

1 HB24
2 154751-4
3 By Representative Roberts
4 RFD: Transportation, Utilities and Infrastructure
5 First Read: 14-JAN-14
6 PFD: 10/02/2013

1 ENGROSSED

2
3
4 A BILL
5 TO BE ENTITLED
6 AN ACT
7

8 To amend Section 39-2-2, Code of Alabama 1975, and
9 Section 39-2-12, Code of Alabama 1975, relating to public
10 works contracts; to require pre-bid meetings to be held at
11 least seven days prior to bid opening; to prohibit the
12 modification of specifications within 24 hours of the opening
13 of a bid; to reduce the timeframe for payment of completed
14 work; to remove the provision in current law that provides
15 that the prompt payment provisions will not apply until an
16 awarding authority is in receipt of funds as provided in the
17 contract; to provide for the review and approval of the
18 progress of completed work; to provide procedures for the
19 dispute of a submitted invoice; and to provide for the
20 alteration of contract terms upon the discovery of certain
21 material changes in the property where work is to be
22 performed.

23 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

24 Section 1. Section 39-2-2, Code of Alabama 1975, and
25 Section 39-2-12, Code of Alabama 1975, are amended to read as
26 follows:

27 "§39-2-2.

1 "(a) Before entering into any contract for a public
2 works involving an amount in excess of fifty thousand dollars
3 (\$50,000), the awarding authority shall advertise for sealed
4 bids. If the awarding authority is the state or a county, or
5 an instrumentality thereof, it shall advertise for sealed bids
6 at least once each week for three consecutive weeks in a
7 newspaper of general circulation in the county or counties in
8 which the improvement or some part thereof, is to be made. If
9 the awarding authority is a municipality, or an
10 instrumentality thereof, it shall advertise for sealed bids at
11 least once in a newspaper of general circulation published in
12 the municipality where the awarding authority is located. If
13 no newspaper is published in the municipality, the awarding
14 authority shall advertise by posting notice thereof on a
15 bulletin board maintained outside the purchasing office and in
16 any other manner and for the length of time as may be
17 determined. In addition to bulletin board notice, sealed bids
18 shall also be solicited by sending notice by mail to all
19 persons who have filed a request in writing with the official
20 designated by the awarding authority that they be listed for
21 solicitation on bids for the public works contracts indicated
22 in the request. If any person whose name is listed fails to
23 respond to any solicitation for bids after the receipt of
24 three such solicitations, the listing may be canceled. With
25 the exception of the Department of Transportation, for all
26 public works contracts involving an estimated amount in excess
27 of five hundred thousand dollars (\$500,000), awarding

1 authorities shall also advertise for sealed bids at least once
2 in three newspapers of general circulation throughout the
3 state. The advertisements shall briefly describe the
4 improvement, state that plans and specifications for the
5 improvement are on file for examination in a designated office
6 of the awarding authority, state the procedure for obtaining
7 plans and specifications, state the time and place in which
8 bids shall be received and opened, and identify whether
9 prequalification is required and where all written
10 prequalification information is available for review. All bids
11 shall be opened publicly at the advertised time and place. No
12 public work as defined in this chapter involving a sum in
13 excess of fifty thousand dollars (\$50,000) shall be split into
14 parts involving sums of fifty thousand dollars (\$50,000) or
15 less for the purpose of evading the requirements of this
16 section.

17 "(b) An awarding authority may let contracts for
18 public works involving fifty thousand dollars (\$50,000) or
19 less with or without advertising or sealed bids.

20 "(c) All contracts for public works entered into in
21 violation of this title shall be null, void, and violative of
22 public policy. Anyone who willfully violates this article
23 concerning public works shall be guilty of a Class C felony.

24 "(d) Excluded from the operation of this title shall
25 be contracts with persons who shall perform only
26 architectural, engineering, construction management, program
27 management, or project management services in support of the

1 public works and who shall not engage in actual construction,
2 repair, renovation, or maintenance of the public works with
3 their own forces, by contract, subcontract, purchase order,
4 lease, or otherwise.

5 "(e) In case of an emergency affecting public
6 health, safety, or convenience, as declared in writing by the
7 awarding authority, setting forth the nature of the danger to
8 the public health, safety, or convenience which would result
9 from delay, contracts may be let to the extent necessary to
10 meet the emergency without public advertisement. The action
11 and the reasons for the action taken shall immediately be made
12 public by the awarding authority upon request.

