



February 22, 2002

**ENGROSSED
SENATE BILL No. 152**

DIGEST OF SB 152 (Updated February 19, 2002 3:47 PM - DI 87)

Citations Affected: IC 4-3; IC 5-11; IC 36-1.

Synopsis: Municipal and county public work projects. Provides that the workforce of a municipality or a county may perform certain public works projects if the cost of the project is estimated to be less than \$150,000. Gives a public works contractor discretion to have the board that contracts for the public work to: (1) hold the retainage; or (2) place the retainage in an escrow account. Provides that the board shall not be required to pay interest on the retainage that the board holds. Specifies notice and public meeting requirements that must be satisfied before a public work project may be performed by the municipality's or county's own workforce. Requires the auditor to withhold from motor vehicle highway account funds an amount equal to the excess costs of a public work project incurred in the preceding fiscal year. Adds requirements for examination reports prepared by the state board of accounts concerning public work projects performed by the municipality's or county's own workforce. Provides that if the cost of public work by a municipal or county hospital is less than \$75,000, the hospital may have the work done without receiving bids and by means of its own workforce.

Effective: July 1, 2002.

Hume, Wheeler, Skillman

(HOUSE SPONSOR — STILWELL)

January 7, 2002, read first time and referred to Committee on Public Policy.
January 17, 2002, reported favorably — Do Pass.
January 22, 2002, read second time, ordered engrossed.
January 23, 2002, engrossed.
January 24, 2002, read third time, passed. Yeas 45, nays 4.

HOUSE ACTION

February 5, 2002, read first time and referred to Committee on Public Policy, Ethics and Veterans Affairs.
February 21, 2002, amended, reported — Do Pass.

ES 152—LS 6306/DI 14+



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February 22, 2002

Second Regular Session 112th General Assembly (2002)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2001 General Assembly.

ENGROSSED SENATE BILL No. 152

A BILL FOR AN ACT to amend the Indiana Code concerning local government.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 4-3-19-23 IS AMENDED TO READ AS
2 FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 23. A person who
3 believes that a department has violated IC 8-23-9, IC 8-23-11, ~~or~~
4 IC 36-1-12-3, **or IC 36-1-12-3.1** may file a written complaint with the
5 board. The complaint must set forth the alleged violation.

6 SECTION 2. IC 4-3-19-28 IS AMENDED TO READ AS
7 FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 28. The opinion issued
8 under section 27 of this chapter must:

9 (1) state whether the department has violated IC 8-23-9,
10 IC 8-23-11, ~~or~~ IC 36-1-12-3, **or IC 36-1-12-3.1**; and

11 (2) be forwarded to the person who filed the complaint and the
12 department not later than sixty (60) days after the hearing is
13 conducted.

14 SECTION 3. IC 5-11-1-26 IS AMENDED TO READ AS
15 FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 26. (a) If a state office,
16 municipality, or other entity has authority to contract for the
17 construction, reconstruction, alteration, repair, improvement, or

ES 152—LS 6306/DI 14+



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1 maintenance of a public work, the state board of accounts shall include
 2 in each examination report concerning the state office, municipality, or
 3 entity:

- 4 (1) an opinion concerning whether the state office, municipality,
 5 or entity has complied with IC 5-16-8; and
 6 (2) a brief description of each instance in which the state office,
 7 municipality, or entity has exercised its authority under
 8 IC 5-16-8-2(b) or IC 5-16-8-4.

9 **(b) If a municipality or a county performs a public work by**
 10 **means of its own workforce under IC 36-1-12-3 or IC 36-1-12-3.1,**
 11 **the state board of accounts shall include the following in each**
 12 **examination report concerning the municipality or county:**

13 **(1) An opinion concerning whether the municipality or county**
 14 **has complied with IC 36-1-12-3 or IC 36-1-12-3.1 for each**
 15 **public work performed by the entity's own workforce.**

16 **(2) A brief description of each public work that the**
 17 **municipality or county has performed with its own workforce**
 18 **under IC 36-1-12-3 or IC 36-1-12-3.1, including a calculation**
 19 **of the actual cost of each public work pursuant to**
 20 **IC 36-1-12-3.1(d).**

21 **(3) An opinion concerning whether the municipality or county**
 22 **has complied with IC 36-1-12-19 in calculating the actual**
 23 **costs of a public work project performed under IC 36-1-12-3**
 24 **or IC 36-1-12-3.1.**

25 ~~(b)~~ (c) The state board of accounts may exercise any of its powers
 26 under this chapter concerning public accounts to carry out this section,
 27 including the power to require a uniform system of accounting or the
 28 use of forms prescribed by the state board of accounts.

