

SECOND REGULAR SESSION  
[TRULY AGREED TO AND FINALLY PASSED]  
SENATE COMMITTEE SUBSTITUTE FOR

# SENATE BILL NO. 529

97TH GENERAL ASSEMBLY

2014

4629S.02T

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## 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.

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*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Section A. Sections 34.057 and 107.170, RSMo, are repealed and two new  
2 sections enacted in lieu thereof, to be known as sections 34.057 and 107.170, to  
3 read as follows:

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

12 (1) A public owner shall make progress payments to the contractor **and**  
13 **any professional engineer, architect, landscape architect, or land**  
14 **surveyor** on at least a monthly basis as the work progresses, or, on a lump sum  
15 basis according to the terms of the lump sum contract. Except in the case of lump  
16 sum contracts, payments shall be based upon estimates prepared at least monthly  
17 of work performed and material delivered, as determined by the project architect

**EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.**

18 or engineer. Retainage withheld on **any construction contract or**  
19 **subcontract for** public works projects shall not exceed five percent of the value  
20 of the contract or subcontract [unless the public owner and the architect or  
21 engineer determine that a higher rate of retainage is required to ensure  
22 performance of the contract. Retainage, however, shall not exceed ten percent of  
23 the value of the contract or subcontract. Except as provided in subsection 4 of  
24 this section,]. **If the contractor is not required to obtain a bond under**  
25 **section 107.170 because the cost of the public works contract is not**  
26 **estimated to exceed fifty thousand dollars, the public owner may**  
27 **withhold retainage on the public works project in an amount not to**  
28 **exceed ten percent of the value of the contract or subcontract.** The  
29 public owner shall pay the contractor the amount due, less a retainage [not to  
30 exceed ten percent], within thirty days following the latter of the following:

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

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

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

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

41 (3) If, in the discretion of the owner and the project architect or engineer  
42 and the contractor, it is determined that a subcontractor's performance has been  
43 completed and the subcontractor can be released prior to substantial completion  
44 of the public works contract without risk to the public owner, the contractor shall  
45 request such adjustment in retainage, if any, from the public owner as necessary  
46 to enable the contractor to pay the subcontractor in full. The public owner may  
47 reduce or eliminate retainage on any contract payment if, in the public owner's  
48 opinion, the work is proceeding satisfactorily. If retainage is released and there  
49 are any remaining minor items to be completed, an amount equal to [two] **one**  
50 **hundred fifty** percent of the value of each item as determined by the public  
51 owner's duly authorized [representative] **representatives** shall be withheld  
52 until such item or items are completed;

53 (4) The public owner shall pay **at least ninety-eight percent of the**

54 retainage, less any offsets or deductions authorized in the contract or otherwise  
55 authorized by law, to the contractor. **The contractor shall pay the**  
56 **subcontractor or supplier** after substantial completion of the contract work  
57 and acceptance by the public owner's authorized contract representative, or as  
58 may otherwise be provided by the contract specifications for state highway, road  
59 or bridge projects administered by the state highways and transportation  
60 commission. Such payment shall be made within thirty days after acceptance,  
61 and the invoice and all other appropriate documentation and certifications in  
62 complete and acceptable form are provided, as may be required by the contract  
63 documents. **If the public owner or the owner's representative determines**  
64 **the work is not substantially completed and accepted, then the owner**  
65 **or the owner's representative shall provide a written explanation of**  
66 **why the work is not considered substantially completed and accepted**  
67 **within fourteen calendar days to the contractor, who shall then provide**  
68 **such notice to the subcontractor or suppliers responsible for such**  
69 **work. If such written explanation is not given by the public body, the**  
70 **public body shall pay at least ninety-eight percent of the retainage**  
71 **within thirty calendar days.** If at that time there are any remaining minor  
72 items to be completed, an amount equal to [two] **one hundred fifty** percent of the  
73 value of each item as determined by the public owner's representative shall be  
74 withheld until such items are completed;

75 (5) All estimates or invoices for supplies and services purchased, approved  
76 and processed, or final payments, shall be paid promptly and shall be subject to  
77 late payment charges provided in this section. Except as provided in subsection  
78 4 of this section, if the contractor has not been paid within thirty days as set  
79 forth in subdivision (1) of subsection 1 of this section, the contracting agency shall  
80 pay the contractor, in addition to the payment due him, interest at the rate of one  
81 and one-half percent per month calculated from the expiration of the thirty-day  
82 period until fully paid;

