

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

ENGROSSED

A BILL

TO BE ENTITLED

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; to amend Section 41-16-3 of the Code of Alabama 1975, relating to timely execution and payment of state contractors; to prohibit the state 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 state to pay contractors for the

1 work under the contract; and to provide that a contractor,
2 subcontractor, or sub-subcontractor that is not paid should be
3 entitled to recover reasonable attorneys' fees, costs, and
4 reasonable expenses in connection with the nonpayment.

5 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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

8 "§39-2-12.

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

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

15 "(2) NONRESIDENT CONTRACTOR. A contractor which is
16 neither a. organized and existing under the laws of the State
17 of Alabama, nor b. maintains its principal place of business
18 in the State of Alabama. A nonresident contractor which has
19 maintained a permanent branch office within the State of
20 Alabama for at least five continuous years shall not
21 thereafter be deemed to be a nonresident contractor so long as
22 the contractor continues to maintain a branch office within
23 Alabama.

24 "(3) RETAINAGE. That money belonging to the
25 contractor which has been retained by the awarding authority
26 conditioned on final completion and acceptance of all work in
27 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 45 days after the acceptance by the awarding authority that the estimate and terms of the contract providing for partial payments have been fulfilled.~~ 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 45-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) at the rate assessed for underpayment of taxes under Section 40-1-44(a), Code of Alabama, 1975 on the unpaid balance due. Any agreement to increase the 45-day period for payment after the execution of the contract is not enforceable. Interest payments shall not be due on payments made after the 45-day period because of administrative or processing delays at the close of the fiscal year. The provisions in this subsection shall not apply to contracts administered by the Alabama Building Commission, regardless of the source of the funds to be utilized to fulfill the awarding authority's obligation under the contract.

"(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. Upon
23 proof of advertisement, the prescribed terms of payment shall
24 not be amended after the terms and specifications have been
25 published.

26 "(2) Such payment shall become due and owing ~~40~~ 45
27 days after all the requirements of subdivision (1) are

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

17 "(3) Except as may be prohibited by Article I,
18 Section 14 of the Constitution of Alabama of 1901, a
19 contractor or awarding authority may file a civil action
20 against the party contractually obligated for the payment or
21 repayment claimed to recover the amount due plus the interest
22 accrued in accordance with this chapter. In addition to the
23 payment of any amounts due plus interest, if applicable, the
24 court shall award the prevailing party reasonable attorneys'
25 fees, court costs, and reasonable expenses. This provision
26 shall not apply to contracts administered by the Alabama
27 Building Commission, regardless of the source of the funds to

1 be utilized to fulfill the awarding authority's obligation
2 under the contract.

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

21 "(k) The contract between the awarding authority and
22 contractor shall contain provisions outlining the source of
23 sufficient funds to be utilized to fulfill the awarding
24 authority's obligations under the contract, including whether
25 the funds are held by the awarding authority at the time of
26 the execution of the contract or whether the funds will become
27 available at a date following the execution of the contract.

1 Should the source of funds for the payment be a grant, award,
2 or direct reimbursement from the state, federal government, or
3 other source which will not become available until after the
4 execution of the contract, this shall be disclosed in the
5 contract and the provisions of this chapter regarding prompt
6 payment shall not apply until the awarding authority is in
7 receipt of the funds as provided in the contract. Upon such
8 receipt, the 45-day requirement in this chapter shall commence
9 and shall be enforceable as provided herein.

10 " (l) In the event of a conflict between the
11 provisions of this section and the provisions of any other
12 section of the Code of Alabama 1975, or any agency's or
13 department's rules, regulations, or manuals, this section
14 shall govern.

15 " (m) The provisions of this section shall not apply
16 to any state agency established pursuant to Chapter 1 of Title
17 33.

18 " §41-16-3.