29 SECTION 4. IC 36-1-12-3 IS AMENDED TO READ AS
 30 FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 3. (a) **Except as**
 31 **provided in section 3.1 of this chapter,** the board may purchase or
 32 lease materials in the manner provided in IC 5-22 and perform any
 33 public work, by means of its own workforce, without awarding a
 34 contract whenever the cost of that public work project is estimated to
 35 be less than one hundred thousand dollars (\$100,000). Before a board
 36 may perform any work under this section by means of its own
 37 workforce, the political subdivision or agency must have a group of
 38 employees on its staff who are capable of performing the construction,
 39 maintenance, and repair applicable to that work. For purposes of this
 40 subsection, the cost of a public work project includes the actual cost of
 41 materials, labor, equipment, rental, a reasonable rate for use of trucks
 42 and heavy equipment owned, and all other expenses incidental to the

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1 performance of the project.

2 (b) When the project involves the rental of equipment with an
3 operator furnished by the owner, or the installation or application of
4 materials by the supplier of the materials, the project is considered to
5 be a public work project and subject to this chapter. However, an
6 annual contract may be awarded for equipment rental and materials to
7 be installed or applied during a calendar or fiscal year if the proposed
8 project or projects are described in the bid specifications.

9 (c) A board of aviation commissioners or an airport authority board
10 may purchase or lease materials in the manner provided in IC 5-22 and
11 perform any public work by means of its own workforce and owned or
12 leased equipment, in the construction, maintenance, and repair of any
13 airport roadway, runway, taxiway, or aircraft parking apron whenever
14 the cost of that public work project is estimated to be less than fifty
15 thousand dollars (\$50,000).

16 (d) Municipal and county hospitals must comply with this chapter
17 for all contracts for public work that are financed in whole or in part
18 with cumulative building fund revenue, as provided in section 1(c) of
19 this chapter. However, if the cost of the public work is estimated to be
20 less than ~~fifty thousand dollars (\$50,000)~~; **seventy-five thousand**
21 **dollars (\$75,000)**, as reflected in the board minutes, the hospital board
22 may have the public work done without receiving bids, by purchasing
23 the materials and performing the work by means of its own workforce
24 and owned or leased equipment.

25 (e) If a public works project involves a structure, an improvement,
26 or a facility under the control of a department (as defined in
27 IC 4-3-19-2(2)), the department may not artificially divide the project
28 to bring any part of the project under this section.

29 SECTION 5. IC 36-1-12-3.1 IS ADDED TO THE INDIANA CODE
30 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
31 1, 2002]: **Sec. 3.1. (a) This section applies to a municipality or a**
32 **county.**

33 (b) **The board may purchase or lease materials in the manner**
34 **provided in IC 5-22 and perform a public work, by means of the**
35 **board's own workforce, in the construction, maintenance, and**
36 **repair of a highway, a street, an alley, a road, or a bridge within**
37 **the jurisdiction of the municipality or county without awarding a**
38 **contract if the cost of the public work project is estimated to be less**
39 **than one hundred fifty thousand dollars (\$150,000).**

40 (c) **The workforce of a municipality or county may perform a**
41 **public work described in subsection (b) only if:**

42 (1) **the workforce, through demonstrated skills, training, or**

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1 expertise, is capable of performing the public work; and
 2 (2) for a public work project whose cost is estimated to be
 3 more than one hundred thousand dollars (\$100,000), the
 4 board:

5 (A) publishes a notice pursuant to IC 5-3-1 that:

6 (i) describes the public work that the board intends to
 7 perform with its own workforce; and

8 (ii) sets forth the projected cost of each component of the
 9 public work as described in subsection (d); and

10 (B) determines at a public meeting that it is in the public
 11 interest to perform the public work with the board's own
 12 workforce.

