

SENATE BILL NO. 530

101ST GENERAL ASSEMBLY

INTRODUCED BY SENATOR CRAWFORD.

2289S.01H

ADRIANE D. CROUSE, Secretary

AN ACT

To repeal sections 8.260, 34.047, 34.057, 34.058, 34.100, 34.203, 34.206, 34.209, 34.212, 34.217, and 34.218, RSMo, and to enact in lieu thereof eleven new sections relating to public contracts.

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

Section A. Sections 8.260, 34.047, 34.057, 34.058,
2 34.100, 34.203, 34.206, 34.209, 34.212, 34.217, and 34.218,
3 RSMo, are repealed and eleven new sections enacted in lieu
4 thereof, to be known as sections 8.260, 8.950, 8.955, 8.1000,
5 8.1005, 8.1010, 8.1015, 8.1020, 8.1025, 34.047, and 34.100, to
6 read as follows:

8.260. All appropriations made by the general assembly
2 amounting to one hundred thousand dollars or more for the
3 construction, renovation, or repair of facilities shall be
4 expended in the following manner:

(1) The agency requesting payment shall provide the
6 commissioner of administration with satisfactory evidence
7 that a bona fide contract, procured in accordance with all
8 applicable procedures, exists for the work for which payment
9 is requested;

(2) All requests for payment shall be approved by the
11 architect or engineer registered to practice in the state of
12 Missouri who designed the project or who has been assigned
13 to oversee it;

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

14 (3) In order to guarantee completion of the contract,
15 the agency or officer shall retain a portion of the contract
16 value in accordance with the provisions of section [34.057]
17 **8.950;**

18 (4) A contractor may be paid for materials delivered
19 to the site or to a storage facility approved by the
20 director of the division of facilities management, design
21 and construction as having adequate safeguards against loss,
22 theft or conversion.

23 In no case shall the amount contracted for exceed the amount
24 appropriated by the general assembly for the purpose.

 [34.057.] **8.950.** 1. Unless contrary to any federal
2 funding requirements or unless funds from a state grant are
3 not timely received by the contracting public municipality
4 but notwithstanding any other law to the contrary, all
5 public works contracts made and awarded by the appropriate
6 officer, board or agency of the state or of a political
7 subdivision of the state or of any district therein,
8 including any municipality, county and any board referred to
9 as the public owner, for construction, reconstruction or
10 alteration of any public works project, shall provide for
11 prompt payment by the public owner to the contractor, and
12 any professional engineer, architect, landscape architect,
13 or land surveyor, as well as prompt payment by the
14 contractor to the subcontractor and material supplier in
15 accordance with the following:

16 (1) A public owner shall make progress payments to the
17 contractor and any professional engineer, architect,
18 landscape architect, or land surveyor on at least a monthly
19 basis as the work progresses, or, on a lump sum basis
20 according to the terms of the lump sum contract. Except in

21 the case of lump sum contracts, payments shall be based upon
22 estimates prepared at least monthly of work performed and
23 material delivered, as determined by the project architect
24 or engineer. Retainage withheld on any construction
25 contract or subcontract for public works projects shall not
26 exceed five percent of the value of the contract or
27 subcontract. If the contractor is not required to obtain a
28 bond under section 107.170 because the cost of the public
29 works contract is not estimated to exceed fifty thousand
30 dollars, the public owner may withhold retainage on the
31 public works project in an amount not to exceed ten percent
32 of the value of the contract or subcontract. The public
33 owner shall pay the contractor the amount due, less a
34 retainage, within thirty days following the latter of the
35 following:

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

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

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

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

50 (3) If, in the discretion of the owner and the project
51 architect or engineer and the contractor, it is determined
52 that a subcontractor's performance has been completed and

53 the subcontractor can be released prior to substantial
54 completion of the public works contract without risk to the
55 public owner, the contractor shall request such adjustment
56 in retainage, if any, from the public owner as necessary to
57 enable the contractor to pay the subcontractor in full. The
58 public owner may reduce or eliminate retainage on any
59 contract payment if, in the public owner's opinion, the work
60 is proceeding satisfactorily. If retainage is released and
61 there are any remaining minor items to be completed, an
62 amount equal to one hundred fifty percent of the value of
63 each item as determined by the public owner's duly
64 authorized representatives shall be withheld until such item
65 or items are completed;

