

SECOND REGULAR SESSION

HOUSE BILL NO. 1484

97TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVES KORMAN (Sponsor), MILLER, CORNEJO, SCHATZ,
WIELAND AND HINSON (Co-sponsors).

4921H.02I

D. ADAM CRUMBLISS, Chief Clerk

AN ACT

To repeal sections 34.057 and 107.170, RSMo, and to enact in lieu thereof two new sections relating to contractor retainage.

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Section A. Sections 34.057 and 107.170, RSMo, are repealed and two new sections enacted in lieu thereof, to be known as sections 34.057 and 107.170, to read as follows: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 **any professional engineer, architect, landscape architect, or land surveyor, as well as** 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 **and any professional engineer, architect, landscape architect, or land surveyor** 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 **construction** 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 **any construction contract or subcontract for** public works projects shall not exceed five percent of the value of the contract

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

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

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

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

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

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

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

46 (4) The public owner shall pay **at least ninety-eight percent of** the retainage, less any
47 offsets or deductions authorized in the contract or otherwise authorized by law, to the contractor
48 after substantial completion of the contract work and acceptance by the public owner's authorized
49 contract representative, or as may otherwise be provided by the contract specifications for state
50 highway, road or bridge projects administered by the state highways and transportation
51 commission. Such payment shall be made within thirty days after acceptance, and the invoice
52 and all other appropriate documentation and certifications in complete and acceptable form are

53 provided, as may be required by the contract documents. **Upon receipt of payment under this**
54 **subdivision, the contractor shall pay the subcontractor or supplier. If the public owner or**
55 **the owner's representative determines the work is not substantially completed and**
56 **accepted, then the public owner or the owner's representative must provide a written**
57 **explanation of why the work is not considered substantially completed and accepted within**
58 **fourteen calendar days to the contractor, who then must provide a copy of the written**
59 **explanation to the subcontractor, or suppliers responsible for such work. If such written**
60 **explanation is not given to the contractor, the public body must pay at least ninety-eight**
61 **percent of the retainage within thirty calendar days.** If at that time there are any remaining
62 minor items to be completed, an amount equal to [two] **one** hundred **fifty** percent of the value
63 of each item as determined by the public owner's [representative] **and general contractor's**
64 **representatives** shall be withheld until such items are completed;

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

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

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

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

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

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

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

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

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

119 3. Should the contractor determine, after application or certification has been made and
120 after payment has been received from the public owner, or after payment has been received by
121 a contractor based upon the public owner's estimate of materials in place and work performed
122 as provided by contract, that all or a portion of the moneys needs to be withheld from a specific
123 subcontractor or material supplier for any of the reasons enumerated in this section, and such
124 moneys are withheld from such subcontractor or material supplier, then such undistributed

125 amounts shall be specifically identified in writing and deducted from the next application or
126 certification made to the public owner or from the next estimate by the public owner of payment
127 due the contractor, until a resolution of the matter has been achieved. Disputes shall be resolved
128 in accordance with the terms of the contract documents. Upon such resolution the amounts
129 withheld by the contractor from the subcontractor or material supplier shall be included in the
130 next application or certification made to the public owner or the next estimate by the public
131 owner and shall be paid promptly in accordance with the provisions of this section. This
132 subsection shall also apply to applications or certifications made by subcontractors or material
133 suppliers to the contractor and throughout the various tiers of the contracting chain.

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

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

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

160 regulation or ordinance applicable to that project causing additional costs or damages to the
161 owner.

162 [6.] 7. **Nothing in this section shall be construed to require direct payment by a**
163 **public owner to a subcontractor or supplier except in the case of the default as determined**
164 **by a court of the contractor on the contract with the public owner where no performance**
165 **or payment bond is required or where the surety fails to execute its duties, as determined**
166 **by the court.**

167 8. Notwithstanding any other provisions in this section to the contrary, no late payment
168 interest shall be due and owing for payments which are withheld in good faith for reasonable
169 cause pursuant to subsections 2 and 5 of this section. If it is determined by a court of competent
170 jurisdiction that a payment which was withheld pursuant to subsections 2 and 5 of this section
171 was not withheld in good faith for reasonable cause, the court may impose interest at the rate of
172 one and one-half percent per month calculated from the date of the invoice and may, in its
173 discretion, award reasonable attorney fees to the prevailing party. In any civil action or part of
174 a civil action brought pursuant to this section, if a court determines after a hearing for such
175 purpose that the cause was initiated, or a defense was asserted, or a motion was filed, or any
176 proceeding therein was done frivolously and in bad faith, the court shall require the party who
177 initiated such cause, asserted such defense, filed such motion, or caused such proceeding to be
178 had to pay the other party named in such action the amount of the costs attributable thereto and
179 reasonable expenses incurred by such party, including 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 services under
3 contract to a public entity. Contractor specifically does not include professional engineers,
4 architects or land surveyors licensed pursuant to chapter 327, those who provide environmental
5 assessment services or those who design, create or otherwise provide works of art under a city's
6 formally established program for the acquisition and installation of works of art and other
7 aesthetic adornments to public buildings and property;
- 8 (2) "Public entity", any official, board, commission or agency of this state or any county,
9 city, town, township, school, road district or other political subdivision of this state;
- 10 (3) "Public works", the erection, construction, alteration, repair or improvement of any
11 building, road, street, public utility or other public facility owned by the public entity.

12 2. It is hereby made the duty of all public entities in this state, in making contracts for
13 public works, the cost of which is estimated to exceed [twenty-five] **fifty** thousand dollars, to be
14 performed for the public entity, to require every contractor for such work to furnish to the public
15 entity, a bond with good and sufficient sureties, in an amount fixed by the public entity, and such
16 bond, among other conditions, shall be conditioned for the payment of any and all materials,

17 incorporated, consumed or used in connection with the construction of such work, and all
18 insurance premiums, both for compensation, and for all other kinds of insurance, said work, and
19 for all labor performed in such work whether by subcontractor or otherwise.

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

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

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

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