

Alabama Legislature Amends Law Requiring Timely Payment for Public-Works Contracts

In the last two years, Alabama has amended its laws regarding timely payments to contractors that are involved in public works contracts. The first amendment was in 2012. Then, a second amendment effective on July 1, 2014 added to what was included in 2012. By way of short summary, the new law with both amendments, codified at Alabama Code section 39-2-12, has provisions that: (a) prohibit awarding authorities¹ from increasing the time for payment for completed work beyond 35 days; (b) require certification of availability of funds by authorities; (c) require a review of contractor payment submissions and written notification of errors in the submission within ten days; and, (d) recovery of interest, attorneys' fees and expenses associated with the failure to make proper payment.

The new law is a change from the pre-2012 statute that partial payments were required as work progressed "at the end of each calendar month, or as soon thereafter as practicable, on the estimates made and approved by the awarding authority." The old law allowed for the possibility of indefinite delay for payments not determined "practicable." The new law deletes the arguably ambiguous "practicable" language and requires partial payments within 35 days² after the authority accepts that the estimate and the terms providing for partial payments have been fulfilled.

With regard to the payment procedure, the 2014 amendment also requires that the contract between the contractor and the awarding authority designate "a person" to review the progress of completed work and documents submitted by the contractor. The designated person cannot just hold a payment submission for an extended period of time without taking any action. Instead, within ten days (or twenty days for Department of Transportation contracts) of the contractor's submission the designated person must either: (a) forward it on for payment; or, (b) write back to the contractor informing of errors in, or disputes related to, the submission. After receiving notice of errors or disputes the contractor can then correct and resubmit the invoice.

If the awarding authority does pay within 35 days, contractors may collect interest at the rate for tax underpayments set out in section 40-1-44(a) of the Alabama Code. This rate is

1 Section 39-2-1 defines an "awarding authority" as "any governmental board, commission, agency, body, authority, instrumentality, department, or subdivision of the state, its counties and municipalities." Awarding authorities do not, however, include the State Docks Department (or any other entity established by Chapter 1 of Title 33) and any entity exempted from competitive bid laws.

2 The 2012 Amendment allowed for 45 days but this was reduced to 35 days in the 2014 Amendment.

calculated by the United States Secretary of the Treasury which formula is found in 26 U.S.C. Section 6621(a)(2). For 2012 through 2014 it has been 3%. The new law also prohibits contractually extending the 35-day window. No interest payment is required for payments that miss the window because of administrative or processing delays at the close of the fiscal year. Also, this section does not apply to contracts administered by the Alabama Building Commission (“ABC”), regardless of the source of the funds used to fulfill the ABC’s obligations under the contract.

Additionally, the new law also allows recovery of attorneys’ fees and costs of collection related to nonpayment. That is, contractors may sue the party obligated for the payment claimed and seek amounts due, interest, attorneys’ fees, court costs, and other expenses. However, this section also does not apply to contracts administered by the ABC.

The new law still requires a contractor to present proof of advertisement before the final payment becomes due, but now provides that after presentment, the terms of payment may not be amended. Also, payments after completion must be made within 35 days, and are subject to the same interest requirements as partial payments.

The 2012 and 2014 amendments cut in half the time for contractors to return overpayments to the Alabama Department of Transportation (“DOT”) or an associated county awarding authority. Previously, a contractor had 120 days after notice to remit the overpayment. The 2012 amendment cuts this to 60 days. Failure to remit overpayments within 60 days results in disqualification from bidding on DOT contracts and interest on overpayments.

The 2014 amendment also added a provision that appears to address contractor’s concerns about not having sufficient time between the pre-bid meeting and the time when a bid must be submitted. It states that if an awarding authority conducts a pre-bid meeting the meeting must occur more than seven days before the bid opening unless an emergency is declared. *Ala. Code* 1§ 39-2-2 (h).

Finally, the 2012 amendment included a special provision that required disclosure in the bid documents of situations where the source of funds for a project is a grant, award or direct reimbursement from the state or federal government or another source and the funds are not going to be available until after the signing of the contract. The 2014 amendment added that once the awarding authority receives funds it must make payment to the contractor within ten days assuming payment is otherwise due.

Delays in payment can make or break a project. Knowledge of the laws with regard to payment requirements are vital for any contractor working in Alabama. As such, contractors bidding on public works projects should examine the new public works statute with a view to utilizing it as a means to motivate complete and timely payment.

Larry S. Logsdon and Oscar M. Price are attorneys practicing in the Construction Law Section at Wallace, Jordan, Ratliff & Brandt, LLC.