

1           HB71  
2        133989-1  
3        By Representative Roberts  
4        RFD: Commerce and Small Business  
5        First Read: 07-FEB-12  
6        PFD: 01/23/2012

8 SYNOPSIS: This bill would prohibit an awarding  
9 authority from contractually increasing the time  
10 for payment for completed work beyond 30 days and  
11 would provide for interest of one percent per month  
12 to be added on any dollar amount approved and  
13 unpaid for each month until final payment is made.

14 This bill would require certification and  
15 proof of certification of the availability of funds  
16 by the awarding authority to pay contractors for  
17 the work under the contract.

18 This bill would provide that a contractor  
19 that is not paid by the awarding authority would be  
20 entitled to recover reasonable attorneys' fees,  
21 costs, and reasonable expenses in connection with  
22 the nonpayment.

23 This bill would prohibit the state from  
24 contractually increasing the time for payment for  
25 completed work beyond 30 days and would provide for  
26 interest of one percent per month to be added on

1                   any dollar amount approved and unpaid for until  
2                   final payment is made.

3                   This bill would require certification and  
4                   proof of certification of the availability of funds  
5                   by the state to pay contractors for the work under  
6                   the contract.

7                   This bill would provide that the state, a  
8                   contractor, subcontractor, or sub-subcontractor  
9                   that is not paid to be entitled to recover  
10                  reasonable attorneys' fees, costs, and reasonable  
11                  expenses in connection with the nonpayment.

12

13                   A BILL

14                   TO BE ENTITLED

15                   AN ACT

16

17                   To amend Section 39-2-12 of the Code of Alabama  
18                  1975, relating to timely execution of public works contracts;  
19                  to prohibit an awarding authority from contractually  
20                  increasing the time for payment for completing work beyond 30  
21                  days; to provide for interest of one percent per month to be  
22                  added on any dollar amount approved and unpaid for each month;  
23                  to require certification and proof of certification of the  
24                  availability of funds by the awarding authority to pay  
25                  contractors for the work under the contract; to provide that a  
26                  contractor that is not paid should be entitled to recover  
27                  reasonable attorney's fees, costs, and reasonable expenses in

1 connection with the nonpayment; to amend Section 41-16-3 of  
2 the Code of Alabama 1975, relating to timely execution and  
3 payment of state contractors; to prohibit the state from  
4 contractually increasing the time for payment for completing  
5 work beyond 30 days; to provide for interest of one percent  
6 per month to be added on any dollar amount approved and unpaid  
7 for each month; to require certification and proof of  
8 certification of the availability of funds by the state to pay  
9 contractors for the work under the contract; and to provide  
10 that a contractor, subcontractor, or sub-subcontractor that is  
11 not paid should be entitled to recover reasonable attorneys'  
12 fees, costs, and reasonable expenses in connection with the  
13 nonpayment.

14 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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

17 "§39-2-12.

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

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

24 "(2) NONRESIDENT CONTRACTOR. A contractor which is  
25 neither a. organized and existing under the laws of the State  
26 of Alabama, nor b. maintains its principal place of business  
27 in the State of Alabama. A nonresident contractor which has

maintained a permanent branch office within the State of Alabama for at least five continuous years shall not thereafter be deemed to be a nonresident contractor so long as the contractor continues to maintain a branch office within Alabama.

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

"(b) Unless otherwise provided in the specifications, partial payments shall be made as the work progresses at the end of each calendar month, ~~or as soon thereafter as practicable, on the estimates made and approved by the awarding authority but in no case later than 30 days after the presentation by the contractor to the awarding authority of a proper payment estimate.~~ In preparing estimates, the material delivered on the site, materials suitably stored and insured off-site, and preparatory work done may be taken into consideration. ~~If the amount due by the awarding authority is not in dispute and the amount payable is not paid within the above 30-day period, the contractor to whom payment is due shall also be entitled to interest from the awarding authority at the rate of one percent per month (12 percent per annum) on the unpaid balance due. Any agreement to increase the 30-day period for payment is not enforceable.~~

