

1 SB237  
2 147144-1  
3 By Senator Marsh  
4 RFD: Fiscal Responsibility and Accountability  
5 First Read: 21-FEB-13

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SYNOPSIS:            This bill would require pre-bid meetings to be held at least seven days prior to bid opening on any public works contract and would prohibit the modification of specifications within 24 hours of the opening of a bid on any public works contract.

                      This bill would reduce the time for payment of completed work on public contracts by an awarding authority from 45 days to 30 days.

                      This bill would remove the provision in current law that provides that the prompt payment provisions will not apply until an awarding authority is in receipt of funds as provided in the contract.

                      This bill would require a representative of an awarding authority to review and approve an invoice within 10 days of submission and would provide procedures for the dispute of a submitted invoice.

                      This bill would provide for alteration of contract terms upon the determination that certain

1 conditions on the property where work is to be  
2 performed under the contract have materially  
3 changed.

4  
5 A BILL  
6 TO BE ENTITLED  
7 AN ACT  
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9 To amend Section 39-2-2, Code of Alabama 1975, and  
10 Section 39-2-12, Code of Alabama 1975, as last amended by Act  
11 2012-379, 2012 Regular Session, relating to public works  
12 contracts; to require pre-bid meetings to be held at least  
13 seven days prior to bid opening; to prohibit the modification  
14 of specifications within 24 hours of the opening of a bid; to  
15 reduce the timeframe for payment of completed work; to remove  
16 the provision in current law that provides that the prompt  
17 payment provisions will not apply until an awarding authority  
18 is in receipt of funds as provided in the contract; to require  
19 a representative of an awarding authority to review and  
20 approve an invoice within 10 days of submission; to provide  
21 procedures for the dispute of a submitted invoice; and to  
22 provide for the alteration of contract terms upon the  
23 discovery of certain material changes in the property where  
24 work is to be performed.

25 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

26 Section 1. Section 39-2-2, Code of Alabama 1975, and  
27 Section 39-2-12, Code of Alabama 1975, as last amended by Act

1 2012-379, 2012 Regular Session, are amended to read as  
2 follows:

3 "§39-2-2.

4 "(a) Before entering into any contract for a public  
5 works involving an amount in excess of fifty thousand dollars  
6 (\$50,000), the awarding authority shall advertise for sealed  
7 bids. If the awarding authority is the state or a county, or  
8 an instrumentality thereof, it shall advertise for sealed bids  
9 at least once each week for three consecutive weeks in a  
10 newspaper of general circulation in the county or counties in  
11 which the improvement or some part thereof, is to be made. If  
12 the awarding authority is a municipality, or an  
13 instrumentality thereof, it shall advertise for sealed bids at  
14 least once in a newspaper of general circulation published in  
15 the municipality where the awarding authority is located. If  
16 no newspaper is published in the municipality, the awarding  
17 authority shall advertise by posting notice thereof on a  
18 bulletin board maintained outside the purchasing office and in  
19 any other manner and for the length of time as may be  
20 determined. In addition to bulletin board notice, sealed bids  
21 shall also be solicited by sending notice by mail to all  
22 persons who have filed a request in writing with the official  
23 designated by the awarding authority that they be listed for  
24 solicitation on bids for the public works contracts indicated  
25 in the request. If any person whose name is listed fails to  
26 respond to any solicitation for bids after the receipt of  
27 three such solicitations, the listing may be canceled. With

1 the exception of the Department of Transportation, for all  
2 public works contracts involving an estimated amount in excess  
3 of five hundred thousand dollars (\$500,000), awarding  
4 authorities shall also advertise for sealed bids at least once  
5 in three newspapers of general circulation throughout the  
6 state. The advertisements shall briefly describe the  
7 improvement, state that plans and specifications for the  
8 improvement are on file for examination in a designated office  
9 of the awarding authority, state the procedure for obtaining  
10 plans and specifications, state the time and place in which  
11 bids shall be received and opened, and identify whether  
12 prequalification is required and where all written  
13 prequalification information is available for review. All bids  
14 shall be opened publicly at the advertised time and place. No  
15 public work as defined in this chapter involving a sum in  
16 excess of fifty thousand dollars (\$50,000) shall be split into  
17 parts involving sums of fifty thousand dollars (\$50,000) or  
18 less for the purpose of evading the requirements of this  
19 section.

