

House _____ Amendment NO. _____

Offered By

1 AMEND House Committee Substitute for Senate Substitute for Senate Committee Substitute for
2 Senate Bill No. 83, Page 11, Section 34.040, Line 58, by inserting immediately after said Line the
3 following:

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

13 (1) A public owner shall make progress payments to the contractor and any professional
14 engineer, architect, landscape architect, or land surveyor on at least a monthly basis as the work
15 progresses, or, on a lump sum basis according to the terms of the lump sum contract. Except in the
16 case of lump sum construction contracts, payments shall be based upon estimates prepared at least
17 monthly of work performed and material delivered, as determined by the project architect or
18 engineer. Retainage withheld on any construction contract or subcontract for public works projects
19 shall not exceed five percent of the value of the contract or subcontract. [unless the public owner and
20 the architect or engineer determine that a higher rate of retainage is required to ensure performance
21 of the contract. Retainage, however, shall not exceed ten percent of the value of the contract or
22 subcontract. Except as provided in subsection 4 of this section,] If the contractor is not required to
23 obtain a bond under section 107.170 because the cost of the public works contract is not estimated to
24 exceed fifty thousand dollars, the public owner may withhold retainage on the public works project
25 in an amount not to exceed ten percent of the value of the contract or subcontract. The public owner
26 shall pay the contractor the amount due, less a retainage [not to exceed ten percent], within thirty
27 days following the latter of the following:

- 28 (a) The date of delivery of materials or construction services purchased;
29 (b) The date, as designated by the public owner, upon which the invoice is duly delivered to
30 the person or place designated by the public owner; or
31 (c) In those instances in which the contractor approves the public owner's estimate, the date
32 upon which such notice of approval is duly delivered to the person or place designated by the public

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1 owner;

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

5 (3) If, in the discretion of the owner and the project architect or engineer and the contractor,
6 it is determined that a subcontractor's performance has been completed and the subcontractor can be
7 released prior to substantial completion of the public works contract without risk to the public owner,
8 the contractor shall request such adjustment in retainage, if any, from the public owner as necessary
9 to enable the contractor to pay the subcontractor in full. The public owner may reduce or eliminate
10 retainage on any contract payment if, in the public owner's opinion, the work is proceeding
11 satisfactorily. If retainage is released and there are any remaining minor items to be completed, an
12 amount equal to [two] one hundred fifty percent of the value of each item as determined by the
13 public owner's duly authorized [representative] representatives shall be withheld until such item or
14 items are completed;

15 (4) The public owner shall pay [the] at least ninety-eight percent of the retainage, less any
16 offsets or deductions authorized in the contract or otherwise authorized by law, to the contractor or a
17 subcontractor or a supplier after substantial completion of the contract work and acceptance by the
18 public owner's authorized contract representative, or as may otherwise be provided by the contract
19 specifications for state highway, road or bridge projects administered by the state highways and
20 transportation commission. Such payment shall be made within thirty days after acceptance, and the
21 invoice and all other appropriate documentation and certifications in complete and acceptable form
22 are provided, as may be required by the contract documents. If the public owner or the owner's
23 representative determines the work is not substantially completed and accepted, then the owner or
24 the owner's representative must provide a written explanation of why the work is not considered
25 substantially completed and accepted within ten calendar days to the contractor, subcontractor, or
26 suppliers responsible for such work. If such written explanation is not given, the public body must
27 pay at least ninety-eight percent of the retainage within thirty calendar days. If at that time there are
28 any remaining minor items to be completed, an amount equal to [two] one hundred fifty percent of
29 the value of each item as determined by the public owner's and general contractor's [representative]
30 representatives shall be withheld until such items are completed;

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

37 (6) When a contractor receives any payment, the contractor shall pay each subcontractor and
38 material supplier in proportion to the work completed by each subcontractor and material supplier
39 his application less any retention not to exceed [ten] five percent. If the contractor receives less than
40 the full payment due under the public construction contract, the contractor shall be obligated to
41 disburse on a pro rata basis those funds received, with the contractor, subcontractors and material

1 suppliers each receiving a prorated portion based on the amount of payment. When, however, the
2 public owner does not release the full payment due under the contract because there are specific
3 areas of work or materials he is rejecting or because he has otherwise determined such areas are not
4 suitable for payment then those specific subcontractors or suppliers involved shall not be paid for
5 that portion of the work rejected or deemed not suitable for payment; provided the public owner or
6 the owner's representative gives a written explanation to the contractor, subcontractor, or supplier
7 involved as to why the work or supplies were rejected or deemed not suitable for payment, and all
8 other subcontractors and suppliers shall be paid in full;

