

FIRST REGULAR SESSION

SENATE BILL NO. 383

97TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR WALLINGFORD.

Read 1st time February 26, 2013, and ordered printed.

TERRY L. SPIELER, Secretary.

1779S.01

AN ACT

To repeal sections 34.057 and 107.170, RSMo, and to enact in lieu thereof two new sections relating to retainage requirements on construction of public works projects.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 34.057 and 107.170, RSMo, are repealed and two new sections enacted in lieu thereof, to be known as sections 34.057 and 107.170, to read as follows:

34.057. 1. Unless contrary to any federal funding requirements or unless funds from a state grant are not timely received by the contracting public municipality but notwithstanding any other law to the contrary, all public works contracts made and awarded by the appropriate officer, board or agency of the state or of a political subdivision of the state or of any district therein, including any municipality, county and any board referred to as the public owner, for construction, reconstruction or alteration of any public works project, shall provide for prompt payment by the public owner to the contractor and prompt payment by the contractor to the subcontractor and material supplier in accordance with the following:

(1) A public owner shall make progress payments to the contractor on at least a monthly basis as the work progresses, or, on a lump sum basis according to the terms of the lump sum contract. Except in the case of lump sum contracts, payments shall be based upon estimates prepared at least monthly of work performed and material delivered, as determined by the project architect or engineer. [Retainage withheld on public works projects shall not exceed five percent of the value of the contract or subcontract unless the public owner and

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

18 the architect or engineer determine that a higher rate of retainage is required to
19 ensure performance of the contract. Retainage, however, shall not exceed ten
20 percent of the value of the contract or subcontract. Except as provided in
21 subsection 4 of this section,] **Provided that the public owner has obtained**
22 **a bond pursuant to section 107.170, the public owner, contractor, and**
23 **subcontractors shall not withhold retainage on public works projects.**
24 **If the public owner is not required to obtain a bond pursuant to section**
25 **107.170 because the cost of the public works contract is not estimated**
26 **to exceed fifty thousand dollars, the public owner may withhold**
27 **retainage on the public works project in an amount not to exceed five**
28 **percent of the value of the contract or subcontract.** The public owner
29 shall pay the contractor the amount due[, less a retainage not to exceed ten
30 percent,] within thirty days following the latter of the following:

31 (a) The date of delivery of materials or construction services purchased;

32 (b) The date, as designated by the public owner, upon which the invoice
33 is duly delivered to the person or place designated by the public owner; or

34 (c) In those instances in which the contractor approves the public owner's
35 estimate, the date upon which such notice of approval is duly delivered to the
36 person or place designated by the public owner;

37 (2) Payments shall be considered received within the context of this
38 section when they are duly posted with the United States Postal Service or other
39 agreed upon delivery service or when they are hand-delivered to an authorized
40 person or place as agreed to by the contracting parties;

41 (3) [If, in the discretion of the owner and the project architect or engineer
42 and the contractor, it is determined that a subcontractor's performance has been
43 completed and the subcontractor can be released prior to substantial completion
44 of the public works contract without risk to the public owner, the contractor shall
45 request such adjustment in retainage, if any, from the public owner as necessary
46 to enable the contractor to pay the subcontractor in full. The public owner may
47 reduce or eliminate retainage on any contract payment if, in the public owner's
48 opinion, the work is proceeding satisfactorily. If retainage is released and there
49 are any remaining minor items to be completed, an amount equal to two hundred
50 percent of the value of each item as determined by the public owner's duly
51 authorized representative shall be withheld until such item or items are
52 completed;

53 (4) The public owner shall pay the retainage, less any offsets or

54 deductions authorized in the contract or otherwise authorized by law, to the
55 contractor after substantial completion of the contract work and acceptance by the
56 public owner's authorized contract representative, or as may otherwise be
57 provided by the contract specifications for state highway, road or bridge projects
58 administered by the state highways and transportation commission. Such
59 payment shall be made within thirty days after acceptance, and the invoice and
60 all other appropriate documentation and certifications in complete and acceptable
61 form are provided, as may be required by the contract documents. If at that time
62 there are any remaining minor items to be completed, an amount equal to two
63 hundred percent of the value of each item as determined by the public owner's
64 representative shall be withheld until such items are completed;

65 (5)] All estimates or invoices for supplies and services purchased,
66 approved and processed, or final payments, shall be paid promptly and shall be
67 subject to late payment charges provided in this section. [Except as provided in
68 subsection 4 of this section,] If the contractor has not been paid within thirty
69 days as set forth in subdivision (1) of subsection 1 of this section, the contracting
70 agency shall pay the contractor, in addition to the payment due him, interest at
71 the rate of one and one-half percent per month calculated from the expiration of
72 the thirty-day period until fully paid;

