

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

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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

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

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

10 "(b) Unless otherwise provided in the
11 specifications, partial payments shall be made as the work
12 progresses at the end of each calendar month, ~~or as soon~~
13 ~~thereafter as practicable, on the estimates made and approved~~
14 ~~by the awarding authority~~ but in no case later than 30 days
15 after the presentation by the contractor to the awarding
16 authority of a proper payment estimate. In preparing
17 estimates, the material delivered on the site, materials
18 suitably stored and insured off-site, and preparatory work
19 done may be taken into consideration. If the amount due by the
20 awarding authority is not in dispute and the amount payable is
21 not paid within the above 30-day period, the contractor to
22 whom payment is due shall also be entitled to interest from
23 the awarding authority at the rate of one percent per month
24 (12 percent per annum) on the unpaid balance due. Any
25 agreement to increase the 30-day period for payment is not
26 enforceable.

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

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