9 (7) If the contractor, without reasonable cause, fails to make any payment to his
10 subcontractors and material suppliers within fifteen days after receipt of payment under the public
11 construction contract, the contractor shall pay to his subcontractors and material suppliers, in
12 addition to the payment due them, interest in the amount of one and one-half percent per month,
13 calculated from the expiration of the fifteen-day period until fully paid. This subdivision shall also
14 apply to any payments made by subcontractors and material suppliers to their subcontractors and
15 material suppliers and to all payments made to lower tier subcontractors and material suppliers
16 throughout the contracting chain;

17 (8) The public owner shall make final payment of all moneys owed to the contractor,
18 including any retainage withheld under subdivision (4) of this section, less any offsets or deductions
19 authorized in the contract or otherwise authorized by law, within thirty days of the due date. Final
20 payment shall be considered due upon the earliest of the following events:

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

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

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

30 2. Nothing in this section shall prevent the contractor or subcontractor, at the time of
31 application or certification to the public owner or contractor, from withholding such applications or
32 certifications to the owner or contractor for payment to the subcontractor or material supplier.
33 Amounts intended to be withheld shall not be included in such applications or certifications to the
34 public owner or contractor. Reasons for withholding such applications or certifications shall include,
35 but not be limited to, the following: unsatisfactory job progress; defective construction work or
36 material not remedied; disputed work; failure to comply with other material provisions of the
37 contract; third party claims filed or reasonable evidence that a claim will be filed; failure of the
38 subcontractor to make timely payments for labor, equipment and materials; damage to a contractor
39 or another subcontractor or material supplier; reasonable evidence that the contract can not be
40 completed for the unpaid balance of the subcontract sum or a reasonable amount for retention, not to
41 exceed the initial percentage retained by the owner.

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

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

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

[5.] 6. Nothing in this section shall prevent the owner from withholding payment or final payment from the contractor, or a subcontractor or material supplier. Reasons for withholding payment or final payment shall include, but not be limited to, the following: liquidated damages; unsatisfactory job progress; defective construction work or material not remedied; disputed work; failure to comply with any material provision of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure to make timely payments for labor, equipment or materials; damage to a contractor, subcontractor or material supplier; reasonable evidence that a subcontractor or material supplier cannot be fully compensated under its contract with the contractor for the unpaid balance of the contract sum; or citation by the enforcing authority for acts of the contractor or subcontractor which do not comply with any material provision of the contract and which result in a violation of any federal, state or local law, regulation or ordinance applicable to that project causing additional costs or damages to the owner.

1 7. Nothing in this section shall be construed to require direct payment by a public owner to a
 2 subcontractor or supplier, except in the case of the default of the contractor on the contract with the
 3 public owner where no performance or payment bond is required or where the surety fails to execute
 4 its duties under a bond.

5 [6.] 8. Notwithstanding any other provisions in this section to the contrary, no late payment
 6 interest shall be due and owing for payments which are withheld in good faith for reasonable cause
 7 pursuant to subsections 2 and 5 of this section. If it is determined by a court of competent
 8 jurisdiction that a payment which was withheld pursuant to subsections 2 and 5 of this section was
 9 not withheld in good faith for reasonable cause, the court may impose interest at the rate of one and
 10 one-half percent per month calculated from the date of the invoice and may, in its discretion, award
 11 reasonable attorney fees to the prevailing party. In any civil action or part of a civil action brought
 12 pursuant to this section, if a court determines after a hearing for such purpose that the cause was
 13 initiated, or a defense was asserted, or a motion was filed, or any proceeding therein was done
 14 frivolously and in bad faith, the court shall require the party who initiated such cause, asserted such
 15 defense, filed such motion, or caused such proceeding to be had to pay the other party named in such
 16 action the amount of the costs attributable thereto and reasonable expenses incurred by such party,
 17 including reasonable attorney fees."; and

18
 19 Further amend said Substitute, Page 22, Section 92.387, Line 2, by inserting after all of said Line the
 20 following:

21 "107.170. 1. As used in this section, the following terms mean:

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

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

30 (3) "Public works", the erection, construction, alteration, repair or improvement of any
 31 building, road, street, public utility or other public facility owned by the public entity.

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

40 3. All bonds executed and furnished under the provisions of this section shall be deemed to
 41 contain the requirements and conditions as herein set out, regardless of whether the same be set forth

1 in said bond, or of any terms or provisions of said bond to the contrary notwithstanding. 4.

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

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

14
15 Further amend said bill by amending the title, enacting clause, and intersectional references
16 accordingly.