

SUMMARY OF HOUSE BILL 71

House Bill 71 (“HB 71”) amends the *Code of Alabama*, Section 39-2-12, which relates to the timely execution of public works contracts. HB 71 was passed by the Alabama House of Representatives on April 17, 2012, and the Alabama Senate on May 8, 2012. The purpose of the amendment is to (a) prohibit an awarding authority to contractually increasing the time for payment for completing work beyond a certain number of days; (b) to provide for interest to be automatically added on any dollar amount approved and unpaid for each month; (c) to require certification and proof of certification of the availability of funds by the awarding authority to pay contractors for work under the contract; and (d) to provide that a contractor that is not paid should be able to recover reasonable attorneys’ fees, costs ,and expenses associated with the nonpayment.

The old law required an awarding authority¹ to make partial payments as work progresses at the end of each calendar month “or as soon thereafter as practicable, on the estimates made and approved b y the awarding authority.” Under this language, awarding authorities could delay payments for an indefinite amount of time of they decided payment was not “practicable.” HB 71 amends the law to delete the “as soon as thereafter practicable” clause and replace it with language that requires that partial payments be made within forty-five (45) days after the acceptance by the awarding authority that the estimate and terms of the contract providing for partial payments have been fulfilled. If the awarding authority does not make partial payments during this forty-five (45) day window, the contractor is entitled to interest from the awarding authority at the rate assessed for underpayment of taxes under Section 40-1-44(a).² Further, the new law prohibits the forty-five (45) day payment window to be extended by contract. 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.

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 This rate is calculated using the rate for underpayment of taxes used by the United States Secretary of the Treasury , which formula is found in 26 U.S.C. Section 6621(a)(2). This rate is, as of the day of this memorandum, three percent (3%).

As did the old law, the new law requires contractors to present to the awarding authority proof of advertisement before the final payment becomes due. The new law, however, provides that after such proof of advertisement is presented the prescribed terms of payment may not be amended after the terms and specifications have been published. Payments after completion now must be paid within forty-five (45) days after the payments come due (rather than forty (40) days under the old law), but such payments are now subject to the same interest requirements as provided in the section concerning partial payments. Again, this forty-five (45) day payment window may not be increased by contract.

Another contractor-friendly addition found in HB 71 is the clause allowing contractors to recover costs of collection of nonpayment. The new law allows either the contractor or the awarding party to file a civil action against the party contractually obligated for the payment or repayment claimed. Such a lawsuit may seek not only the amounts due under the contract (along with the interest provided by this section), but also reasonable attorneys' fees, court costs, and reasonable expenses. Like the "partial payment" section, this section does not apply to the ABC.

One important element of the new law that contractors who do work with the Alabama Department of Transportation ("DOT") should note is the halving of the time given for contractors to return overpayments to the DOT (or associated county awarding authority). Under the old law, a contractor given written notice of an overpayment had one hundred twenty (120) days to remit the overpayment. The new law cuts this time to sixty (60) days. As under the old law, failure to remit the overpayment within the allotted time period will result in the contractor's disqualification from bidding on future DOT contracts, while the new law also allows the DOT to collect interest on overdue overpayments.

Finally, HB 71 enacts several reporting requirements regarding the source of contract funding. The new law requires contracts between awarding authorities and contractors to contain information regarding the source of funding. Particularly, the contract must explicitly state whether the source of funds is coming from a source that will not be available until after the execution of the contract (such as a grant, award, or direct reimbursement from a governmental entity).