13 (d) For purposes of this section, the cost of a public work project
 14 includes:

15 (1) the actual cost of materials, labor, equipment, and rental
 16 used in;

17 (2) a reasonable rate for trucks and heavy equipment that are
 18 owned by the municipality or county and are used in; and

19 (3) other expenses incidental to;

20 the performance of the project.

21 (e) A public work project performed by a board's own
 22 workforce shall be inspected and accepted as complete in the same
 23 manner as a public work project performed pursuant to a contract
 24 awarded after receiving bids.

25 SECTION 6. IC 36-1-12-14 IS AMENDED TO READ AS
 26 FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 14. (a) This section
 27 applies to public work contracts in excess of one hundred thousand
 28 dollars (\$100,000) for projects other than highways, roads, streets,
 29 alleys, bridges, and appurtenant structures situated on streets, alleys,
 30 and dedicated highway rights-of-way. This section also applies to a
 31 lessor corporation qualifying under IC 21-5-11 or IC 21-5-12 or any
 32 other lease-back arrangement containing an option to purchase,
 33 notwithstanding the statutory provisions governing those leases.

34 (b) A board that enters into a contract for public work, and a
 35 contractor who subcontracts parts of that contract, shall include in their
 36 respective contracts provisions for the retainage of portions of
 37 payments by the board to contractors, by contractors to subcontractors,
 38 and for the payment of subcontractors. ~~Either the board or~~ **At the**
 39 **discretion of the contractor, or both, shall place** the retainage **shall**
 40 **either be held by the board or be placed** in an escrow account, with
 41 a bank, savings and loan institution, or the state as the escrow agent.
 42 The escrow agent shall be selected by mutual agreement between board



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1 and contractor or contractor and subcontractor under a written
2 agreement among the bank or savings and loan institution and:

- 3 (1) the board and the contractor; or
- 4 (2) the subcontractor and the contractor.

5 **The board shall not be required to pay interest on the amounts of**
6 **retainage that it holds under this section.**

7 (c) To determine the amount of retainage to be withheld, the board
8 shall:

- 9 (1) withhold no more than ten percent (10%) of the dollar value
10 of all work satisfactorily completed until the public work is fifty
11 percent (50%) completed, and nothing further after that; or
- 12 (2) withhold no more than five percent (5%) of the dollar value of
13 all work satisfactorily completed until the public work is
14 substantially completed.

15 If upon substantial completion of the public work minor items remain
16 uncompleted, an amount computed under subsection (f) ~~of this section~~
17 shall be withheld until those items are completed.

18 (d) The escrow agreement must contain the following provisions:

- 19 (1) The escrow agent shall invest all escrowed principal in
20 obligations selected by the escrow agent.
- 21 (2) The escrow agent shall hold the escrowed principal and
22 income until receipt of notice from the board and the contractor,
23 or the contractor and the subcontractor, specifying the part of the
24 escrowed principal to be released from the escrow and the person
25 to whom that portion is to be released. After receipt of the notice,
26 the escrow agent shall remit the designated part of escrowed
27 principal and the same proportion of then escrowed income to the
28 person specified in the notice.
- 29 (3) The escrow agent shall be compensated for the agent's
30 services. The parties may agree on a reasonable fee comparable
31 with fees being charged for the handling of escrow accounts of
32 similar size and duration. The fee shall be paid from the escrowed
33 income.

34 The escrow agreement may include other terms and conditions
35 consistent with this subsection, including provisions authorizing the
36 escrow agent to commingle the escrowed funds with funds held in
37 other escrow accounts and limiting the liability of the escrow agent.