66 (4) The public owner shall pay at least ninety-eight
67 percent of the retainage, less any offsets or deductions
68 authorized in the contract or otherwise authorized by law,
69 to the contractor. The contractor shall pay the
70 subcontractor or supplier after substantial completion of
71 the contract work and acceptance by the public owner's
72 authorized contract representative, or as may otherwise be
73 provided by the contract specifications for state highway,
74 road or bridge projects administered by the state highways
75 and transportation commission. Such payment shall be made
76 within thirty days after acceptance, and the invoice and all
77 other appropriate documentation and certifications in
78 complete and acceptable form are provided, as may be
79 required by the contract documents. If the public owner or
80 the owner's representative determines the work is not
81 substantially completed and accepted, then the owner or the
82 owner's representative shall provide a written explanation
83 of why the work is not considered substantially completed
84 and accepted within fourteen calendar days to the

85 contractor, who shall then provide such notice to the
86 subcontractor or suppliers responsible for such work. If
87 such written explanation is not given by the public body,
88 the public body shall pay at least ninety-eight percent of
89 the retainage within thirty calendar days. If at that time
90 there are any remaining minor items to be completed, an
91 amount equal to one hundred fifty percent of the value of
92 each item as determined by the public owner's representative
93 shall be withheld until such items are completed;

94 (5) All estimates or invoices for supplies and
95 services purchased, approved and processed, or final
96 payments, shall be paid promptly and shall be subject to
97 late payment charges provided in this section. Except as
98 provided in subsection 4 of this section, if the contractor
99 has not been paid within thirty days as set forth in
100 subdivision (1) of subsection 1 of this section, the
101 contracting agency shall pay the contractor, in addition to
102 the payment due him, interest at the rate of one and one-
103 half percent per month calculated from the expiration of the
104 thirty-day period until fully paid;

105 (6) When a contractor receives any payment, the
106 contractor shall pay each subcontractor and material
107 supplier in proportion to the work completed by each
108 subcontractor and material supplier his application less any
109 retention not to exceed five percent. If the contractor
110 receives less than the full payment due under the public
111 construction contract, the contractor shall be obligated to
112 disburse on a pro rata basis those funds received, with the
113 contractor, subcontractors and material suppliers each
114 receiving a prorated portion based on the amount of
115 payment. When, however, the public owner does not release
116 the full payment due under the contract because there are

117 specific areas of work or materials he is rejecting or
118 because he has otherwise determined such areas are not
119 suitable for payment then those specific subcontractors or
120 suppliers involved shall not be paid for that portion of the
121 work rejected or deemed not suitable for payment; provided
122 the public owner or the owner's representative gives a
123 written explanation to the contractor, subcontractor, or
124 supplier involved as to why the work or supplies were
125 rejected or deemed not suitable for payment, and all other
126 subcontractors and suppliers shall be paid in full;

127 (7) If the contractor, without reasonable cause, fails
128 to make any payment to his subcontractors and material
129 suppliers within fifteen days after receipt of payment under
130 the public construction contract, the contractor shall pay
131 to his subcontractors and material suppliers, in addition to
132 the payment due them, interest in the amount of one and one-
133 half percent per month, calculated from the expiration of
134 the fifteen-day period until fully paid. This subdivision
135 shall also apply to any payments made by subcontractors and
136 material suppliers to their subcontractors and material
137 suppliers and to all payments made to lower tier
138 subcontractors and material suppliers throughout the
139 contracting chain;

140 (8) The public owner shall make final payment of all
141 moneys owed to the contractor, including any retainage
142 withheld under subdivision (4) of this subsection, less any
143 offsets or deductions authorized in the contract or
144 otherwise authorized by law, within thirty days of the due
145 date. Final payment shall be considered due upon the
146 earliest of the following events:

147 (a) Completion of the project and filing with the
148 owner of all required documentation and certifications, in

149 complete and acceptable form, in accordance with the terms
150 and conditions of the contract;

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

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

160 2. Nothing in this section shall prevent the
161 contractor or subcontractor, at the time of application or
162 certification to the public owner or contractor, from
163 withholding such applications or certifications to the owner
164 or contractor for payment to the subcontractor or material
165 supplier. Amounts intended to be withheld shall not be
166 included in such applications or certifications to the
167 public owner or contractor. Reasons for withholding such
168 applications or certifications shall include, but not be
169 limited to, the following: unsatisfactory job progress;
170 defective construction work or material not remedied;
171 disputed work; failure to comply with other material
172 provisions of the contract; third-party claims filed or
173 reasonable evidence that a claim will be filed; failure of
174 the subcontractor to make timely payments for labor,
175 equipment and materials; damage to a contractor or another
176 subcontractor or material supplier; reasonable evidence that
177 the contract cannot be completed for the unpaid balance of
178 the subcontract sum or a reasonable amount for retention,
179 not to exceed the initial percentage retained by the owner.