20 "(b) An awarding authority may let contracts for  
21 public works involving fifty thousand dollars (\$50,000) or  
22 less with or without advertising or sealed bids.

23 "(c) All contracts for public works entered into in  
24 violation of this title shall be null, void, and violative of  
25 public policy. Anyone who willfully violates this article  
26 concerning public works shall be guilty of a Class C felony.

1           "(d) Excluded from the operation of this title shall  
2 be contracts with persons who shall perform only  
3 architectural, engineering, construction management, program  
4 management, or project management services in support of the  
5 public works and who shall not engage in actual construction,  
6 repair, renovation, or maintenance of the public works with  
7 their own forces, by contract, subcontract, purchase order,  
8 lease, or otherwise.

9           "(e) In case of an emergency affecting public  
10 health, safety, or convenience, as declared in writing by the  
11 awarding authority, setting forth the nature of the danger to  
12 the public health, safety, or convenience which would result  
13 from delay, contracts may be let to the extent necessary to  
14 meet the emergency without public advertisement. The action  
15 and the reasons for the action taken shall immediately be made  
16 public by the awarding authority upon request.

17           "(f) No awarding authority may specify in the plans  
18 and specifications for the improvement the use of materials,  
19 products, systems, or services by a sole source unless all of  
20 the following requirements are met:

21           "(1) Except for contracts involving the  
22 construction, reconstruction, renovation, or replacement of  
23 public roads, bridges, and water and sewer facilities, the  
24 awarding authority can document to the satisfaction of the  
25 State Building Commission that the sole source product,  
26 material, system, or service is of an indispensable nature for  
27 the improvement, that there are no other viable alternatives,

1 and that only this particular product, material, system, or  
2 service fulfills the function for which it is needed.

3 "(2) The sole source specification has been  
4 recommended by the architect or engineer of record as an  
5 indispensable item for which there is no other viable  
6 alternative.

7 "(3) All information substantiating the use of a  
8 sole source specification, including the recommendation of the  
9 architect or engineer of record, shall be documented and made  
10 available for examination in the office of the awarding  
11 authority at the time of advertisement for sealed bids.

12 "(g) In the event of a proposed public works  
13 project, acknowledged in writing by the Alabama Homeland  
14 Security Department as (1) having a direct impact on the  
15 security or safety of persons or facilities and (2) requiring  
16 confidential handling for the protection of such persons or  
17 facilities, contracts may be let without public advertisement  
18 but with the taking of informal bids otherwise consistent with  
19 the requirements of this title and the requirements of  
20 maintaining confidentiality. Records of bidding and award  
21 shall not be disclosed to the public, and shall remain  
22 confidential.

23 "(h) If a pre-bid meeting is held, the pre-bid  
24 meeting shall be held at least seven days prior to the bid  
25 opening.

1                   "(i) Specifications for a proposed public works  
2 project may not be modified within 24 hours of the bid  
3 opening.

4                   "§39-2-12.

5                   "(a) As used in this section the following words  
6 shall have the meanings ascribed to them as follows:

7                   "(1) CONTRACTOR. Any natural person, partnership,  
8 company, firm, corporation, association, limited liability  
9 company, cooperative, or other legal entity licensed by the  
10 Alabama State Licensing Board for General Contractors.

11                   "(2) NONRESIDENT CONTRACTOR. A contractor which is  
12 neither a. organized and existing under the laws of the State  
13 of Alabama, nor b. maintains its principal place of business  
14 in the State of Alabama. A nonresident contractor which has  
15 maintained a permanent branch office within the State of  
16 Alabama for at least five continuous years shall not  
17 thereafter be deemed to be a nonresident contractor so long as  
18 the contractor continues to maintain a branch office within  
19 Alabama.

