

1 SB437
2 128683-3
3 By Senators Smitherman, Marsh and Dunn
4 RFD: Commerce, Transportation, and Utilities
5 First Read: 21-APR-11

8 SYNOPSIS: Under existing law, prompt payment is
9 required on construction contracts for improvement
10 to real property. Public works contracts restrict
11 retainage, but payments of retainage to other
12 contractors is not defined or restricted in other
13 contracts.

14 This bill would amend the prompt payment law
15 related to construction contracts to define
16 retainage and to provide for the retainage
17 requirements in private construction contracts.
18

19 A BILL
20 TO BE ENTITLED
21 AN ACT
22

23 To amend Section 8-29-3 of the Code of Alabama 1975,
24 relating to prompt payment of construction contracts for
25 improvements to real property, to define retainage and to
26 provide for retainage in construction contracts covered by the
27 prompt pay act.

1 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

2 Section 1. Section 8-29-3 of the Code of Alabama
3 1975, is amended to read as follows:

4 "§8-29-3.

5 "(a) When a contractor has performed pursuant to his
6 or her contract and submits an application or pay request for
7 payment or an invoice for materials, to the owner or owner's
8 representative, the owner shall timely pay the contractor by
9 mailing via first class mail or delivering the amount of the
10 pay request or invoice in accordance with the payment terms
11 agreed to by the owner and the contractor, the agreed upon
12 payment terms must be specified in all contract documents, but
13 if payment terms are not agreed to, then within 30 days after
14 receipt of the pay request or invoice.

15 "(b) When a subcontractor has performed pursuant to
16 his or her contract and submits an application or pay request
17 for payment or an invoice for materials to a contractor in
18 sufficient time to allow the contractor to include the
19 application, request, or invoice in his or her own pay request
20 submitted to an owner, the contractor shall timely pay to the
21 subcontractor in accordance with the payment terms agreed to
22 by the contractor and subcontractor, but if payment terms are
23 not agreed to, then within seven days of receipt of payment
24 from owner by mailing via first class mail or delivering the
25 amount received for the subcontractor's work and materials
26 based on work properly completed or service properly provided
27 under the contract.

1 "(c) When a sub-subcontractor has performed labor or
2 supplied materials for a subcontractor pursuant to his or her
3 contract and submits an application or pay request for payment
4 or an invoice for materials to a subcontractor in sufficient
5 time to allow the subcontractor to include the application,
6 request, or invoice in his or her own pay request submitted to
7 a contractor, the subcontractor shall timely pay the
8 sub-subcontractor in accordance with the payment terms agreed
9 to by the subcontractor and sub-subcontractor but if payment
10 terms are not agreed to, then within seven days of receipt of
11 payment from contractor by mailing via first class mail or
12 delivering the amount received for the sub-subcontractor's
13 work and materials based on work properly completed or service
14 properly provided under the contract.

15 "(d) If the owner, contractor, or subcontractor does
16 not make payment in compliance with this chapter, the owner,
17 contractor, or subcontractor shall be obligated to pay his or
18 her contractor, subcontractor, or sub-subcontractor interest
19 at the rate of one percent per month (12% per annum) on the
20 unpaid balance due.

21 "(e) A contractor who receives a payment under
22 subsection (a) or otherwise, from an owner in connection with
23 a contract shall pay each of its subcontractors the portion of
24 the owner's payment to the extent of that subcontractor's
25 interest in the owner's payment. The payment shall include
26 interest, if any, that is attributable to work properly
27 performed or materials suitably stored by that subcontractor

1 if payment for stored materials is provided for in the
2 contract. The payment required by this subsection shall be
3 made not later than the seventh day after the date the
4 contractor receives the owner's payment.

5 "(f) The percentage of retainage on payments by the
6 contractor to the subcontractor shall not exceed the
7 percentage of retainage on payments made by the owner to the
8 contractor. Any percentage of retainage on payments made by
9 contractor to the subcontractor that exceeds the percentage of
10 retainage on payments made by the owner to the contractor
11 shall be subject to interest to be paid by the contractor to
12 the subcontractor at the rate of one percent per month (12%
13 per annum) .