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

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

23 "(2) Such payment shall become due and owing ~~40~~ 30  
24 days after all the requirements of subdivision (1) are  
25 fulfilled, and any agreement to increase the 30-day period for  
26 payment is not enforceable. If the ~~awarding authority fails to~~  
27 ~~make payment, amount payable is not paid as required, interest~~

1 on the amount shall be due and owing to the contractor. The  
2 interest rate shall be ~~the legal amount currently charged by~~  
3 ~~the State of Alabama Department of Revenue at the rate of one~~  
4 ~~percent per month (12 percent per annum)~~ on the unpaid balance  
5 ~~due.~~ Interest shall accrue on the day following the later date  
6 described above and shall be paid from the same fund or source  
7 from which the contract principal is paid.

8                 "(3) A contractor may file a civil action against  
9 the party contractually obligated for the payment of the  
10 amount claimed to recover the amount due plus the interest  
11 accrued in accordance with this chapter. If the court finds in  
12 the civil action that the awarding authority has not made  
13 payment in compliance with this chapter, the court shall award  
14 the party that did not receive payment the interest specified  
15 in this chapter in addition to the amount due plus reasonable  
16 attorneys' fees, court costs, and reasonable expenses.

17                 "(j) If the Department of Transportation or a county  
18 awarding authority shall determine that there has been  
19 overpayment to a contractor on a contract award pursuant to  
20 this chapter, the Department of Transportation or the county  
21 awarding authority shall provide written notice of the  
22 overpayment to the contractor and the contractor shall remit  
23 the overpayment to the Department of Transportation or the  
24 county awarding authority within 120 days of receipt of the  
25 demand. If the contractor fails to remit payment in full of  
26 the overpayment within 120 days of receipt of demand, the  
27 contractor shall be disqualified from bidding as a prime

1 contractor or from performing work as a subcontractor on any  
2 future Department of Transportation contract or county  
3 contract for the construction or maintenance of public  
4 highways, bridges, or roads until the overpayment is made.

5 "(k) The contract between the awarding authority and  
6 contractor must contain a certification from the awarding  
7 authority that the awarding authority has funds sufficient to  
8 fulfill the awarding authority's obligations under the  
9 contract. Before the commencement of the work, the awarding  
10 authority must furnish to the contractor reasonable evidence  
11 that financial arrangements have been made to fulfill the  
12 awarding authority's obligations under the contract. After  
13 such evidence has been furnished, the awarding authority shall  
14 not materially vary the financial arrangements without prior  
15 notice to the contractor.

16 "(l) In the event of a conflict between the  
17 provisions of Section 39-2-12 and the provisions of any other  
18 section of the Code of Alabama 1975, or any agency's or  
19 department's rules, regulations, or manuals, this section  
20 shall govern.

21 "(m) The provisions of Section 39-2-12 shall not  
22 apply to any state agency established pursuant to Chapter 1 of  
23 Title 33.

24 "§41-16-3.

25 "(a) Whenever the State of Alabama is a party to any  
26 contract, the contract shall be executed by all parties in a  
27 timely fashion. When a party to a contract, other than the

