

SECOND REGULAR SESSION

# HOUSE BILL NO. 1702

## 96TH GENERAL ASSEMBLY

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INTRODUCED BY REPRESENTATIVES FUHR (Sponsor), KORMAN, SCHATZ, WIELAND, HINSON,  
HAEFNER, BERRY, McGEORGHEGAN, ELLINGER, ELLINGTON AND BROWN (85) (Co-sponsors).

5480L.03I

D. ADAM CRUMBLISS, Chief Clerk

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### AN ACT

To repeal section 34.057, RSMo, and to enact in lieu thereof one new section relating to public works contracts.

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*Be it enacted by the General Assembly of the state of Missouri, as follows:*

Section A. Section 34.057, RSMo, is repealed and one new section enacted in lieu thereof, to be known as section 34.057, to read as follows: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 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 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 contracts, payments shall be based upon estimates prepared at least monthly of work performed and material delivered, as [determined] **verified** by the project architect [or], engineer, **or public owner**. Retainage withheld on public works projects shall not exceed five percent of the value of the contract [or subcontract] unless the public owner and the architect or engineer determine that a higher rate of retainage is required to ensure performance of the contract. Retainage, however, shall not exceed ten percent of the

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 value of the contract [or subcontract]. Except as provided in subsection 4 of this section, the  
18 public owner shall pay the contractor the amount due, less a retainage not to exceed ten percent,  
19 within thirty days following the latter of the following:

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

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

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

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

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

40 (4) The public owner shall pay the retainage, less any offsets or deductions authorized  
41 in the contract or otherwise authorized by law, to the contractor after substantial completion of  
42 the contract work and acceptance by the public owner's authorized contract representative, or as  
43 may otherwise be provided by the contract specifications for state highway, road or bridge  
44 projects administered by the state highways and transportation commission. Such payment shall  
45 be made within thirty days after acceptance, and the invoice and all other appropriate  
46 documentation and certifications in complete and acceptable form are provided, as may be  
47 required by the contract documents. If at that time there are any remaining minor items to be  
48 completed, an amount equal to two hundred percent of the value of each item as determined by  
49 the public owner's representative shall be withheld until such items are completed;

50 (5) All estimates or invoices for supplies and services purchased, approved and  
51 processed, or final payments, shall be paid promptly and shall be subject to late payment charges  
52 provided in this section. Except as provided in subsection 4 of this section, if the contractor has

53 not been paid within thirty days as set forth in subdivision (1) of subsection 1 of this section, the  
54 contracting agency shall pay the contractor, in addition to the payment due him, interest at the  
55 rate of one and one-half percent per month calculated from the expiration of the thirty-day period  
56 until fully paid;

57 (6) When a contractor receives any payment, the contractor shall pay each subcontractor  
58 and material supplier, in proportion to the work completed by each subcontractor and material  
59 supplier, **the amount of** his application less any retention not to exceed [ten] **five** percent. If the  
60 contractor receives less than the full payment due under the public construction contract, the  
61 contractor shall be obligated to disburse on a pro rata basis those funds received, with the  
62 contractor, subcontractors and material suppliers each receiving a prorated portion based on the  
63 amount of payment. When, however, the public owner does not release the full payment due  
64 under the contract because there are specific areas of work or materials he is rejecting or because  
65 he has otherwise determined such areas are not suitable for payment then those specific  
66 subcontractors or suppliers involved shall not be paid for that portion of the work rejected or  
67 deemed not suitable for payment and all other subcontractors and suppliers shall be paid in full;

68 (7) **Except as provided in subsections 2 and 5 of this section, contractors shall not**  
69 **withhold more than five percent retainage from any subcontractor, and shall release to**  
70 **subcontractors any retainage withheld within fifteen days of the completion of the**  
71 **subcontract.** If the contractor, without reasonable cause, fails to make any payment to his  
72 subcontractors and material suppliers within fifteen days after receipt of payment under the  
73 public construction contract, the contractor shall pay to his subcontractors and material suppliers,  
74 in addition to the payment due them, interest in the amount of one and one-half percent per  
75 month, calculated from the expiration of the fifteen-day period until fully paid. This subdivision  
76 shall also apply to any payments made by subcontractors and material suppliers to their  
77 subcontractors and material suppliers and to all payments made to lower tier subcontractors and  
78 material suppliers throughout the contracting chain;