73 [(6)] (4) When a contractor receives any payment, the contractor shall
74 pay each subcontractor and material supplier in proportion to the work completed
75 by each subcontractor and material supplier his application [less any retention
76 not to exceed ten percent]. If the contractor receives less than the full payment
77 due under the public construction contract, the contractor shall be obligated to
78 disburse on a pro rata basis those funds received, with the contractor,
79 subcontractors and material suppliers each receiving a prorated portion based on
80 the amount of payment. When, however, the public owner does not release the
81 full payment due under the contract because there are specific areas of work or
82 materials he is rejecting or because he has otherwise determined such areas are
83 not suitable for payment then those specific subcontractors or suppliers involved
84 shall not be paid for that portion of the work rejected or deemed not suitable for
85 payment and all other subcontractors and suppliers shall be paid in full;

86 [(7)] (5) If the contractor, without reasonable cause, fails to make any
87 payment to his subcontractors and material suppliers within fifteen days after
88 receipt of payment under the public construction contract, the contractor shall
89 pay to his subcontractors and material suppliers, in addition to the payment due

90 them, interest in the amount of one and one-half percent per month, calculated
91 from the expiration of the fifteen-day period until fully paid. This subdivision
92 shall also apply to any payments made by subcontractors and material suppliers
93 to their subcontractors and material suppliers and to all payments made to lower
94 tier subcontractors and material suppliers throughout the contracting chain;

95 ~~[(8)]~~ **(6)** The public owner shall make final payment of all moneys owed
96 to the contractor, less any offsets or deductions authorized in the contract or
97 otherwise authorized by law, within thirty days of the due date. Final payment
98 shall be considered due upon the earliest of the following events:

99 (a) Completion of the project and filing with the owner of all required
100 documentation and certifications, in complete and acceptable form, in accordance
101 with the terms and conditions of the contract;

102 (b) The project is certified by the architect or engineer authorized to make
103 such certification on behalf of the owner as having been completed, including the
104 filing of all documentation and certifications required by the contract, in complete
105 and acceptable form; or

106 (c) The project is certified by the contracting authority as having been
107 completed, including the filing of all documentation and certifications required
108 by the contract, in complete and acceptable form.

109 2. Nothing in this section shall prevent the contractor or subcontractor,
110 at the time of application or certification to the public owner or contractor, from
111 withholding such applications or certifications to the owner or contractor for
112 payment to the subcontractor or material supplier. Amounts intended to be
113 withheld shall not be included in such applications or certifications to the public
114 owner or contractor. Reasons for withholding such applications or certifications
115 shall include, but not be limited to, the following: unsatisfactory job progress;
116 defective construction work or material not remedied; disputed work; failure to
117 comply with other material provisions of the contract; third party claims filed or
118 reasonable evidence that a claim will be filed; failure of the subcontractor to make
119 timely payments for labor, equipment and materials; damage to a contractor or
120 another subcontractor or material supplier; reasonable evidence that the contract
121 can not be completed for the unpaid balance of the subcontract sum [or a
122 reasonable amount for retention, not to exceed the initial percentage retained by
123 the owner].

124 3. Should the contractor determine, after application or certification has
125 been made and after payment has been received from the public owner, or after

126 payment has been received by a contractor based upon the public owner's
127 estimate of materials in place and work performed as provided by contract, that
128 all or a portion of the moneys needs to be withheld from a specific subcontractor
129 or material supplier for any of the reasons enumerated in this section, and such
130 moneys are withheld from such subcontractor or material supplier, then such
131 undistributed amounts shall be specifically identified in writing and deducted
132 from the next application or certification made to the public owner or from the
133 next estimate by the public owner of payment due the contractor, until a
134 resolution of the matter has been achieved. Disputes shall be resolved in
135 accordance with the terms of the contract documents. Upon such resolution the
136 amounts withheld by the contractor from the subcontractor or material supplier
137 shall be included in the next application or certification made to the public owner
138 or the next estimate by the public owner and shall be paid promptly in accordance
139 with the provisions of this section. This subsection shall also apply to
140 applications or certifications made by subcontractors or material suppliers to the
141 contractor and throughout the various tiers of the contracting chain.

142 4. The contracts which provide for payments to the contractor based upon
143 the public owner's estimate of materials in place and work performed rather than
144 applications or certifications submitted by the contractor, the public owner shall
145 pay the contractor within thirty days following the date upon which the estimate
146 is required by contract to be completed by the public owner, the amount due [less
147 a retainage not to exceed five percent]. All such estimates by the public owner
148 shall be paid promptly and shall be subject to late payment charges as provided
149 in this subsection. After the thirtieth day following the date upon which the
150 estimate is required by contract to be completed by the public owner, the
151 contracting agency shall pay the contractor, in addition to the payment due him,
152 interest at a rate of one and one-half percent per month calculated from the
153 expiration of the thirty-day period until fully paid.