14 "(g) The percentage of retainage on payments by the
15 subcontractor to the sub-subcontractor shall not exceed the
16 percentage of retainage on payments made by the contractor to
17 the subcontractor. Retainage on payments made by the
18 subcontractor to the sub-subcontractor that exceeds the
19 percentage of retainage on payments made by the contractor to
20 the subcontractor shall be subject to interest paid at the
21 rate of one percent per month (12% per annum) .

22 "(h) For the purposes of this chapter, retainage
23 means that money, or other security as agreed to by the
24 parties to a construction contract, earned by the contractor,
25 subcontractor or lower tier sub-subcontractor, or supplier for
26 work properly performed or materials suitably stored if
27 payment for stored materials is provided for in the contract,

1 which has been retained by the owner conditioned on final
2 completion and acceptance of all work in connection with a
3 project or projects by the contractor, subcontractor or lower
4 tier sub-subcontractor, or supplier.

5 "(i) A construction contract on any project in this
6 state may provide for the owner's withholding of retainage
7 from payments to its contractor for work performed by that
8 contractor on a construction project. There shall be retained
9 not more than 10 percent of the estimated amount of work
10 properly done and the value of materials stored on the site or
11 suitably stored and insured off-site, and after 50 percent
12 completion has been accomplished, no further retainage shall
13 be withheld. If an owner withholds an amount greater than that
14 allowed by this subsection, the owner shall be liable to the
15 contractor for interest accruing on the excess amount withheld
16 at the rate of one percent per month. Nothing herein is
17 intended to limit or alter the paying party's right to
18 withhold or not approve payment on grounds set forth in the
19 parties' contract or the grounds set forth in Section 8-29-4
20 or otherwise for work not properly performed or payment not
21 earned; rather, this section is intended only to establish a
22 maximum amount of retainage, establish the timing for release
23 of retainage, and provide for the payment of interest for
24 improperly held retainage.

25 "(j) A construction contract on any project in this
26 state may provide for the contractor's withholding of
27 retainage from payments to its subcontractors for work

1 performed by the subcontractors on a construction project.
2 There shall be retained not more than 10 percent of the
3 estimated amount of work properly done and the value of
4 materials stored on the site or suitably stored and insured
5 off-site, and after 50 percent completion has been
6 accomplished, no further retainage shall be withheld. If a
7 contractor withholds an amount greater than that allowed by
8 this subsection, the contractor shall be liable to the
9 subcontractor for interest accruing on the excess amount
10 withheld at the rate of one percent per month.

11 "(k) A construction contract on any project in this
12 state may provide for the subcontractor's withholding of
13 retainage from payments to its sub-subcontractors or material
14 suppliers for work performed by such sub-subcontractors or
15 material suppliers on a construction project. There shall be
16 retained not more than 10 percent of the estimated amount of
17 work properly done and the value of materials stored on the
18 site or suitably stored and insured off-site, and after 50
19 percent completion has been accomplished, no further retainage
20 shall be withheld. If a subcontractor withholds an amount
21 greater than that allowed by this subsection, the
22 subcontractor shall be liable to the sub-subcontractor or
23 material supplier for interest accruing on the excess amount
24 withheld at the rate of one percent per month.

25 "(l) (1) The owner shall release and pay retainage to
26 the contractor for work completed on any construction contract
27 no later than 60 days after the completion of the contractor's

1 work defined in its contract with the owner, or no later than
2 60 days after substantial completion of the project, whichever
3 occurs first. The contractor shall release and pay retainage
4 to its subcontractors for work completed pursuant to the terms
5 of this chapter.

6 "(2) For the purposes of this subsection,
7 substantial completion means the stage in the progress of the
8 project when the project or designated portion thereof is
9 sufficiently complete in accordance with the contract
10 documents so that the owner may occupy or utilize the project
11 for its intended purpose.

12 "(m) The provisions of subsections (h) through (l)
13 shall not apply to any construction project for or by an
14 electric utility regulated by the Public Service Commission."

15 Section 2. All laws or parts of laws which conflict
16 with this act are repealed.

17 Section 3. This act shall become effective on the
18 first day of the third month following its passage and
19 approval by the Governor, or its otherwise becoming law.