authority within ~~120~~ 60 days of receipt of the
17 demand. If the contractor fails to remit payment in full of
18 the overpayment within ~~120~~ 60 days of receipt of demand, the
19 contractor shall be disqualified from bidding as a prime
20 contractor or from performing work as a subcontractor on any
21 future Department of Transportation contract or county
22 contract for the construction or maintenance of public
23 highways, bridges, or roads until the overpayment is made. The
24 Department of Transportation or county awarding authority
25 shall also be entitled to interest from the contractor at the

1 ~~rate of one percent per month (12 percent per annum). rate~~
2 ~~assessed for under payment of taxes under Section 40-1-44 (a)~~
3 ~~Code of Alabama 1975 beginning on the 61st day after the~~
4 ~~contractor's receipt 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
16 contract and the provisions of this chapter regarding prompt
17 payment shall not apply until the awarding authority is in
18 receipt of the funds as provided in the contract. Upon such
19 receipt, the 45-day requirement in this chapter shall commence
20 and shall be enforceable as provided herein.

21 "(l) In the event of a conflict between the
22 provisions of this section and the provisions of any other
23 section of the Code of Alabama 1975, or any agency's or
24 department's rules, regulations, or manuals, this section
25 shall govern.

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

4 "§41-16-3.

5 "~~(a) Whenever the State of Alabama is a party to any~~
6 ~~contract, the contract shall be executed by all parties in a~~
7 ~~timely fashion. When a party to a contract, other than the~~
8 ~~state, has fully executed the its responsibility under the~~
9 ~~contract and there remains only the payment of funds by the~~
10 ~~state, payment shall be made in a timely manner. If the amount~~
11 ~~due by the state is not in dispute, payment shall be made~~
12 ~~within 30 45 days after the other party has completed his or~~
13 ~~her portion of the contract and presented a proper invoice,~~
14 ~~the 45 days in which payment shall be made shall not be waived~~
15 ~~by either party to the contract. Any agreement to increase the~~
16 ~~45-day period for payment is not enforceable. If the amount~~
17 ~~payable is not paid within 30 45 days, the party to whom~~
18 ~~payment is due shall also be entitled to interest at the rate~~
19 ~~currently charged by the Alabama Department of Revenue on the~~
20 ~~any amount shall be charged approved and unpaid shall be added~~
21 ~~for each month or fraction thereof until final payment is~~
22 ~~made. The contract between the state and a contractor that is~~
23 ~~executed pursuant to this chapter shall contain a~~
24 ~~certification from the state that the state has funds~~
25 ~~sufficient to fulfill its obligations under the contract.~~

1 ~~Before commencement of the work by the contractor, the state~~
2 ~~shall furnish to the contractor reasonable evidence that~~
3 ~~financial arrangements have been made to fulfill the state's~~
4 ~~obligations under the contract. After the evidence has been~~
5 ~~furnished, the state shall not materially vary the financial~~
6 ~~arrangements without prior notice to the contractor. A party~~
7 ~~who receives a payment from the state in connection with a~~
8 ~~contract shall pay each of its subcontractors or~~
9 ~~sub-subcontractors the portion of the state's payment to the~~
10 ~~extent of that subcontractor's or sub-subcontractor's interest~~
11 ~~in the state's payment in accordance with the payment terms~~
12 ~~agreed to by the contractor and the subcontractor, but if~~
13 ~~payment terms are not agreed to, then within seven days after~~
14 ~~receipt of payment from the state. The payment shall include~~
15 ~~interest, if any, that is attributable to work performed by~~
16 ~~the subcontractor or sub-subcontractor. The interest rate~~
17 ~~shall be the legal amount currently charged by the state one~~
18 ~~percent per month of the unpaid balance. Interest shall be~~
19 ~~paid from the same fund or source from which the contract~~
20 ~~principal is paid. Nothing in this subsection shall prevent~~
21 ~~the state, contractor, or subcontractor from withholding~~
22 ~~payments if there is a bona fide dispute over one or more of~~
23 ~~the following:~~

24 ~~"(1) Unsatisfactory job progress.~~

25 ~~"(2) Defective construction not remedied.~~

1 ~~"(3) Disputed work.~~

2 ~~"(4) Third party claims filed or reasonable evidence~~
3 ~~that a claim will be filed.~~

4 ~~"(5) Failure of the contractor, subcontractor, or~~
5 ~~sub-subcontractor to make timely payments for labor, equipment~~
6 ~~and materials.~~

7 ~~"(6) Property damage to owner the state, contractor,~~
8 ~~or subcontractor.~~

9 ~~"(7) Reasonable evidence that the contract,~~
10 ~~subcontract, or sub-subcontract cannot be completed for the~~
11 ~~unpaid balance of the contract or contract sum.~~

12 ~~"(b) In the event that there is a bona fide dispute~~
13 ~~over all or any portion of the amount due on a progress~~
14 ~~payment from the owner state, contractor, or subcontractor~~
15 ~~then the owner state, contractor, or subcontractor may~~
16 ~~withhold payment in an amount not to exceed two times the~~
17 ~~disputed amount. In any civil action, the state, contractor,~~
18 ~~or subcontractor in whose favor a judgment is rendered shall~~
19 ~~be entitled to recover payment of reasonable attorney's fees~~
20 ~~and court costs.~~

21 ~~"(c) An owner The state is required to notify a~~
22 ~~contractor in writing within 15 days of receipt of any~~
23 ~~disputed request for payment. A contractor, subcontractor, and~~
24 ~~sub-subcontractor is required to provide written notification~~
25 ~~within five 10 days of disputed request for payment or notice~~

1 of disputed request for payment receipt of any disputed
2 request for payment.

3 ~~"(d) The amount of retainage withheld by the~~
4 ~~contractor to the subcontractor or the subcontractor to the~~
5 ~~sub-subcontractor shall not exceed the retainage withheld by~~
6 ~~the state unless interest as provided in subsection (a) is~~
7 ~~applied to the withheld amount.~~

8 ~~"(e) If the state, a contractor, or a subcontractor~~
9 ~~has not made payment in compliance with this chapter, the~~
10 ~~party that did not receive timely payment shall be entitled,~~
11 ~~in addition to the interest specified in this section and the~~
12 ~~contract amount due, to reasonable attorneys' fees, costs, and~~
13 ~~reasonable expenses incurred to collect the amount due.~~

14 ~~"(f) In the event of a conflict between the~~
15 ~~provisions of Section 41-16-3 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 ~~"(g) The provisions of Section 41-16-3 shall not~~
20 ~~apply to any state agency established pursuant to Chapter 1 of~~
21 ~~Title 33."~~

22 Section 2. The payment provisions of this amendatory
23 act shall not apply to contracts entered into by governmental
24 entities as a result of response and recovery to any of the

1 conditions described in Section 31-9-2(a), Code of Alabama
2 1975.

3 Section 3. The provisions set forth in this
4 amendatory act shall apply to all payments, partial or
5 otherwise.

6 Section 4. This act shall become effective on the
7 first day of the third month following its passage and
8 approval by the Governor, or its otherwise becoming law.

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Speaker of the House of Representatives

President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in
and was passed by the House 17-APR-12, as amended.

Greg Pappas
Clerk

Senate

08-MAY-12

Amended and Passed

House

08-MAY-12

Concurred in Sen-
ate Amendment