154 5. Nothing in this section shall prevent the owner from withholding
155 payment or final payment from the contractor, or a subcontractor or material
156 supplier. Reasons for withholding payment or final payment shall include, but
157 not be limited to, the following: liquidated damages; unsatisfactory job progress;
158 defective construction work or material not remedied; disputed work; failure to
159 comply with any material provision of the contract; third party claims filed or
160 reasonable evidence that a claim will be filed; failure to make timely payments
161 for labor, equipment or materials; damage to a contractor, subcontractor or

162 material supplier; reasonable evidence that a subcontractor or material supplier
163 cannot be fully compensated under its contract with the contractor for the unpaid
164 balance of the contract sum; or citation by the enforcing authority for acts of the
165 contractor or subcontractor which do not comply with any material provision of
166 the contract and which result in a violation of any federal, state or local law,
167 regulation or ordinance applicable to that project causing additional costs or
168 damages to the owner.

169 6. Notwithstanding any other provisions in this section to the contrary,
170 no late payment interest shall be due and owing for payments which are withheld
171 in good faith for reasonable cause pursuant to subsections 2 and 5 of this section.
172 If it is determined by a court of competent jurisdiction that a payment which was
173 withheld pursuant to subsections 2 and 5 of this section was not withheld in good
174 faith for reasonable cause, the court may impose interest at the rate of one and
175 one-half percent per month calculated from the date of the invoice and may, in
176 its discretion, award reasonable attorney fees to the prevailing party. In any civil
177 action or part of a civil action brought pursuant to this section, if a court
178 determines after a hearing for such purpose that the cause was initiated, or a
179 defense was asserted, or a motion was filed, or any proceeding therein was done
180 frivolously and in bad faith, the court shall require the party who initiated such
181 cause, asserted such defense, filed such motion, or caused such proceeding to be
182 had to pay the other party named in such action the amount of the costs
183 attributable thereto and reasonable expenses incurred by such party, including
184 reasonable attorney fees.

107.170. 1. As used in this section, the following terms mean:

2 (1) "Contractor", a person or business entity who provides construction
3 services under contract to a public entity. Contractor specifically does not include
4 professional engineers, architects or land surveyors licensed pursuant to chapter
5 327, those who provide environmental assessment services or those who design,
6 create or otherwise provide works of art under a city's formally established
7 program for the acquisition and installation of works of art and other aesthetic
8 adornments to public buildings and property;

9 (2) "Public entity", any official, board, commission or agency of this state
10 or any county, city, town, township, school, road district or other political
11 subdivision of this state;

12 (3) "Public works", the erection, construction, alteration, repair or
13 improvement of any building, road, street, public utility or other public facility

14 owned by the public entity.

15 2. It is hereby made the duty of all public entities in this state, in making
16 contracts for public works, the cost of which is estimated to exceed [twenty-five]
17 **fifty** thousand dollars, to be performed for the public entity, to require every
18 contractor for such work to furnish to the public entity, a bond with good and
19 sufficient sureties, in an amount fixed by the public entity, and such bond, among
20 other conditions, shall be conditioned for the payment of any and all materials,
21 incorporated, consumed or used in connection with the construction of such work,
22 and all insurance premiums, both for compensation, and for all other kinds of
23 insurance, said work, and for all labor performed in such work whether by
24 subcontractor or otherwise.

25 3. All bonds executed and furnished under the provisions of this section
26 shall be deemed to contain the requirements and conditions as herein set out,
27 regardless of whether the same be set forth in said bond, or of any terms or
28 provisions of said bond to the contrary notwithstanding.

29 4. Nothing in this section shall be construed to require a member of the
30 school board of any public school district of this state to independently confirm
31 the existence or solvency of any bonding company if a contractor represents to the
32 member that the bonding company is solvent and that the representations made
33 in the purported bond are true and correct. This subsection shall not relieve from
34 any liability any school board member who has any actual knowledge of the
35 insolvency of any bonding company, or any school board member who does not act
36 in good faith in complying with the provisions of subsection 2 of this section.

37 5. A public entity may defend, save harmless and indemnify any of its
38 officers and employees, whether elective or appointive, against any claim or
39 demand, whether groundless or otherwise arising out of an alleged act or
40 omission occurring in the performance of a duty under this section. The
41 provisions of this subsection do not apply in case of malfeasance in office or
42 willful or wanton neglect of duty.

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