

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

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ENROLLED, An Act,

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

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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

"§39-2-2.

"(a) Before entering into any contract for a public works involving an amount in excess of fifty thousand dollars (\$50,000), the awarding authority shall advertise for sealed

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

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

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

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

23 "(d) Excluded from the operation of this title shall
24 be contracts with persons who shall perform only
25 architectural, engineering, construction management, program

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

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

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

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

1 and that only this particular product, material, system, or
2 service fulfills the function for which it is needed.

3 "(2) The sole source specification has been
4 recommended by the architect or engineer of record as an
5 indispensable item for which there is no other viable
6 alternative.

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

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

23 "(h) If a pre-bid meeting is held, the pre-bid
24 meeting shall be held at least seven days prior to the bid

1 opening except when the project has been declared an emergency
2 in accordance with subsection (e).

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

6 (i) The awarding authority may not offer a contract
7 for bidding unless confirmation of any applicable grant has
8 been received and any required matching funds have been
9 secured by or are available to the awarding authority.

10 "§39-2-12.

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

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

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

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

5 "(b) (1) Unless otherwise provided in the
6 specifications, partial payments shall be made as the work
7 progresses at the end of each calendar month, but in no case
8 later than ~~45~~ 35 days after the ~~acceptance by the~~ acceptance
9 by the awarding authority ~~designee has signed the pay~~
10 ~~authorization which recognizes~~ that the estimate and terms of
11 the contract providing for partial payments have been
12 fulfilled. The contract between the contractor and the
13 awarding authority shall designate a person to review the
14 progress of completed work. ~~The designated person shall review~~
15 ~~completed work within 10 days and then submit the invoice to~~
16 ~~the awarding authority for payment. In the event of an error~~
17 ~~or dispute, the designated person shall submit, within 10 days~~
18 ~~from the completion of the work, in writing to the contractor~~
19 ~~the reason for the disapproval of the invoice and specify~~
20 ~~procedures for dispute resolution of the submitted invoice.~~
21 work and to review documents submitted by the contractor as
22 provided in this section. Except as otherwise provided for the
23 Department of Transportation, the designated person, within 10
24 days, shall review the submission and respond in writing to
25 accept or forward, as provided in this subsection, a request

1 for payment. For contracts involving the Department of
2 Transportation, the time frame for review and response shall
3 be 20 days. In the event of an error in the submission or a
4 dispute regarding compliance with the provisions of the
5 contract, the error or dispute shall be disclosed in writing
6 to the contractor within 10 days and, after corrective actions
7 are taken, the invoice may be resubmitted and shall be
8 addressed as provided in this section; provided that for
9 contracts involving the Department of Transportation, the time
10 frame for review and response shall be 20 days. In the absence
11 of error or dispute, the awarding authority shall proceed
12 within 10 days as follows for payment of the invoice:

13 "a. For contracts subject to subsection (1), the
14 awarding authority shall forward the request for payment to
15 the entity or agency that is the source of funding to be used
16 by the contractor.

17 "b. For contracts not subject to subsection (1), the
18 payment shall be made by the contracting agency in accordance
19 with the payment requirements and deadlines established in
20 this section.

21 (2) In preparing estimates, the material delivered
22 on the site, materials suitably stored and insured off-site,
23 and preparatory work done may be taken into consideration. If
24 the amount due by the awarding authority is not in dispute and
25 the amount payable is not paid within the above ~~45-day~~ 35-day

1 period, the contractor to whom payment is due shall also be
2 entitled to interest from the awarding authority at the rate
3 assessed for underpayment of taxes under Section 40-1-44(a),
4 on the unpaid balance due. Any agreement to increase the
5 ~~45-day~~ 35-day period for payment after the execution of the
6 contract is not enforceable. Interest payments shall not be
7 due on payments made after the ~~45-day~~ 35-day period because of
8 administrative or processing delays at the close of the fiscal
9 year or delays resulting from official and announced closures
10 by the awarding authority. The provisions in this subsection
11 shall not apply to contracts administered by the Alabama
12 Building Commission, regardless of the source of the funds to
13 be utilized to fulfill the awarding authority's obligation
14 under the contract.

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

1 construction or maintenance of public highways, bridges, or
2 roads.

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

19 "(e) In lieu of the retained amounts provided for in
20 subsection (c) of this section, the awarding authority may
21 provide in the specifications or contracts an alternate
22 procedure for the maintenance of an escrow account as provided
23 in subsection (f) or the depositing of security as provided in
24 subsection (g).

1 "(f) An escrow account, established pursuant to an
2 escrow agreement, shall be entered into only on the following
3 conditions:

4 "(1) If the contractor shall have entered into more
5 than one construction contract allowing for the maintenance of
6 escrow accounts, the contractor may elect to combine the
7 amounts held in lieu of retainage under each contract into one
8 or more escrow accounts or may elect to establish a separate
9 escrow account for each contract.

10 "(2) Only state or national banks chartered within
11 the State of Alabama or savings and loan associations
12 domiciled in the State of Alabama may serve as an escrow
13 agent.

14 "(3) The escrow agent must limit the investment of
15 funds held in escrow in lieu of retained amounts provided for
16 in subsection (c) of this section to savings accounts,
17 certificates of deposit or similar time deposit investments
18 (which may, at the election of the contractor, be in an amount
19 in excess of the maximum dollar amount of coverage by the
20 Federal Deposit Insurance Corporation, the Federal Savings &
21 Loan Insurance Corporation, or other similar agency), U.S.
22 Treasury Bonds, U.S. Treasury Notes, U.S. Treasury
23 Certificates of Indebtedness, U.S. Treasury Bills, bonds or
24 notes of the State of Alabama or bonds of any political
25 subdivision of the State of Alabama.

