

1 SB437
2 132268-3
3 By Senators Smitherman, Marsh and Dunn
4 RFD: Commerce, Transportation, and Utilities
5 First Read: 21-APR-11

SB437

ENROLLED, An Act,

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

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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

"§8-29-3.

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

"(b) When a subcontractor has performed pursuant to his or her contract and submits an application or pay request

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

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

1 "(d) If the owner, contractor, or subcontractor does
2 not make payment in compliance with this chapter, the owner,
3 contractor, or subcontractor shall be obligated to pay his or
4 her contractor, subcontractor, or sub-subcontractor interest
5 at the rate of one percent per month (12% per annum) on the
6 unpaid balance due.

7 "(e) A contractor who receives a payment under
8 subsection (a) or otherwise, from an owner in connection with
9 a contract shall pay each of its subcontractors the portion of
10 the owner's payment to the extent of that subcontractor's
11 interest in the owner's payment. The payment shall include
12 interest, if any, that is attributable to work properly
13 performed or materials suitably stored by that subcontractor
14 if payment for stored materials is provided for in the
15 contract. The payment required by this subsection shall be
16 made not later than the seventh day after the date the
17 contractor receives the owner's payment.

18 "(f) The percentage of retainage on payments by the
19 contractor to the subcontractor shall not exceed the
20 percentage of retainage on payments made by the owner to the
21 contractor. Any percentage of retainage on payments made by
22 contractor to the subcontractor that exceeds the percentage of
23 retainage on payments made by the owner to the contractor
24 shall be subject to interest to be paid by the contractor to

1 the subcontractor at the rate of one percent per month (12%
2 per annum) .

3 "(g) The percentage of retainage on payments by the
4 subcontractor to the sub-subcontractor shall not exceed the
5 percentage of retainage on payments made by the contractor to
6 the subcontractor. Retainage on payments made by the
7 subcontractor to the sub-subcontractor that exceeds the
8 percentage of retainage on payments made by the contractor to
9 the subcontractor shall be subject to interest paid at the
10 rate of one percent per month (12% per annum) .

11 "(h) For the purposes of this chapter, retainage
12 means that money, or other security as agreed to by the
13 parties to a construction contract, earned by the contractor,
14 subcontractor or lower tier sub-subcontractor, or supplier for
15 work properly performed or materials suitably stored if
16 payment for stored materials is provided for in the contract,
17 which has been retained by the owner conditioned on final
18 completion and acceptance of all work in connection with a
19 project or projects by the contractor, subcontractor or lower
20 tier sub-subcontractor, or supplier.

21 "(i) A construction contract on any project in this
22 state may provide for the owner's withholding of retainage
23 from payments to its contractor for work performed by that
24 contractor on a construction project. There shall be retained
25 not more than 10 percent of the estimated amount of work

1 properly done and the value of materials stored on the site or
2 suitably stored and insured off-site, and after 50 percent
3 completion has been accomplished, no further retainage shall
4 be withheld. If an owner withholds an amount greater than that
5 allowed by this subsection, the owner shall be liable to the
6 contractor for interest accruing on the excess amount withheld
7 at the rate of one percent per month. Nothing herein is
8 intended to limit or alter the paying party's right to
9 withhold or not approve payment on grounds set forth in the
10 parties' contract or the grounds set forth in Section 8-29-4
11 or otherwise for work not properly performed or payment not
12 earned; rather, this section is intended only to establish a
13 maximum amount of retainage, establish the timing for release
14 of retainage, and provide for the payment of interest for
15 improperly held retainage.

16 "(j) A construction contract on any project in this
17 state may provide for the contractor's withholding of
18 retainage from payments to its subcontractors for work
19 performed by the subcontractors on a construction project.
20 There shall be retained not more than 10 percent of the
21 estimated amount of work properly done and the value of
22 materials stored on the site or suitably stored and insured
23 off-site, and after 50 percent completion has been
24 accomplished, no further retainage shall be withheld. If a
25 contractor withholds an amount greater than that allowed by

1 this subsection, the contractor shall be liable to the
2 subcontractor for interest accruing on the excess amount
3 withheld at the rate of one percent per month.

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

18 "(l) (1) The owner shall release and pay retainage to
19 the contractor for work completed on any construction contract
20 no later than 60 days after the completion of the contractor's
21 work defined in its contract with the owner, or no later than
22 60 days after substantial completion of the project, whichever
23 occurs first, and in both events, with all necessary
24 certificates of occupancy having been issued. The contractor

1 shall release and pay retainage to its subcontractors for work
2 completed pursuant to the terms of this chapter.

3 "(2) For the purposes of this subsection,
4 substantial completion means the stage in the progress of the
5 project when the project or designated portion thereof is
6 sufficiently complete in accordance with the contract
7 documents with all necessary certificates of occupancy having
8 been issued so that the owner may occupy or utilize the
9 project for its intended purpose.

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

13 "(n) Nothing herein limits or alters the paying
14 party's right to withhold or not approve payment on grounds
15 set forth in the party's contract or the grounds set forth in
16 Section 8-29-4 or otherwise for work not properly performed or
17 payment not earned; rather, this section is intended only to
18 establish a maximum amount of retainage, establish the timing
19 for release of retainage, and provide for the payment of
20 interest for improperly held retainage. Also, the paying party
21 may condition payment on the receipt of a full release of any
22 lien of the contractor, subcontractor, or sub-subcontractor
23 for the amount of work being paid.

24 "(o) All loans and loan proceeds related to a
25 construction project, and the disbursement and use thereof,

1 are governed solely by the terms of the documents evidencing
2 and securing the loan, and contractors, subcontractors, and
3 sub-subcontractors have no lien or rights in any such loan,
4 loan proceeds, or the disbursement or use thereof."

5 Section 2. The provisions of this amendatory act
6 shall apply only to contracts entered into on or after the
7 effective date of this act.

8 Section 3. All laws or parts of laws which conflict
9 with this act are repealed.

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

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President and Presiding Officer of the Senate

Speaker of the House of Representatives

SB437

Senate 25-MAY-11

I hereby certify that the within Act originated in and passed
the Senate.

Patrick Harris
Secretary

House of Representatives
Amended and passed 02-JUN-11

Senate concurred in House amendment 02-JUN-11

By: Senator Smitherman