

SECOND REGULAR SESSION

# SENATE BILL NO. 862

96TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR ENGLER.

Read 1st time February 29, 2012, and ordered printed.

TERRY L. SPIELER, Secretary.

6058S.011

## AN ACT

To repeal section 34.057, RSMo, and to enact in lieu thereof one new section relating to payment of public works contracts.

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

Section A. Section 34.057, RSMo, is repealed and one new section enacted  
2 in lieu thereof, to be known as section 34.057, to read as follows:

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

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

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

20 percent of the value of the contract or subcontract. Except as provided in  
21 subsection 4 of this section,] **If the public owner has obtained a bond**  
22 **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 public works contract is not estimated to**  
26 **exceed twenty-five 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.

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