13 "(f) No awarding authority may specify in the plans
14 and specifications for the improvement the use of materials,
15 products, systems, or services by a sole source unless all of
16 the following requirements are met:

17 "(1) Except for contracts involving the
18 construction, reconstruction, renovation, or replacement of
19 public roads, bridges, and water and sewer facilities, the
20 awarding authority can document to the satisfaction of the
21 State Building Commission that the sole source product,
22 material, system, or service is of an indispensable nature for
23 the improvement, that there are no other viable alternatives,
24 and that only this particular product, material, system, or
25 service fulfills the function for which it is needed.

26 "(2) The sole source specification has been
27 recommended by the architect or engineer of record as an

1 indispensable item for which there is no other viable
2 alternative.

3 "(3) All information substantiating the use of a
4 sole source specification, including the recommendation of the
5 architect or engineer of record, shall be documented and made
6 available for examination in the office of the awarding
7 authority at the time of advertisement for sealed bids.

8 "(g) In the event of a proposed public works
9 project, acknowledged in writing by the Alabama Homeland
10 Security Department as (1) having a direct impact on the
11 security or safety of persons or facilities and (2) requiring
12 confidential handling for the protection of such persons or
13 facilities, contracts may be let without public advertisement
14 but with the taking of informal bids otherwise consistent with
15 the requirements of this title and the requirements of
16 maintaining confidentiality. Records of bidding and award
17 shall not be disclosed to the public, and shall remain
18 confidential.

19 "(h) If a pre-bid meeting is held, the pre-bid
20 meeting shall be held at least seven days prior to the bid
21 opening except when the project has been declared an emergency
22 in accordance with subsection (e).

23 ~~"(i) Specifications for a proposed public works~~
24 ~~project may not be modified within 24 hours of the bid~~
25 ~~opening.~~

26 "§39-2-12.

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

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

7 "(2) NONRESIDENT CONTRACTOR. A contractor which is
8 neither a. organized and existing under the laws of the State
9 of Alabama, nor b. maintains its principal place of business
10 in the State of Alabama. A nonresident contractor which has
11 maintained a permanent branch office within the State of
12 Alabama for at least five continuous years shall not
13 thereafter be deemed to be a nonresident contractor so long as
14 the contractor continues to maintain a branch office within
15 Alabama.

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

20 "(b) (1) Unless otherwise provided in the
21 specifications, partial payments shall be made as the work
22 progresses at the end of each calendar month, but in no case
23 later than ~~45~~ 35 days after the ~~acceptance by the~~ acceptance
24 by the awarding authority ~~designee has signed the pay~~
25 ~~authorization which recognizes~~ that the estimate and terms of
26 the contract providing for partial payments have been
27 fulfilled. The contract between the contractor and the

1 awarding authority shall designate a person to review the
2 progress of completed work. The designated person shall review
3 completed work within 10 days and then submit the invoice to
4 the awarding authority for payment. In the event of an error
5 or dispute, the designated person shall submit, within 10 days
6 from the completion of the work, in writing to the contractor
7 the reason for the disapproval of the invoice and specify
8 procedures for dispute resolution of the submitted invoice.
9 work and to review documents submitted by the contractor as
10 provided in this section. Except as otherwise provided for the
11 Department of Transportation, the designated person, within 10
12 days, shall review the submission and respond in writing to
13 accept or forward, as provided in this subsection, a request
14 for payment. For contracts involving the Department of
15 Transportation, the time frame for review and response shall
16 be 20 days. In the event of an error in the submission or a
17 dispute regarding compliance with the provisions of the
18 contract, the error or dispute shall be disclosed in writing
19 to the contractor within 10 days and, after corrective actions
20 are taken, the invoice may be resubmitted and shall be
21 addressed as provided in this section; provided that for
22 contracts involving the Department of Transportation, the time
23 frame for review and response shall be 20 days. In the absence
24 of error or dispute, the awarding authority shall proceed
25 within 10 days as follows for payment of the invoice:

26 "a. For contracts subject to subsection (1), the
27 awarding authority shall forward the request for payment to

1 the entity or agency that is the source of funding to be used
2 by the contractor.

3 "b. For contracts not subject to subsection (1), the
4 payment shall be made by the contracting agency in accordance
5 with the payment requirements and deadlines established in
6 this section.

7 (2) In preparing estimates, the material delivered
8 on the site, materials suitably stored and insured off-site,
9 and preparatory work done may be taken into consideration. If
10 the amount due by the awarding authority is not in dispute and
11 the amount payable is not paid within the above ~~45-day~~ 35-day
12 period, the contractor to whom payment is due shall also be
13 entitled to interest from the awarding authority at the rate
14 assessed for underpayment of taxes under Section 40-1-44(a),
15 on the unpaid balance due. Any agreement to increase the
16 ~~45-day~~ 35-day period for payment after the execution of the
17 contract is not enforceable. Interest payments shall not be
18 due on payments made after the ~~45-day~~ 35-day period because of
19 administrative or processing delays at the close of the fiscal
20 year or delays resulting from official and announced closures
21 by the awarding authority. The provisions in this subsection
22 shall not apply to contracts administered by the Alabama
23 Building Commission, regardless of the source of the funds to
24 be utilized to fulfill the awarding authority's obligation
25 under the contract.