1 state, has fully executed ~~the~~ its responsibility under the  
2 contract and there remains only the payment of funds by the  
3 state, payment shall be made in a timely manner. If the amount  
4 due by the state is not in dispute, payment shall be made  
5 within 30 days after the other party has completed his or her  
6 portion of the contract and presented a proper invoice, the 30  
7 days in which payment shall be made shall not be waived by  
8 either party to the contract. Any agreement to increase the  
9 30-day period for payment is not enforceable. If the amount  
10 payable is not paid within 30 days, the party to whom payment  
11 is due shall also be entitled to interest of one percent per  
12 month on the any amount shall be charged approved and unpaid  
13 shall be added for each month or fraction thereof until final  
14 payment is made. The contract between the state and a  
15 contractor that is executed pursuant to this chapter must  
16 contain a certification from the state that the state has  
17 funds sufficient to fulfill its obligations under the  
18 contract. Before commencement of the work by the contractor,  
19 the state must furnish to the contractor reasonable evidence  
20 that financial arrangements have been made to fulfill the  
21 state's obligations under the contract. After such evidence  
22 has been furnished, the state shall not materially vary such  
23 financial arrangements without prior notice to the contractor.  
24 A party who receives a payment from the state in connection  
25 with a contract shall pay each of its subcontractors or  
26 sub-subcontractors the portion of the state's payment to the  
27 extent of that subcontractor's or sub-subcontractor's interest

1 in the state's payment in accordance with the payment terms  
2 agreed to by the contractor and the subcontractor, but if  
3 payment terms are not agreed to, then within seven days after  
4 receipt of payment from the state. The payment shall include  
5 interest, if any, that is attributable to work performed by  
6 the subcontractor or sub-subcontractor. The interest rate  
7 shall be ~~the legal amount currently charged by the state~~ one  
8 percent per month. Interest shall be paid from the same fund  
9 or source from which the contract principal is paid. Nothing  
10 in this subsection shall prevent the state, contractor, or  
11 subcontractor from withholding payments if there is a bona  
12 fide dispute over one or more of the following:

13                 "(1) Unsatisfactory job progress.

14                 "(2) Defective construction not remedied.

15                 "(3) Disputed work.

16                 "(4) Third party claims filed or reasonable evidence  
17 that a claim will be filed.

18                 "(5) Failure of the contractor, subcontractor, or  
19 sub-subcontractor to make timely payments for labor, equipment  
20 and materials.

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

23                 "(7) Reasonable evidence that the contract,  
24 subcontract, or sub-subcontract cannot be completed for the  
25 unpaid balance of the contract or contract sum.

26                 "(b) In the event that there is a bona fide dispute  
27 over all or any portion of the amount due on a progress

1 payment from the owner state, contractor, or subcontractor  
2 then the owner state, contractor, or subcontractor may  
3 withhold payment in an amount not to exceed two times the  
4 disputed amount. In any civil action, the state, contractor,  
5 or subcontractor in whose favor a judgment is rendered shall  
6 be entitled to recover payment of reasonable attorney's fees  
7 and court costs.

8 "(c) An owner The state is required to notify a  
9 contractor in writing within 15 days of receipt of any  
10 disputed request for payment. A contractor, subcontractor, and  
11 sub-subcontractor is required to provide written notification  
12 within five 10 days of disputed request for payment or notice  
13 of disputed request for payment receipt of any disputed  
14 request for payment.

15 "(d) The amount of retainage withheld by the  
16 contractor to the subcontractor or the subcontractor to the  
17 sub-subcontractor shall not exceed the retainage withheld by  
18 the state unless interest as provided in subsection (a) is  
19 applied to the withheld amount.

20 "(e) If the state, a contractor, or a subcontractor  
21 has not made payment in compliance with this chapter, the  
22 party that did not receive timely payment shall be entitled,  
23 in addition to the interest specified in this section and the  
24 contract amount due, to reasonable attorneys' fees, costs, and  
25 reasonable expenses incurred to collect the amount due.

26 "(f) In the event of a conflict between the  
27 provisions of Section 41-16-3 and the provisions of any other

1                   section of the Code of Alabama 1975, or any agency's or  
2                   department's rules, regulations, or manuals, this section  
3                   shall govern.

4                   "(q) The provisions of Section 41-16-3 shall not  
5                   apply to any state agency established pursuant to Chapter 1 of  
6                   Title 33."

7                   Section 2. The provisions set forth in this  
8                   amendatory act shall apply to all payments, partial or  
9                   otherwise.

10                  Section 3. 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.