38 (e) The contractor shall furnish the board with a performance bond
39 equal to the contract price. If acceptable to the board, the performance
40 bond may provide for incremental bonding in the form of multiple or
41 chronological bonds that, when taken as a whole, equal the contract
42 price. The surety on the performance bond may not be released until

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1 one (1) year after the date of the board's final settlement with the
2 contractor. The performance bond must specify that:

- 3 (1) a modification, omission, or addition to the terms and
4 conditions of the public work contract, plans, specifications,
5 drawings, or profile;
6 (2) a defect in the public work contract; or
7 (3) a defect in the proceedings preliminary to the letting and
8 awarding of the public work contract;

9 does not discharge the surety.

10 (f) The **board or escrow agent shall pay the** contractor ~~shall be~~
11 ~~paid in full, including all escrowed principal and escrowed income, by~~
12 ~~the board and escrow agent,~~ within sixty-one (61) days after the date of
13 substantial completion, subject to sections 11 and 12 of this chapter.

14 **Payment by the escrow agent shall include all escrowed principal**
15 **and escrowed income.** If within sixty-one (61) days after the date of
16 substantial completion there remain uncompleted minor items, an
17 amount equal to two hundred percent (200%) of the value of each item
18 as determined by the architect-engineer shall be withheld until the item
19 is completed. Required warranties begin not later than the date of
20 substantial completion.

21 (g) Actions against a surety on a performance bond must be brought
22 within one (1) year after the date of the board's final settlement with the
23 contractor.

24 (h) This subsection applies to public work contracts of less than two
25 hundred fifty thousand dollars (\$250,000). The board may waive the
26 performance bond requirement of subsection (e) and accept from a
27 contractor an irrevocable letter of credit for an equivalent amount from
28 an Indiana financial institution approved by the department of financial
29 institutions instead of a performance bond. Subsections (e) through (g)
30 apply to a letter of credit submitted under this subsection.

31 SECTION 7. IC 36-1-12-22 IS ADDED TO THE INDIANA CODE
32 AS A **NEW SECTION TO READ AS FOLLOWS** [EFFECTIVE JULY
33 1, 2002]: **Sec. 22. (a) For purposes of this section, the "actual cost"**
34 **of a public work project includes:**

- 35 (1) **the actual cost of materials, labor equipment, and rental**
36 **used in;**
37 (2) **a reasonable rate for trucks and heavy equipment that are**
38 **owned by the municipality or county and are used in; and**
39 (3) **other expenses incidental to;**
40 **the performance of the project.**

41 (b) **For purposes of this section, the "excess cost" of a public**
42 **work project is the amount by which the actual cost of a public**

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1 **work project performed by a municipality or county with its own**
2 **workforce under section 3 or 3.1 of this chapter exceeds one**
3 **hundred five percent (105%) of the amount permitted under**
4 **section 3.1(b) of this chapter.**
5 **(c) The state board of accounts shall calculate the excess costs**
6 **incurred by a municipality or a county pursuant to its examination**
7 **under IC 5-11-1-26.**
8 **(d) The auditor shall withhold from the distribution of motor**
9 **vehicle highway account funds an amount equaling the sum of the**
10 **excess costs incurred by a municipality or a county in the**
11 **preceding fiscal year.**

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COMMITTEE REPORT

Mr. President: The Senate Committee on Public Policy, to which was referred Senate Bill No. 152, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill DO PASS.

(Reference is made to Senate Bill 152 as introduced.)

WYSS, Chairperson

Committee Vote: Yeas 9, Nays 1.

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SENATE MOTION

Mr. President: I move that Senator Skillman be added as coauthor of Senate Bill 152.

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COMMITTEE REPORT

Mr. Speaker: Your Committee on Public Policy, Ethics and Veterans Affairs, to which was referred Senate Bill 152, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Page 1, between lines 13 and 14, begin a new paragraph and insert:

"SECTION 3. IC 5-11-1-26 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 26. (a) If a state office, municipality, or other entity has authority to contract for the construction, reconstruction, alteration, repair, improvement, or maintenance of a public work, the state board of accounts shall include in each examination report concerning the state office, municipality, or entity:

- (1) an opinion concerning whether the state office, municipality, or entity has complied with IC 5-16-8; and
- (2) a brief description of each instance in which the state office, municipality, or entity has exercised its authority under IC 5-16-8-2(b) or IC 5-16-8-4.

