

SECOND REGULAR SESSION
HOUSE COMMITTEE SUBSTITUTE FOR
HOUSE BILL NO. 1484
97TH GENERAL ASSEMBLY

4921H.04C

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 the payment 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Section A. Sections 34.057 and 107.170, RSMo, are repealed and two new sections
2 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
2 state grant are not timely received by the contracting public municipality but notwithstanding any
3 other law to the contrary, all public works contracts made and awarded by the appropriate officer,
4 board or agency of the state or of a political subdivision of the state or of any district therein,
5 including any municipality, county and any board referred to as the public owner, for
6 construction, reconstruction or alteration of any public works project, shall provide for prompt
7 payment by the public owner to the contractor and **any professional engineer, architect,**
8 **landscape architect, or land surveyor, as well as** prompt payment by the contractor to the
9 subcontractor and material supplier in accordance with the following:

10 (1) A public owner shall make progress payments to the contractor **and any**
11 **professional engineer, architect, landscape architect, or land surveyor** on at least a monthly
12 basis as the work progresses, or, on a lump sum basis according to the terms of the lump sum
13 contract. Except in the case of lump sum contracts, payments shall be based upon estimates
14 prepared at least monthly of work performed and material delivered, as determined by the project
15 architect or engineer. Retainage withheld on **any construction contract or subcontract for**
16 public works projects shall not exceed five percent of the value of the contract or subcontract
17 [unless the public owner and the architect or engineer determine that a higher rate of retainage
18 is required to ensure performance of the contract. Retainage, however, shall not exceed ten

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.

19 percent of the value of the contract or subcontract. Except as provided in subsection 4 of this
20 section,] . **If the contractor is not required to obtain a bond under section 107.170 because**
21 **the cost of the public works contract is not estimated to exceed fifty thousand dollars, the**
22 **public owner may withhold retainage on the public works project in an amount not to**
23 **exceed ten percent of the value of the contract or subcontract.** The public owner shall pay
24 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 **The contractor shall pay the subcontractor or supplier** after substantial completion of the
49 contract work and acceptance by the public owner's authorized contract representative, or as may
50 otherwise be provided by the contract specifications for state highway, road or bridge projects
51 administered by the state highways and transportation commission. Such payment shall be made
52 within thirty days after acceptance, and the invoice and all other appropriate documentation and
53 certifications in complete and acceptable form are provided, as may be required by the contract
54 documents. **If the public owner or the owner's representative determines the work is not**

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

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

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

85 (7) If the contractor, without reasonable cause, fails to make any payment to his
86 subcontractors and material suppliers within fifteen days after receipt of payment under the
87 public construction contract, the contractor shall pay to his subcontractors and material suppliers,
88 in addition to the payment due them, interest in the amount of one and one-half percent per
89 month, calculated from the expiration of the fifteen-day period until fully paid. This subdivision
90 shall also apply to any payments made by subcontractors and material suppliers to their

91 subcontractors and material suppliers and to all payments made to lower tier subcontractors and
92 material suppliers throughout the contracting chain;

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

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

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

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

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

118 3. Should the contractor determine, after application or certification has been made and
119 after payment has been received from the public owner, or after payment has been received by
120 a contractor based upon the public owner's estimate of materials in place and work performed
121 as provided by contract, that all or a portion of the moneys needs to be withheld from a specific
122 subcontractor or material supplier for any of the reasons enumerated in this section, and such
123 moneys are withheld from such subcontractor or material supplier, then such undistributed
124 amounts shall be specifically identified in writing and deducted from the next application or
125 certification made to the public owner or from the next estimate by the public owner of payment
126 due the contractor, until a resolution of the matter has been achieved. Disputes shall be resolved

127 in accordance with the terms of the contract documents. Upon such resolution the amounts
128 withheld by the contractor from the subcontractor or material supplier shall be included in the
129 next application or certification made to the public owner or the next estimate by the public
130 owner and shall be paid promptly in accordance with the provisions of this section. This
131 subsection shall also apply to applications or certifications made by subcontractors or material
132 suppliers to the contractor and throughout the various tiers of the contracting chain.

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

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

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

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

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

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

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

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

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