83 (6) When a contractor receives any payment, the contractor shall pay each  
84 subcontractor and material supplier in proportion to the work completed by each  
85 subcontractor and material supplier his application less any retention not to  
86 exceed [ten] **five** percent. If the contractor receives less than the full payment  
87 due under the public construction contract, the contractor shall be obligated to  
88 disburse on a pro rata basis those funds received, with the contractor,  
89 subcontractors and material suppliers each receiving a prorated portion based on

90 the amount of payment. When, however, the public owner does not release the  
91 full payment due under the contract because there are specific areas of work or  
92 materials he is rejecting or because he has otherwise determined such areas are  
93 not suitable for payment then those specific subcontractors or suppliers involved  
94 shall not be paid for that portion of the work rejected or deemed not suitable for  
95 payment; **provided the public owner or the owner's representative gives**  
96 **a written explanation to the contractor, subcontractor, or supplier**  
97 **involved as to why the work or supplies were rejected or deemed not**  
98 **suitable for payment**, and all other subcontractors and suppliers shall be paid  
99 in full;

100 (7) If the contractor, without reasonable cause, fails to make any payment  
101 to his subcontractors and material suppliers within fifteen days after receipt of  
102 payment under the public construction contract, the contractor shall pay to his  
103 subcontractors and material suppliers, in addition to the payment due them,  
104 interest in the amount of one and one-half percent per month, calculated from the  
105 expiration of the fifteen-day period until fully paid. This subdivision shall also  
106 apply to any payments made by subcontractors and material suppliers to their  
107 subcontractors and material suppliers and to all payments made to lower tier  
108 subcontractors and material suppliers throughout the contracting chain;

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

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

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

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

124 2. Nothing in this section shall prevent the contractor or subcontractor,  
125 at the time of application or certification to the public owner or contractor, from

126 withholding such applications or certifications to the owner or contractor for  
127 payment to the subcontractor or material supplier. Amounts intended to be  
128 withheld shall not be included in such applications or certifications to the public  
129 owner or contractor. Reasons for withholding such applications or certifications  
130 shall include, but not be limited to, the following: unsatisfactory job progress;  
131 defective construction work or material not remedied; disputed work; failure to  
132 comply with other material provisions of the contract; third party claims filed or  
133 reasonable evidence that a claim will be filed; failure of the subcontractor to make  
134 timely payments for labor, equipment and materials; damage to a contractor or  
135 another subcontractor or material supplier; reasonable evidence that the contract  
136 can not be completed for the unpaid balance of the subcontract sum or a  
137 reasonable amount for retention, not to exceed the initial percentage retained by  
138 the owner.

139         3. Should the contractor determine, after application or certification has  
140 been made and after payment has been received from the public owner, or after  
141 payment has been received by a contractor based upon the public owner's  
142 estimate of materials in place and work performed as provided by contract, that  
143 all or a portion of the moneys needs to be withheld from a specific subcontractor  
144 or material supplier for any of the reasons enumerated in this section, and such  
145 moneys are withheld from such subcontractor or material supplier, then such  
146 undistributed amounts shall be specifically identified in writing and deducted  
147 from the next application or certification made to the public owner or from the  
148 next estimate by the public owner of payment due the contractor, until a  
149 resolution of the matter has been achieved. Disputes shall be resolved in  
150 accordance with the terms of the contract documents. Upon such resolution the  
151 amounts withheld by the contractor from the subcontractor or material supplier  
152 shall be included in the next application or certification made to the public owner  
153 or the next estimate by the public owner and shall be paid promptly in accordance  
154 with the provisions of this section. This subsection shall also apply to  
155 applications or certifications made by subcontractors or material suppliers to the  
156 contractor and throughout the various tiers of the contracting chain.

157         4. The contracts which provide for payments to the contractor based upon  
158 the public owner's estimate of materials in place and work performed rather than  
159 applications or certifications submitted by the contractor, the public owner shall  
160 pay the contractor within thirty days following the date upon which the estimate  
161 is required by contract to be completed by the public owner, the amount due less

162 a retainage not to exceed five percent. All such estimates by the public owner  
163 shall be paid promptly and shall be subject to late payment charges as provided  
164 in this subsection. After the thirtieth day following the date upon which the  
165 estimate is required by contract to be completed by the public owner, the  
166 contracting agency shall pay the contractor, in addition to the payment due him,  
167 interest at a rate of one and one-half percent per month calculated from the  
168 expiration of the thirty-day period until fully paid.