180 3. Should the contractor determine, after application
181 or certification has been made and after payment has been
182 received from the public owner, or after payment has been
183 received by a contractor based upon the public owner's
184 estimate of materials in place and work performed as
185 provided by contract, that all or a portion of the moneys
186 needs to be withheld from a specific subcontractor or
187 material supplier for any of the reasons enumerated in this
188 section, and such moneys are withheld from such
189 subcontractor or material supplier, then such undistributed
190 amounts shall be specifically identified in writing and
191 deducted from the next application or certification made to
192 the public owner or from the next estimate by the public
193 owner of payment due the contractor, until a resolution of
194 the matter has been achieved. Disputes shall be resolved in
195 accordance with the terms of the contract documents. Upon
196 such resolution the amounts withheld by the contractor from
197 the subcontractor or material supplier shall be included in
198 the next application or certification made to the public
199 owner or the next estimate by the public owner and shall be
200 paid promptly in accordance with the provisions of this
201 section. This subsection shall also apply to applications
202 or certifications made by subcontractors or material
203 suppliers to the contractor and throughout the various tiers
204 of the contracting chain.

205 4. The contracts which provide for payments to the
206 contractor based upon the public owner's estimate of
207 materials in place and work performed rather than
208 applications or certifications submitted by the contractor,
209 the public owner shall pay the contractor within thirty days
210 following the date upon which the estimate is required by
211 contract to be completed by the public owner, the amount due

212 less a retainage not to exceed five percent. All such
213 estimates by the public owner shall be paid promptly and
214 shall be subject to late payment charges as provided in this
215 subsection. After the thirtieth day following the date upon
216 which the estimate is required by contract to be completed
217 by the public owner, the contracting agency shall pay the
218 contractor, in addition to the payment due him, interest at
219 a rate of one and one-half percent per month calculated from
220 the expiration of the thirty-day period until fully paid.

221 5. The public owner shall pay or cause to be paid to
222 any professional engineer, architect, landscape architect,
223 or land surveyor the amount due within thirty days following
224 the receipt of an invoice prepared and submitted in
225 accordance with the contract terms. In addition to the
226 payment due, the contracting agency shall pay interest at
227 the rate of one and one-half percent per month calculated
228 from the expiration of the thirty-day period until fully
229 paid.

230 6. Nothing in this section shall prevent the owner
231 from withholding payment or final payment from the
232 contractor, or a subcontractor or material supplier.
233 Reasons for withholding payment or final payment shall
234 include, but not be limited to, the following: liquidated
235 damages; unsatisfactory job progress; defective construction
236 work or material not remedied; disputed work; failure to
237 comply with any material provision of the contract; third
238 party claims filed or reasonable evidence that a claim will
239 be filed; failure to make timely payments for labor,
240 equipment or materials; damage to a contractor,
241 subcontractor or material supplier; reasonable evidence that
242 a subcontractor or material supplier cannot be fully
243 compensated under its contract with the contractor for the

244 unpaid balance of the contract sum; or citation by the
245 enforcing authority for acts of the contractor or
246 subcontractor which do not comply with any material
247 provision of the contract and which result in a violation of
248 any federal, state or local law, regulation or ordinance
249 applicable to that project causing additional costs or
250 damages to the owner.

251 7. Nothing in this section shall be construed to
252 require direct payment by a public owner to a subcontractor
253 or supplier, except in the case of the default, as
254 determined by a court, of the contractor on the contract
255 with the public owner where no performance or payment bond
256 is required or where the surety fails to execute its duties,
257 as determined by a court.