20                   "(3) RETAINAGE. That money belonging to the  
21 contractor which has been retained by the awarding authority  
22 conditioned on final completion and acceptance of all work in  
23 connection with a project or projects by the contractor.

24                   "(b) Unless otherwise provided in the  
25 specifications, partial payments shall be made as the work  
26 progresses at the end of each calendar month, but in no case  
27 later than ~~45~~ 30 days after the acceptance by the awarding



1 authority that the estimate and terms of the contract  
2 providing for partial payments have been fulfilled. A  
3 representative of the awarding authority shall review and  
4 approve an invoice within 10 days of submission. An architect  
5 or engineer, within seven days after receipt of the  
6 contractor's application for payment, shall either issue the  
7 owner a certificate for payment, with a copy to the  
8 contractors for amounts that are determined to be properly due  
9 or notify the contractor and owner in writing of the  
10 architect's or engineer's reason for withholding certification  
11 in whole or in part. In preparing estimates, the material  
12 delivered on the site, materials suitably stored and insured  
13 off-site, and preparatory work done may be taken into  
14 consideration. If the amount due by the awarding authority is  
15 not in dispute and the amount payable is not paid within the  
16 above ~~45-day~~ 30-day period, the contractor to whom payment is  
17 due shall also be entitled to interest from the awarding  
18 authority at the rate assessed for underpayment of taxes under  
19 Section 40-1-44(a), on the unpaid balance due. Any agreement  
20 to increase the ~~45-day~~ 30-day period for payment after the  
21 execution of the contract is not enforceable. Interest  
22 payments shall not be due on payments made after the ~~45-day~~  
23 30-day period because of administrative or processing delays  
24 at the close of the fiscal year. The provisions in this  
25 subsection shall not apply to contracts administered by the  
26 Alabama Building Commission, regardless of the source of the

1 funds to be utilized to fulfill the awarding authority's  
2 obligation under the contract.

3 "(c) In making the partial payments, there shall be  
4 retained not more than five percent of the estimated amount of  
5 work done and the value of materials stored on the site or  
6 suitably stored and insured off-site, and after 50 percent  
7 completion has been accomplished, no further retainage shall  
8 be withheld. The retainage as set out above shall be held  
9 until final completion and acceptance of all work covered by  
10 the contract unless the escrow or deposit arrangement  
11 described in subsections (f) and (g) is utilized. Provided,  
12 however, no retainage shall be withheld on contracts entered  
13 into by the Alabama Department of Transportation for the  
14 construction or maintenance of public highways, bridges, or  
15 roads.

16 "(d) In addition to other requirements, a  
17 nonresident contractor shall satisfy the awarding authority  
18 that he or she has paid all taxes due and payable to the State  
19 of Alabama or any political subdivision thereof prior to  
20 receiving final payment for contract work. When maintenance  
21 periods are included in the contract covering highways and  
22 bridges or similar structures, the periods shall be considered  
23 a component part of the contract. On completion and acceptance  
24 of each separate building, public work, or other division of  
25 the contract on which a price is stated separately in the  
26 contract or can be separately ascertained, payment may be made  
27 in full, including the retained percentage thereof, less

1 authorized deductions. Nothing in this section shall be  
2 interpreted to require the awarding authority to make full  
3 payment on an item of work when the item of work is an  
4 integral part of a complete improvement.

5 "(e) In lieu of the retained amounts provided for in  
6 subsection (c) of this section, the awarding authority may  
7 provide in the specifications or contracts an alternate  
8 procedure for the maintenance of an escrow account as provided  
9 in subsection (f) or the depositing of security as provided in  
10 subsection (g).

11 "(f) An escrow account, established pursuant to an  
12 escrow agreement, shall be entered into only on the following  
13 conditions:

14 "(1) If the contractor shall have entered into more  
15 than one construction contract allowing for the maintenance of  
16 escrow accounts, the contractor may elect to combine the  
17 amounts held in lieu of retainage under each contract into one  
18 or more escrow accounts or may elect to establish a separate  
19 escrow account for each contract.