79 (8) The public owner shall make final payment of all moneys owed to the contractor, less  
80 any offsets or deductions authorized in the contract or otherwise authorized by law, within thirty  
81 days of the due date. Final payment shall be considered due upon the earliest of the following  
82 events:

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

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

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

92 2. Nothing in this section shall prevent the contractor or subcontractor, at the time of  
93 application or certification to the public owner or contractor, from withholding such applications  
94 or certifications to the owner or contractor for payment to the subcontractor or material supplier.  
95 Amounts intended to be withheld shall not be included in such applications or certifications to  
96 the public owner or contractor. Reasons for withholding such applications or certifications shall  
97 include, but not be limited to, the following: unsatisfactory job progress; defective construction  
98 work or material not remedied; disputed work; failure to comply with other material provisions  
99 of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure  
100 of the subcontractor to make timely payments for labor, equipment and materials; damage to a  
101 contractor or another subcontractor or material supplier; reasonable evidence that the contract  
102 [can not] **cannot** be completed for the unpaid balance of the subcontract sum or a reasonable  
103 amount for retention, not to exceed the initial percentage retained by the owner.

104 3. Should the contractor determine, after application or certification has been made and  
105 after payment has been received from the public owner, or after payment has been received by  
106 a contractor based upon the public owner's estimate of materials in place and work performed  
107 as provided by contract, that all or a portion of the moneys needs to be withheld from a specific  
108 subcontractor or material supplier for any of the reasons enumerated in this section, and such  
109 moneys are withheld from such subcontractor or material supplier, then such undistributed  
110 amounts shall be specifically identified in writing and deducted from the next application or  
111 certification made to the public owner or from the next estimate by the public owner of payment  
112 due the contractor, until a resolution of the matter has been achieved. Disputes shall be resolved  
113 in accordance with the terms of the contract documents. Upon such resolution the amounts  
114 withheld by the contractor from the subcontractor or material supplier shall be included in the  
115 next application or certification made to the public owner or the next estimate by the public  
116 owner and shall be paid promptly in accordance with the provisions of this section. This  
117 subsection shall also apply to applications or certifications made by subcontractors or material  
118 suppliers to the contractor and throughout the various tiers of the contracting chain.

119 4. [The] **When** contracts [which] provide for payments to the contractor **to be** based  
120 upon the public owner's estimate of materials in place and work performed rather than  
121 applications or certifications submitted by the contractor, the public owner shall pay the  
122 contractor within thirty days following the date upon which the estimate is required by contract  
123 to be completed by the public owner, the amount due less a retainage not to exceed five percent.  
124 All such estimates by the public owner shall be paid promptly and shall be subject to late

125 payment charges as provided in this subsection. After the thirtieth day following the date upon  
126 which the estimate is required by contract to be completed by the public owner, the contracting  
127 agency shall pay the contractor, in addition to the payment due him, interest at a rate of one and  
128 one-half percent per month calculated from the expiration of the thirty-day period until fully  
129 paid.

130         5. Nothing in this section shall prevent the owner from withholding payment or final  
131 payment from the contractor, or a subcontractor or material supplier. Reasons for withholding  
132 payment or final payment shall include, but not be limited to, the following: liquidated damages;  
133 unsatisfactory job progress; defective construction work or material not remedied; disputed  
134 work; failure to comply with any material provision of the contract; third party claims filed or  
135 reasonable evidence that a claim will be filed; failure to make timely payments for labor,  
136 equipment or materials; damage to a contractor, subcontractor or material supplier; reasonable  
137 evidence that a subcontractor or material supplier cannot be fully compensated under its contract  
138 with the contractor for the unpaid balance of the contract sum; or citation by the enforcing  
139 authority for acts of the contractor or subcontractor which do not comply with any material  
140 provision of the contract and which result in a violation of any federal, state or local law,  
141 regulation or ordinance applicable to that project causing additional costs or damages to the  
142 owner.

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

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