26 "(c) In making the partial payments, there shall be
27 retained not more than five percent of the estimated amount of

1 work 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. The retainage as set out above shall be held
5 until final completion and acceptance of all work covered by
6 the contract unless the escrow or deposit arrangement
7 described in subsections (f) and (g) is utilized. Provided,
8 however, no retainage shall be withheld on contracts entered
9 into by the Alabama Department of Transportation for the
10 construction or maintenance of public highways, bridges, or
11 roads.

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

1 "(e) In lieu of the retained amounts provided for in
2 subsection (c) of this section, the awarding authority may
3 provide in the specifications or contracts an alternate
4 procedure for the maintenance of an escrow account as provided
5 in subsection (f) or the depositing of security as provided in
6 subsection (g).

7 "(f) An escrow account, established pursuant to an
8 escrow agreement, shall be entered into only on the following
9 conditions:

10 "(1) If the contractor shall have entered into more
11 than one construction contract allowing for the maintenance of
12 escrow accounts, the contractor may elect to combine the
13 amounts held in lieu of retainage under each contract into one
14 or more escrow accounts or may elect to establish a separate
15 escrow account for each contract.

16 "(2) Only state or national banks chartered within
17 the State of Alabama or savings and loan associations
18 domiciled in the State of Alabama may serve as an escrow
19 agent.

20 "(3) The escrow agent must limit the investment of
21 funds held in escrow in lieu of retained amounts provided for
22 in subsection (c) of this section to savings accounts,
23 certificates of deposit or similar time deposit investments
24 (which may, at the election of the contractor, be in an amount
25 in excess of the maximum dollar amount of coverage by the
26 Federal Deposit Insurance Corporation, the Federal Savings &
27 Loan Insurance Corporation, or other similar agency), U.S.

1 Treasury Bonds, U.S. Treasury Notes, U.S. Treasury
2 Certificates of Indebtedness, U.S. Treasury Bills, bonds or
3 notes of the State of Alabama or bonds of any political
4 subdivision of the State of Alabama.

5 "(4) As interest on all investments held in escrow
6 becomes due, it shall be collected by the escrow agent and
7 paid to the contractor.

8 "(5) The escrow agent shall periodically acknowledge
9 to the awarding authority and contractor the amount and value
10 of the escrow account held by the escrow agent, and any
11 additions to the escrow account by the awarding authority
12 shall be reported immediately to the contractor. Withdrawals
13 from the escrow account shall only be made subject to the
14 written approval of the awarding authority.

15 "(6) Upon default or overpayment, as determined by
16 the awarding authority, of any contract or contracts subject
17 to this procedure, and upon the written demand of the awarding
18 authority, the escrow agent shall within 10 days deliver a
19 cashier's check to the awarding authority in the amount of the
20 escrow account balance (subject to the redemption value of
21 such investments at the time of disbursement) relating to the
22 contract or contracts in default.

23 "(7) The escrow account may be terminated upon
24 completion and acceptance of the contract or contracts as
25 provided in subsections (c) and (i) of this section.

26 "(8) All fees and expenses of the escrow agent shall
27 be paid by the contractor to the escrow agent and if not paid

1 shall constitute a lien on the interest accruing to the escrow
2 account and shall be paid therefrom.

3 "(9) The escrow account shall constitute a specific
4 pledge to the awarding authority, and the contractor shall
5 not, except to his surety, otherwise assign, pledge, discount,
6 sell, or transfer his interest in said escrow account, the
7 funds in which shall not be subject to levy, garnishment,
8 attachment, or any other process whatsoever.

9 "(10) The form of the escrow agreement and
10 provisions thereof in compliance herewith, as well as such
11 other provisions as the awarding authority shall from time to
12 time prescribe, shall be subject to written approval of the
13 awarding authority. The approval of the escrow agreement by
14 the awarding authority shall authorize the escrow agent to
15 accept appointment in such capacity.

16 "(11) The awarding authority shall not be liable to
17 the contractor or his surety for the failure of the escrow
18 agent to perform under the escrow agreement, or for the
19 failure of any financial institution to honor investments
20 issued by it which are held in the escrow account.