20 "(2) Only state or national banks chartered within  
21 the State of Alabama or savings and loan associations  
22 domiciled in the State of Alabama may serve as an escrow  
23 agent.

24 "(3) The escrow agent must limit the investment of  
25 funds held in escrow in lieu of retained amounts provided for  
26 in subsection (c) of this section to savings accounts,  
27 certificates of deposit or similar time deposit investments

1 (which may, at the election of the contractor, be in an amount  
2 in excess of the maximum dollar amount of coverage by the  
3 Federal Deposit Insurance Corporation, the Federal Savings &  
4 Loan Insurance Corporation, or other similar agency), U.S.  
5 Treasury Bonds, U.S. Treasury Notes, U.S. Treasury  
6 Certificates of Indebtedness, U.S. Treasury Bills, bonds or  
7 notes of the State of Alabama or bonds of any political  
8 subdivision of the State of Alabama.

9 "(4) As interest on all investments held in escrow  
10 becomes due, it shall be collected by the escrow agent and  
11 paid to the contractor.

12 "(5) The escrow agent shall periodically acknowledge  
13 to the awarding authority and contractor the amount and value  
14 of the escrow account held by the escrow agent, and any  
15 additions to the escrow account by the awarding authority  
16 shall be reported immediately to the contractor. Withdrawals  
17 from the escrow account shall only be made subject to the  
18 written approval of the awarding authority.

19 "(6) Upon default or overpayment, as determined by  
20 the awarding authority, of any contract or contracts subject  
21 to this procedure, and upon the written demand of the awarding  
22 authority, the escrow agent shall within 10 days deliver a  
23 cashier's check to the awarding authority in the amount of the  
24 escrow account balance (subject to the redemption value of  
25 such investments at the time of disbursement) relating to the  
26 contract or contracts in default.

1           "(7) The escrow account may be terminated upon  
2 completion and acceptance of the contract or contracts as  
3 provided in subsections (c) and (i) of this section.

4           "(8) All fees and expenses of the escrow agent shall  
5 be paid by the contractor to the escrow agent and if not paid  
6 shall constitute a lien on the interest accruing to the escrow  
7 account and shall be paid therefrom.

8           "(9) The escrow account shall constitute a specific  
9 pledge to the awarding authority, and the contractor shall  
10 not, except to his surety, otherwise assign, pledge, discount,  
11 sell, or transfer his interest in said escrow account, the  
12 funds in which shall not be subject to levy, garnishment,  
13 attachment, or any other process whatsoever.

14           "(10) The form of the escrow agreement and  
15 provisions thereof in compliance herewith, as well as such  
16 other provisions as the awarding authority shall from time to  
17 time prescribe, shall be subject to written approval of the  
18 awarding authority. The approval of the escrow agreement by  
19 the awarding authority shall authorize the escrow agent to  
20 accept appointment in such capacity.

21           "(11) The awarding authority shall not be liable to  
22 the contractor or his surety for the failure of the escrow  
23 agent to perform under the escrow agreement, or for the  
24 failure of any financial institution to honor investments  
25 issued by it which are held in the escrow account.

1           "(g) The contractor may withdraw the whole or any  
2 part of the retainage upon deposit of securities only in  
3 accordance with the following procedures:

4           "(1) The contractor shall deposit with the State  
5 Treasurer or the municipal or county official holding funds  
6 belonging to the contractor, the following readily negotiable  
7 security or any combination thereof in an amount at least  
8 equal to the amount withdrawn, the security shall be accepted  
9 at the time of deposit at market value but not in excess of  
10 par value:

11           "a. U.S. Treasury Bonds, U.S. Treasury Notes, U.S.  
12 Treasury Certificates of Indebtedness, or U.S. Treasury Bills.

13           "b. Bonds or notes of the State of Alabama.

14           "c. Bonds of any political subdivision of the State  
15 of Alabama.