258 8. Notwithstanding any other provisions in this
259 section to the contrary, no late payment interest shall be
260 due and owing for payments which are withheld in good faith
261 for reasonable cause pursuant to subsections 2, 5, and 6 of
262 this section. If it is determined by a court of competent
263 jurisdiction that a payment which was withheld pursuant to
264 subsections 2, 5, and 6 of this section was not withheld in
265 good faith for reasonable cause, the court may impose
266 interest at the rate of one and one-half percent per month
267 calculated from the date of the invoice and may, in its
268 discretion, award reasonable attorney fees to the prevailing
269 party. In any civil action or part of a civil action
270 brought pursuant to this section, if a court determines
271 after a hearing for such purpose that the cause was
272 initiated, or a defense was asserted, or a motion was filed,
273 or any proceeding therein was done frivolously and in bad
274 faith, the court shall require the party who initiated such
275 cause, asserted such defense, filed such motion, or caused

276 such proceeding to be had to pay the other party named in
277 such action the amount of the costs attributable thereto and
278 reasonable expenses incurred by such party, including
279 reasonable attorney fees.

[34.058.] **8.955.** 1. As used in this section, the term
2 "public works contract" means a contract of the state,
3 county, city and other political subdivisions of the state,
4 except the Missouri transportation department, for the
5 construction, alteration, repair, or maintenance of any
6 building, structure, highway, bridge, viaduct, pipeline,
7 public works, or any other works dealing with construction,
8 which shall include, but need not be limited to, moving,
9 demolition, or excavation performed in conjunction with such
10 work.

11 2. Any clause in a public works contract that purports
12 to waive, release, or extinguish the rights of a contractor
13 to recover costs or damages, or obtain an equitable
14 adjustment, for delays in performing such contract, if such
15 delay is caused in whole, or in part, by acts or omissions
16 within the control of the contracting public entity or
17 persons acting on behalf thereof, is against public policy
18 and is void and unenforceable.

19 3. Subsection 2 of this section is not intended to
20 render void any contract provision of a public works
21 contract that:

22 (1) Precludes a contractor from recovering that
23 portion of delay costs caused by the acts or omissions of
24 the contractor or its agents;

25 (2) Requires notice of any delay by the party
26 responsible for such delay;

27 (3) Provides for reasonable liquidated damages; or

28 (4) Provides for arbitration or any other procedure
29 designed to settle contract disputes.

[34.203.] **8.1000.** The provisions of sections [34.203
2 to 34.216*] **8.1000 to 8.1020** shall be known and may be cited
3 as the "Fairness in Public Construction Act".

[34.206.] **8.1005.** The purpose of sections [34.203 to
2 34.216*] **8.1000 to 8.1020** is to fulfill the state's
3 proprietary objectives in maintaining and promoting the
4 economical, nondiscriminatory, and efficient expenditures of
5 public funds in connection with publicly funded or assisted
6 construction projects. Nothing in sections [34.203 to
7 34.216*] **8.1000 to 8.1020** shall prohibit employers or other
8 parties covered by the National Labor Relations Act from
9 entering into agreements or engaging in any other activity
10 arguably protected by law, nor shall any aspect of sections
11 [34.203 to 34.216*] **8.1000 to 8.1020** be interpreted in such
12 a way as to interfere with the labor relations of parties
13 covered by the National Labor Relations Act.

[34.209.] **8.1010.** 1. The state, any agency of the
2 state, any political subdivision of the state, or any
3 instrumentality thereof, when engaged in procuring or
4 letting contracts for construction, repair, remodeling, or
5 demolition of a facility shall ensure that bid
6 specification, project agreements, and other controlling
7 documents entered into, required, or subject to approval by
8 the state, agency, political subdivision, or instrumentality
9 do not:

10 (1) Require or prohibit bidders, offerors,
11 contractors, or subcontractors to enter into or adhere to
12 agreements with one or more labor organizations on the same
13 or related projects; or

14 (2) Discriminate against, encourage, or give
15 preferential treatment to bidders, offerors, contractors, or
16 subcontractors for:

17 (a) Entering or refusing to enter agreements with one
18 or more labor organizations on the same or related
19 construction projects; or

20 (b) Remaining or refusing to remain signatory with one
21 or more labor organizations on the same or related
22 construction projects.

23 2. Nothing in this section shall be construed to
24 prohibit the state, any agency of the state, any political
25 subdivision of the state, or any instrumentality thereof
26 from requiring bidders, offerors, contractors, or
27 subcontractors, as a condition of receiving work or
28 submitting a bid, to test its workers and employees for the
29 presence of illegal drugs.