21 "(g) The contractor may withdraw the whole or any
22 part of the retainage upon deposit of securities only in
23 accordance with the following procedures:

24 "(1) The contractor shall deposit with the State
25 Treasurer or the municipal or county official holding funds
26 belonging to the contractor, the following readily negotiable
27 security or any combination thereof in an amount at least

1 equal to the amount withdrawn, the security shall be accepted
2 at the time of deposit at market value but not in excess of
3 par value:

4 "a. U.S. Treasury Bonds, U.S. Treasury Notes, U.S.
5 Treasury Certificates of Indebtedness, or U.S. Treasury Bills.

6 "b. Bonds or notes of the State of Alabama.

7 "c. Bonds of any political subdivision of the State
8 of Alabama.

9 "d. Certificates of deposit issued by the Federal
10 Deposit Insurance Corporation insured banks located in the
11 State of Alabama. The certificates shall be negotiable and
12 only in an amount not in excess of the maximum dollar amount
13 of coverage by the Federal Deposit Insurance Corporation.

14 "e. Certificates of deposit issued by savings and
15 loan associations located in the State of Alabama, the
16 accounts of which are insured by the Federal Deposit Insurance
17 Corporation or the accounts of which are insured by a company
18 approved by the state Savings and Loan Board and the
19 certificates shall be made payable with accrued interest on
20 demand. Any certificate from any of the savings and loan
21 associations referred to in this paragraph shall not be for an
22 amount in excess of the maximum dollar amount of coverage of
23 the Federal Deposit Insurance Corporation.

24 "(2) The agency or department of the state having
25 jurisdiction over any public works contract shall notify the
26 State Treasurer of the amount of the deposit required and

1 shall also notify the State Treasurer when to release the
2 deposit.

3 "(3) The architect or engineer representing any
4 municipality or county or the chair of any board, commission,
5 or agency of any municipality or county shall notify the
6 municipal or county official of the amount of deposit required
7 and shall also notify the municipal or county official when to
8 release the deposit.

9 "(4) At the time of deposit of any security, the
10 security may be endorsed and shall be accompanied by a
11 conditional assignment to the public body designated as owner
12 in the contract document, which assignment shall empower the
13 State Treasurer, or the municipal or county official to
14 negotiate the security at any time to the extent necessary to
15 cause the fulfilling of the contract.

16 "(5) Any interest or income due on any security
17 deposited shall be paid to the contractor. If the deposit is
18 in the form of coupon bonds, the coupons, as they respectively
19 become due, shall be delivered to the contractor.

20 "(6) In the event the contractor defaults in the
21 performance of the contract or any portion of the contract,
22 the securities deposited by the contractor in lieu of
23 retainage and all interest, income, and coupons accruing on
24 the securities, after default, may be sold by the state or any
25 agency or department of the state, any municipality or county,
26 or any board, commission, or agency of the municipality or
27 county and the proceeds of the sale shall be used as if the

1 proceeds represented the retainage provided for under the
2 contract.

3 "(h) All material and work covered by partial
4 payments made shall become the sole property of the awarding
5 authority, but the contractor shall not be relieved from the
6 sole responsibility for the care and protection of materials
7 and work upon which payments have been made, and for the
8 restoration of any damaged work.

9 "(i) (1) Upon the contractor's completion and the
10 awarding authority's acceptance of all work required, the
11 awarding authority shall pay the amount due the contractor
12 upon the contractor's presentation of the following items:

13 "a. A properly executed and duly certified voucher
14 for payment.

15 "b. A release, if required, of all claims and claims
16 of lien against the awarding authority arising under and by
17 virtue of the contract, other than such claims of the
18 contractor, if any, as may be specifically excepted by the
19 contractor from the operation of the release in stated amounts
20 to be set forth therein.

21 "c. Proof of advertisement as provided by law. Upon
22 proof of advertisement, the prescribed terms of payment shall
23 not be amended after the terms and specifications have been
24 published.

25 "(2) Such payment shall become due and owing ~~45~~ 35
26 days after all the requirements of subdivision (1) are
27 fulfilled, and any agreement to increase the ~~45-day~~ 35-day

1 period for payment after the execution of the contract is not
2 enforceable. If the amount payable is not paid as required,
3 interest on the amount shall be due and owing to the
4 contractor. Interest shall accrue on the day following the
5 ~~later date described above and shall be paid from the same~~
6 ~~fund or source from which the contract principal is paid by~~
7 ~~the awarding authority. The interest rate for payments shall~~
8 later date described above and shall be paid from the same
9 fund or source from which the contract principal is paid. The
10 interest rate for payments shall be the legal amount currently
11 assessed for under payment of taxes under Section 40-1-44 (a).