16           "d. Certificates of deposit issued by the Federal  
17 Deposit Insurance Corporation insured banks located in the  
18 State of Alabama. The certificates shall be negotiable and  
19 only in an amount not in excess of the maximum dollar amount  
20 of coverage by the Federal Deposit Insurance Corporation.

21           "e. Certificates of deposit issued by savings and  
22 loan associations located in the State of Alabama, the  
23 accounts of which are insured by the Federal Deposit Insurance  
24 Corporation or the accounts of which are insured by a company  
25 approved by the state Savings and Loan Board and the  
26 certificates shall be made payable with accrued interest on  
27 demand. Any certificate from any of the savings and loan

1 associations referred to in this paragraph shall not be for an  
2 amount in excess of the maximum dollar amount of coverage of  
3 the Federal Deposit Insurance Corporation.

4 "(2) The agency or department of the state having  
5 jurisdiction over any public works contract shall notify the  
6 State Treasurer of the amount of the deposit required and  
7 shall also notify the State Treasurer when to release the  
8 deposit.

9 "(3) The architect or engineer representing any  
10 municipality or county or the chair of any board, commission,  
11 or agency of any municipality or county shall notify the  
12 municipal or county official of the amount of deposit required  
13 and shall also notify the municipal or county official when to  
14 release the deposit.

15 "(4) At the time of deposit of any security, the  
16 security may be endorsed and shall be accompanied by a  
17 conditional assignment to the public body designated as owner  
18 in the contract document, which assignment shall empower the  
19 State Treasurer, or the municipal or county official to  
20 negotiate the security at any time to the extent necessary to  
21 cause the fulfilling of the contract.

22 "(5) Any interest or income due on any security  
23 deposited shall be paid to the contractor. If the deposit is  
24 in the form of coupon bonds, the coupons, as they respectively  
25 become due, shall be delivered to the contractor.

26 "(6) In the event the contractor defaults in the  
27 performance of the contract or any portion of the contract,

1 the securities deposited by the contractor in lieu of  
2 retainage and all interest, income, and coupons accruing on  
3 the securities, after default, may be sold by the state or any  
4 agency or department of the state, any municipality or county,  
5 or any board, commission, or agency of the municipality or  
6 county and the proceeds of the sale shall be used as if the  
7 proceeds represented the retainage provided for under the  
8 contract.

9 "(h) All material and work covered by partial  
10 payments made shall become the sole property of the awarding  
11 authority, but the contractor shall not be relieved from the  
12 sole responsibility for the care and protection of materials  
13 and work upon which payments have been made, and for the  
14 restoration of any damaged work.

15 "(i) (1) Upon the contractor's completion and the  
16 awarding authority's acceptance of all work required, the  
17 awarding authority shall pay the amount due the contractor  
18 upon the contractor's presentation of the following items:

19 "a. A properly executed and duly certified voucher  
20 for payment.

21 "b. A release, if required, of all claims and claims  
22 of lien against the awarding authority arising under and by  
23 virtue of the contract, other than such claims of the  
24 contractor, if any, as may be specifically excepted by the  
25 contractor from the operation of the release in stated amounts  
26 to be set forth therein.



1            "c. Proof of advertisement as provided by law. Upon  
2 proof of advertisement, the prescribed terms of payment shall  
3 not be amended after the terms and specifications have been  
4 published.

5            "(2) Such payment shall become due and owing 45 days  
6 after all the requirements of subdivision (1) are fulfilled,  
7 and any agreement to increase the 45-day period for payment  
8 after the execution of the contract is not enforceable. If the  
9 amount payable is not paid as required, interest on the amount  
10 shall be due and owing to the contractor. Interest shall  
11 accrue on the day following the later date described above and  
12 shall be paid from the same fund or source from which the  
13 contract principal is paid. The interest rate for payments  
14 shall be the legal amount currently assessed for under payment  
15 of taxes under Section 40-1-44 (a).