19 " (a) Whenever the State of Alabama is a party to any
20 contract, the contract shall be executed by all parties in a
21 timely fashion. When a party to a contract, other than the
22 state, has fully executed the its responsibility under the
23 contract and there remains only the payment of funds by the
24 state, payment shall be made in a timely manner. If the amount
25 due by the state is not in dispute, payment shall be made
26 within 30 45 days after the other party has completed his or
27 her portion of the contract and presented a proper invoice,

1 the 45 days in which payment shall be made shall not be waived
2 by either party to the contract. Any agreement to increase the
3 45 day period for payment is not enforceable. If the amount
4 payable is not paid within 30 45 days, the party to whom
5 payment is due shall also be entitled to interest at the rate
6 currently charged by the Alabama Department of Revenue on the
7 any amount shall be charged approved and unpaid shall be added
8 for each month or fraction thereof until final payment is
9 made. The contract between the state and a contractor that is
10 executed pursuant to this chapter shall contain a
11 certification from the state that the state has funds
12 sufficient to fulfill its obligations under the contract.
13 Before commencement of the work by the contractor, the state
14 shall furnish to the contractor reasonable evidence that
15 financial arrangements have been made to fulfill the state's
16 obligations under the contract. After the evidence has been
17 furnished, the state shall not materially vary the financial
18 arrangements without prior notice to the contractor. A party
19 who receives a payment from the state in connection with a
20 contract shall pay each of its subcontractors or
21 sub-subcontractors the portion of the state's payment to the
22 extent of that subcontractor's or sub-subcontractor's interest
23 in the state's payment in accordance with the payment terms
24 agreed to by the contractor and the subcontractor, but if
25 payment terms are not agreed to, then within seven days after
26 receipt of payment from the state. The payment shall include
27 interest, if any, that is attributable to work performed by

1 the subcontractor or sub-subcontractor. The interest rate
2 shall be the legal amount currently charged by the state one
3 percent per month of the unpaid balance. Interest shall be
4 paid from the same fund or source from which the contract
5 principal is paid. Nothing in this subsection shall prevent
6 the state, contractor, or subcontractor from withholding
7 payments if there is a bona fide dispute over one or more of
8 the following:

9 "(1) Unsatisfactory job progress.

10 "(2) Defective construction not remedied.

11 "(3) Disputed work.

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

14 "(5) Failure of the contractor, subcontractor, or
15 sub-subcontractor to make timely payments for labor, equipment
16 and materials.

17 "(6) Property damage to owner the state, contractor,
18 or subcontractor.

19 "(7) Reasonable evidence that the contract,
20 subcontract, or sub-subcontract cannot be completed for the
21 unpaid balance of the contract or contract sum.

22 "(b) In the event that there is a bona fide dispute
23 over all or any portion of the amount due on a progress
24 payment from the owner state, contractor, or subcontractor
25 then the owner state, contractor, or subcontractor may
26 withhold payment in an amount not to exceed two times the
27 disputed amount. In any civil action, the state, contractor,

1 or subcontractor in whose favor a judgment is rendered shall
2 be entitled to recover payment of reasonable attorney's fees
3 and court costs.

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

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

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

22 "(f) In the event of a conflict between the
23 provisions of Section 41-16-3 and the provisions of any other
24 section of the Code of Alabama 1975, or any agency's or
25 department's rules, regulations, or manuals, this section
26 shall govern.

1 ~~"(g) The provisions of Section 41-16-3 shall not~~
2 ~~apply to any state agency established pursuant to Chapter 1 of~~
3 ~~Title 33."~~

4 Section 2. The payment provisions of this amendatory
5 act shall not apply to contracts entered into by governmental
6 entities as a result of response and recovery to any of the
7 conditions described in Section 31-9-2(a), Code of Alabama
8 1975.

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

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

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House of Representatives

4 Read for the first time and re-
5 ferred to the House of Representa-
6 tives committee on Commerce and
7 Small Business..... 07-FEB-12

8

9 Read for the second time and placed
10 on the calendar 1 amendment 01-MAR-12

11

12 Read for the third time and passed
13 as amended..... 17-APR-12

14

Yea 72, Nays 14, Abstains 0

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Greg Pappas
Clerk