169 **5. The public owner shall pay or cause to be paid to any**  
170 **professional engineer, architect, landscape architect, or land surveyor**  
171 **the amount due within thirty days following the receipt of an invoice**  
172 **prepared and submitted in accordance with the contract terms. In**  
173 **addition to the payment due, the contracting agency shall pay interest**  
174 **at the rate of one and one-half percent per month calculated from the**  
175 **expiration of the thirty-day period until fully paid.**

176 **6.** Nothing in this section shall prevent the owner from withholding  
177 payment or final payment from the contractor, or a subcontractor or material  
178 supplier. Reasons for withholding payment or final payment shall include, but  
179 not be limited to, the following: liquidated damages; unsatisfactory job progress;  
180 defective construction work or material not remedied; disputed work; failure to  
181 comply with any material provision of the contract; third party claims filed or  
182 reasonable evidence that a claim will be filed; failure to make timely payments  
183 for labor, equipment or materials; damage to a contractor, subcontractor or  
184 material supplier; reasonable evidence that a subcontractor or material supplier  
185 cannot be fully compensated under its contract with the contractor for the unpaid  
186 balance of the contract sum; or citation by the enforcing authority for acts of the  
187 contractor or subcontractor which do not comply with any material provision of  
188 the contract and which result in a violation of any federal, state or local law,  
189 regulation or ordinance applicable to that project causing additional costs or  
190 damages to the owner.

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

197 [6.] **8.** Notwithstanding any other provisions in this section to the

198 contrary, no late payment interest shall be due and owing for payments which are  
199 withheld in good faith for reasonable cause pursuant to subsections [2 and 5] **2,**  
200 **5, and 6** of this section. If it is determined by a court of competent jurisdiction  
201 that a payment which was withheld pursuant to subsections [2 and 5] **2, 5, and**  
202 **6** of this section was not withheld in good faith for reasonable cause, the court  
203 may impose interest at the rate of one and one-half percent per month calculated  
204 from the date of the invoice and may, in its discretion, award reasonable attorney  
205 fees to the prevailing party. In any civil action or part of a civil action brought  
206 pursuant to this section, if a court determines after a hearing for such purpose  
207 that the cause was initiated, or a defense was asserted, or a motion was filed, or  
208 any proceeding therein was done frivolously and in bad faith, the court shall  
209 require the party who initiated such cause, asserted such defense, filed such  
210 motion, or caused such proceeding to be had to pay the other party named in such  
211 action the amount of the costs attributable thereto and reasonable expenses  
212 incurred by such party, including reasonable attorney fees.

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

2 (1) "Contractor", a person or business entity who provides construction  
3 services under contract to a public entity. Contractor specifically does not include  
4 professional engineers, architects or land surveyors licensed pursuant to chapter  
5 327, those who provide environmental assessment services or those who design,  
6 create or otherwise provide works of art under a city's formally established  
7 program for the acquisition and installation of works of art and other aesthetic  
8 adornments to public buildings and property;

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

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

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

22 and all insurance premiums, both for compensation, and for all other kinds of  
23 insurance, said work, and for all labor performed in such work whether by  
24 subcontractor or otherwise.

25 3. All bonds executed and furnished under the provisions of this section  
26 shall be deemed to contain the requirements and conditions as herein set out,  
27 regardless of whether the same be set forth in said bond, or of any terms or  
28 provisions of said bond to the contrary notwithstanding.

29 4. Nothing in this section shall be construed to require a member of the  
30 school board of any public school district of this state to independently confirm  
31 the existence or solvency of any bonding company if a contractor represents to the  
32 member that the bonding company is solvent and that the representations made  
33 in the purported bond are true and correct. This subsection shall not relieve from  
34 any liability any school board member who has any actual knowledge of the  
35 insolvency of any bonding company, or any school board member who does not act  
36 in good faith in complying with the provisions of subsection 2 of this section.

37 5. A public entity may defend, save harmless and indemnify any of its  
38 officers and employees, whether elective or appointive, against any claim or  
39 demand, whether groundless or otherwise arising out of an alleged act or  
40 omission occurring in the performance of a duty under this section. The  
41 provisions of this subsection do not apply in case of malfeasance in office or  
42 willful or wanton neglect of duty.

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