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

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

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

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

22 "(8) All fees and expenses of the escrow agent shall
23 be paid by the contractor to the escrow agent and if not paid
24 shall constitute a lien on the interest accruing to the escrow
25 account and shall be paid therefrom.

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

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

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

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

22 "(1) The contractor shall deposit with the State
23 Treasurer or the municipal or county official holding funds
24 belonging to the contractor, the following readily negotiable
25 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

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

1 agency or department of the state, any municipality or county,
2 or any board, commission, or agency of the municipality or
3 county and the proceeds of the sale shall be used as if the
4 proceeds represented the retainage provided for under the
5 contract.

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

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

16 "a. A properly executed and duly certified voucher
17 for payment.

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

24 "c. Proof of advertisement as provided by law. Upon
25 proof of advertisement, the prescribed terms of payment shall

1 not be amended after the terms and specifications have been
2 published.

3 "(2) Such payment shall become due and owing ~~45~~ 35
4 days after all the requirements of subdivision (1) are
5 fulfilled, and any agreement to increase the ~~45-day~~ 35-day
6 period for payment after the execution of the contract is not
7 enforceable. If the amount payable is not paid as required,
8 interest on the amount shall be due and owing to the
9 contractor. Interest shall accrue on the day following the
10 ~~later date described above and shall be paid from the same~~
11 ~~fund or source from which the contract principal is paid by~~
12 ~~the awarding authority. The interest rate for payments shall~~
13 later date described above and shall be paid from the same
14 fund or source from which the contract principal is paid. The
15 interest rate for payments shall be the legal amount currently
16 assessed for under payment of taxes under Section 40-1-44 (a).

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

1 shall not apply to contracts administered by the Alabama
2 Building Commission, regardless of the source of the funds to
3 be utilized to fulfill the awarding authority's obligation
4 under the contract.

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

1 "(k) The contract between the awarding authority and
2 contractor shall contain provisions outlining the source of
3 sufficient funds to be utilized to fulfill the awarding
4 authority's obligations under the contract, including whether
5 the funds are held by the awarding authority at the time of
6 the execution of the contract or whether the funds will become
7 available at a date following the execution of the contract.
8 ~~Should the source of funds for the payment be a grant, award,~~
9 ~~or direct reimbursement from the state, federal government, or~~
10 ~~other source which will not become available until after the~~
11 ~~execution of the contract, this shall be disclosed in the~~
12 ~~contract and the provisions of this chapter regarding prompt~~
13 ~~payment shall not apply until the awarding authority is in~~
14 ~~receipt of the funds as provided in the contract. Upon such~~
15 ~~receipt, the 45-day requirement in this chapter shall commence~~
16 ~~and shall be enforceable as provided herein.~~

17 ~~"(l) If subsurface or unknown physical conditions~~
18 ~~are encountered differing materially from those indicated in~~
19 ~~the contract, the party discovering the differing conditions~~
20 ~~shall promptly notify all parties to the contract in writing~~
21 ~~before the affected work is performed and in no event later~~
22 ~~than 10 days after discovering the condition. Upon the owner's~~
23 ~~receipt of written notification of materially different~~
24 ~~conditions, the architect or engineer of record shall~~
25 ~~investigate. If the architect or engineer determines that the~~

1 ~~conditions are materially different from the contract and may~~
2 ~~cause an increase or decrease in the cost or time required for~~
3 ~~performance of the work under the contract, the architect or~~
4 ~~engineer shall recommend to the owner that an adjustment of~~
5 ~~the contract terms be made to adequately reflect the increase~~
6 ~~or decrease in the cost or time required due to the condition~~
7 ~~changes. If the architect or engineer determines that~~
8 ~~materially different conditions do not exist, the architect or~~
9 ~~engineer shall notify the owner and the contractor in writing~~
10 ~~stating the reason for the determination.~~

11 "(l) Should the source of funds for the payment be a
12 grant, award, or direct reimbursement from the state, federal
13 government, or other source which will not become available
14 until after the execution of the contract, this shall be
15 disclosed in the bid document and contract and the provisions
16 of this chapter regarding prompt payment shall not apply until
17 the awarding authority is in receipt of the funds as provided
18 in the contract. Upon such receipt, the contracting agency
19 shall process payment within 21 10 days and the 45-day
20 requirement in this chapter shall commence and shall be
21 enforceable as provided herein.

22 ~~"(i) (m)~~ In the event of a conflict between the
23 provisions of this section and the provisions of any other
24 section of the Code of Alabama 1975, or any agency's or

1 department's rules, regulations, or manuals, this section
2 shall govern.

3 ~~"(m)~~ (n) The provisions of this section shall not
4 apply to any state agency established pursuant to Chapter 1 of
5 Title 33.

6 ~~"(o) This section shall not apply to any contract
7 relating to or concerning a declared state or national
8 emergency.~~

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

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

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

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Speaker of the House of Representatives

President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in
and was passed by the House 25-FEB-14, as amended.

Jeff Woodard
Clerk

Senate	<hr/>	03-APR-14	Amended and Passed
House	<hr/>	03-APR-14	Concurred in Senate Amendment