16            "(3) Except as may be prohibited by Article I,  
17 Section 14 of the Constitution of Alabama of 1901, a  
18 contractor or awarding authority may file a civil action  
19 against the party contractually obligated for the payment or  
20 repayment claimed to recover the amount due plus the interest  
21 accrued in accordance with this chapter. In addition to the  
22 payment of any amounts due plus interest, if applicable, the  
23 court shall award the prevailing party reasonable attorneys'  
24 fees, court costs, and reasonable expenses. This provision  
25 shall not apply to contracts administered by the Alabama  
26 Building Commission, regardless of the source of the funds to

1 be utilized to fulfill the awarding authority's obligation  
2 under the contract.

3 "(j) If the Department of Transportation or a county  
4 awarding authority shall determine that there has been  
5 overpayment to a contractor on a contract award pursuant to  
6 this chapter, the Department of Transportation or the county  
7 awarding authority shall provide written notice of the  
8 overpayment to the contractor and the contractor shall remit  
9 the overpayment to the Department of Transportation or the  
10 county awarding authority within 60 days of receipt of the  
11 demand. If the contractor fails to remit payment in full of  
12 the overpayment within 60 days of receipt of demand, the  
13 contractor shall be disqualified from bidding as a prime  
14 contractor or from performing work as a subcontractor on any  
15 future Department of Transportation contract or county  
16 contract for the construction or maintenance of public  
17 highways, bridges, or roads until the overpayment is made. The  
18 Department of Transportation or county awarding authority  
19 shall also be entitled to interest from the contractor at the  
20 rate assessed for under payment of taxes under Section 40-1-44  
21 (a) beginning on the 61st day after the contractor's receipt  
22 of demand.

23 "(k) The contract between the awarding authority and  
24 contractor shall contain provisions outlining the source of  
25 sufficient funds to be utilized to fulfill the awarding  
26 authority's obligations under the contract, including whether  
27 the funds are held by the awarding authority at the time of

1 the execution of the contract or whether the funds will become  
2 available at a date following the execution of the contract.  
3 ~~Should the source of funds for the payment be a grant, award,~~  
4 ~~or direct reimbursement from the state, federal government, or~~  
5 ~~other source which will not become available until after the~~  
6 ~~execution of the contract, this shall be disclosed in the~~  
7 ~~contract and the provisions of this chapter regarding prompt~~  
8 ~~payment shall not apply until the awarding authority is in~~  
9 ~~receipt of the funds as provided in the contract. Upon such~~  
10 ~~receipt, the 45-day requirement in this chapter shall commence~~  
11 ~~and shall be enforceable as provided herein.~~

12 "(l) If subsurface or latent physical conditions are  
13 encountered at a site where work is to be performed under the  
14 contract differing materially from those indicated in the  
15 contract, the party discovering the conditions shall promptly  
16 notify all parties to the contract in writing before the  
17 affected work is performed. Upon written notification of  
18 materially different conditions, an engineer shall  
19 investigate, and if the engineer determines that the  
20 conditions are materially different and may cause an increase  
21 or decrease in the cost or time required for performance of  
22 any work under the contract, an adjustment of the contract  
23 terms shall be made to adequately reflect the increase or  
24 decrease in the cost or time required due to the condition  
25 changes.

26 "(i)(m) In the event of a conflict between the  
27 provisions of this section and the provisions of any other

1 section of the Code of Alabama 1975, or any agency's or  
2 department's rules, regulations, or manuals, this section  
3 shall govern.

4 "~~(m)~~ (n) The provisions of this section shall not  
5 apply to any state agency established pursuant to Chapter 1 of  
6 Title 33.

7 "~~(n)~~ (o) The payment provisions of this section shall  
8 not apply to contracts entered into by governmental entities  
9 as a result of response and recovery to any of the conditions  
10 described in Section 31-9-2(a).

11 "~~(o)~~ (p) The provisions set forth in this section  
12 shall apply to all payments, partial or otherwise."

13 Section 2. This act shall become effective on the  
14 first day of the third month following its passage and  
15 approval by the Governor, or its otherwise becoming law.