 [34.212.] **8.1015.** 1. The state, any agency of the
2 state, any political subdivision of the state, or any
3 instrumentality thereof shall not issue or award grants, tax
4 abatements, or tax credits or enter into cooperative
5 agreements for construction projects or for the improvement,
6 maintenance, or renovation of real property or fixtures, a
7 condition of which requires that bid specifications, project
8 agreements, or other controlling documents pertaining to the
9 grant, tax abatement, tax credit, or cooperative agreement
10 contain any of the elements specified in section [34.209]
11 **8.1010.**

12 2. The state, any agency of the state, any political
13 subdivision, or any instrumentality thereof shall exercise
14 such authority as may be required to preclude a grant, tax
15 abatement, or tax credit recipient or party to a cooperative
16 agreement from imposing any of the elements specified in

17 section [34.209] **8.1010** in connection with any grant or
18 cooperative agreement awarded or entered into. Nothing in
19 sections [34.203 to 34.217] **8.1000 to 8.1020** shall prohibit
20 contractors or subcontractors from voluntarily entering into
21 agreements described in section [34.209] **8.1010**.

[34.217.] **8.1020**. Notwithstanding the provisions of
2 section 1.140, the provisions of sections 290.095 and
3 290.250 and sections [34.203 to 34.216*] **8.1000 to 8.1020**
4 shall not be severable. In the event a court of competent
5 jurisdiction rules that any part of this act is
6 unenforceable, the entire act shall be rendered null and
7 void.

[34.218.] **8.1025**. 1. Any entity which violates the
2 provisions of sections [34.203 to 34.217] **8.1000 to 8.1020**
3 shall be liable to the person affected for such equitable
4 relief as may be appropriate, including reasonable
5 attorney's fees.

6 2. Any entity which violates the provisions of
7 sections [34.203 to 34.217] **8.1000 to 8.1020** shall not be
8 eligible for any state funding or tax credits issued by the
9 state for two years.

10 3. The prosecuting attorney or circuit attorney with
11 jurisdiction over the location where a violation of sections
12 [34.203 to 34.217] **8.1000 to 8.1020** occurs, or the attorney
13 general of this state, shall investigate complaints of
14 violation of such sections, and use all means at their
15 command to ensure the effective enforcement of this section.

34.047. Notwithstanding any provision in section
2 34.040, section 34.100, or any other law to the contrary,
3 [departments] **the commissioner of administration** shall have
4 the authority to purchase products and services related to
5 information technology when the estimated expenditure of

6 such purchase shall not exceed one hundred fifty thousand
7 dollars, the length of any contract or agreement does not
8 exceed twelve months, the [department] **commissioner of**
9 **administration** complies with the informal methods of
10 procurement established in section 34.040, and 1 CSR 40-
11 1.050(1) for expenditures of less than one hundred thousand
12 dollars, and the [department] **commissioner of administration**
13 posts notice of such proposed purchase on the online
14 bidding/vendor registration system maintained by the office
15 of administration. For the purposes of this section,
16 "information technology" shall mean any computer or
17 electronic information equipment or interconnected system
18 that is used in the acquisition, storage, manipulation,
19 management, movement, control, display, switching,
20 interchange, transmission, or reception of information,
21 including audio, graphic, and text.

34.100. The commissioner of administration may, when
2 in the commissioner's best judgment it is in the best
3 interests of the state, delegate the commissioner's
4 procurement authority pursuant to this chapter to an
5 individual department; provided, however, that each instance
6 of single feasible source purchasing authority in excess of
7 **[five] ten** thousand dollars under section 34.044 must be
8 specifically delegated by the commissioner. The delegation
9 may allow departments to negotiate in accordance with
10 section 34.042 the purchase of services for patients,
11 residents or clients with funds appropriated for this
12 purpose. In accepting this delegated authority the
13 department acknowledges its ability to, and agrees to,
14 fulfill all of the requirements of this chapter in making
15 purchases and entering into contracts and keeping records.
16 No claim for payment based upon any purchase under this

17 section shall be certified by the commissioner unless
18 accompanied by such documentation of compliance with the
19 provisions of this chapter as the commissioner may require.
20 Any department that fails to fulfill all such requirements
21 may have its delegated authority rescinded by the
22 commissioner of administration.

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