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

25 "(j) If the Department of Transportation or a county
26 awarding authority shall determine that there has been
27 overpayment to a contractor on a contract award pursuant to

1 this chapter, the Department of Transportation or the county
2 awarding authority shall provide written notice of the
3 overpayment to the contractor and the contractor shall remit
4 the overpayment to the Department of Transportation or the
5 county awarding authority within 60 days of receipt of the
6 demand. If the contractor fails to remit payment in full of
7 the overpayment within 60 days of receipt of demand, the
8 contractor shall be disqualified from bidding as a prime
9 contractor or from performing work as a subcontractor on any
10 future Department of Transportation contract or county
11 contract for the construction or maintenance of public
12 highways, bridges, or roads until the overpayment is made. The
13 Department of Transportation or county awarding authority
14 shall also be entitled to interest from the contractor at the
15 rate assessed for under payment of taxes under Section 40-1-44
16 (a) beginning on the 61st day after the contractor's receipt
17 of demand.

18 "(k) The contract between the awarding authority and
19 contractor shall contain provisions outlining the source of
20 sufficient funds to be utilized to fulfill the awarding
21 authority's obligations under the contract, including whether
22 the funds are held by the awarding authority at the time of
23 the execution of the contract or whether the funds will become
24 available at a date following the execution of the contract.
25 ~~Should the source of funds for the payment be a grant, award,~~
26 ~~or direct reimbursement from the state, federal government, or~~
27 ~~other source which will not become available until after the~~

1 ~~execution of the contract, this shall be disclosed in the~~
2 ~~contract and the provisions of this chapter regarding prompt~~
3 ~~payment shall not apply until the awarding authority is in~~
4 ~~receipt of the funds as provided in the contract. Upon such~~
5 ~~receipt, the 45-day requirement in this chapter shall commence~~
6 ~~and shall be enforceable as provided herein.~~

7 ~~"(1) If subsurface or unknown physical conditions~~
8 ~~are encountered differing materially from those indicated in~~
9 ~~the contract, the party discovering the differing conditions~~
10 ~~shall promptly notify all parties to the contract in writing~~
11 ~~before the affected work is performed and in no event later~~
12 ~~than 10 days after discovering the condition. Upon the owner's~~
13 ~~receipt of written notification of materially different~~
14 ~~conditions, the architect or engineer of record shall~~
15 ~~investigate. If the architect or engineer determines that the~~
16 ~~conditions are materially different from the contract and may~~
17 ~~cause an increase or decrease in the cost or time required for~~
18 ~~performance of the work under the contract, the architect or~~
19 ~~engineer shall recommend to the owner that an adjustment of~~
20 ~~the contract terms be made to adequately reflect the increase~~
21 ~~or decrease in the cost or time required due to the condition~~
22 ~~changes. If the architect or engineer determines that~~
23 ~~materially different conditions do not exist, the architect or~~
24 ~~engineer shall notify the owner and the contractor in writing~~
25 ~~stating the reason for the determination.~~

26 ~~"(1) Should the source of funds for the payment be a~~
27 ~~grant, award, or direct reimbursement from the state, federal~~

1 government, or other source which will not become available
2 until after the execution of the contract, this shall be
3 disclosed in the bid document and contract and the provisions
4 of this chapter regarding prompt payment shall not apply until
5 the awarding authority is in receipt of the funds as provided
6 in the contract. Upon such receipt, the contracting agency
7 shall process payment within 21 10 days and the 45-day
8 requirement in this chapter shall commence and shall be
9 enforceable as provided herein.

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

18 ~~"(o)"~~ ~~This section shall not apply to any contract~~
19 ~~relating to or concerning a declared state or national~~
20 ~~emergency.~~

21 ~~"(n)"~~ ~~(p)~~ (o) The payment provisions of this section
22 shall not apply to contracts entered into by governmental
23 entities as a result of response and recovery to any of the
24 conditions described in Section 31-9-2(a) or as a result of
25 any other disaster event.

26 ~~"(o)"~~ ~~(q)~~ (p) The provisions set forth in this
27 section shall apply to all payments, partial or otherwise."

1 Section 2. This act shall become effective on the
2 first day of the third month following its passage and
3 approval by the Governor, or its otherwise becoming law.

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House of Representatives

Read for the first time and re-
ferred to the House of Representa-
tives committee on Transportation,
Utilities and Infrastructure 14-JAN-14

Read for the second time and placed
on the calendar..... 06-FEB-14

Read for the third time and passed
as amended..... 25-FEB-14

Yeas 96, Nays 0, Abstains 3

Jeff Woodard
Clerk