(b) If a municipality or a county performs a public work by means of its own workforce under IC 36-1-12-3 or IC 36-1-12-3.1, the state board of accounts shall include the following in each examination report concerning the municipality or county:

- (1) An opinion concerning whether the municipality or county has complied with IC 36-1-12-3 or IC 36-1-12-3.1 for each public work performed by the entity's own workforce.**
- (2) A brief description of each public work that the municipality or county has performed with its own workforce under IC 36-1-12-3 or IC 36-1-12-3.1, including a calculation of the actual cost of each public work pursuant to IC 36-1-12-3.1(d).**
- (3) An opinion concerning whether the municipality or county has complied with IC 36-1-12-19 in calculating the actual costs of a public work project performed under IC 36-1-12-3 or IC 36-1-12-3.1.**

~~(b)~~ (c) The state board of accounts may exercise any of its powers under this chapter concerning public accounts to carry out this section, including the power to require a uniform system of accounting or the use of forms prescribed by the state board of accounts."

Page 2, line 30, strike "fifty thousand dollars (\$50,000)," and insert "**seventy-five thousand dollars (\$75,000),"**

Page 3, line 8, delete "the workforce is" and insert ":

- (1) the workforce, through demonstrated skills, training, or**

ES 152—LS 6306/DI 14+



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expertise, is capable of performing the public work; and
(2) for a public work project whose cost is estimated to be more than one hundred thousand dollars (\$100,000), the board:

- (A) publishes a notice pursuant to IC 5-3-1 that:
 - (i) describes the public work that the board intends to perform with its own workforce; and
 - (ii) sets forth the projected cost of each component of the public work as described in subsection (d); and
- (B) determines at a public meeting that it is in the public interest to perform the public work with the board's own workforce."

Page 3, delete line 9.

Page 3, after line 17, begin a new paragraph and insert:

"(e) A public work project performed by a board's own workforce shall be inspected and accepted as complete in the same manner as a public work project performed pursuant to a contract awarded after receiving bids.

SECTION 6. IC 36-1-12-14 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: Sec. 14. (a) This section applies to public work contracts in excess of one hundred thousand dollars (\$100,000) for projects other than highways, roads, streets, alleys, bridges, and appurtenant structures situated on streets, alleys, and dedicated highway rights-of-way. This section also applies to a lessor corporation qualifying under IC 21-5-11 or IC 21-5-12 or any other lease-back arrangement containing an option to purchase, notwithstanding the statutory provisions governing those leases.

(b) A board that enters into a contract for public work, and a contractor who subcontracts parts of that contract, shall include in their respective contracts provisions for the retainage of portions of payments by the board to contractors, by contractors to subcontractors, and for the payment of subcontractors. ~~Either the board or~~ **At the discretion of the contractor, or both, shall place the retainage shall either be held by the board or be placed** in an escrow account, with a bank, savings and loan institution, or the state as the escrow agent. The escrow agent shall be selected by mutual agreement between board and contractor or contractor and subcontractor under a written agreement among the bank or savings and loan institution and:

- (1) the board and the contractor; or
- (2) the subcontractor and the contractor.

The board shall not be required to pay interest on the amounts of retainage that it holds under this section.



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(c) To determine the amount of retainage to be withheld, the board shall:

- (1) withhold no more than ten percent (10%) of the dollar value of all work satisfactorily completed until the public work is fifty percent (50%) completed, and nothing further after that; or
- (2) withhold no more than five percent (5%) of the dollar value of all work satisfactorily completed until the public work is substantially completed.

If upon substantial completion of the public work minor items remain uncompleted, an amount computed under subsection (f) of this section shall be withheld until those items are completed.

(d) The escrow agreement must contain the following provisions:

- (1) The escrow agent shall invest all escrowed principal in obligations selected by the escrow agent.
- (2) The escrow agent shall hold the escrowed principal and income until receipt of notice from the board and the contractor, or the contractor and the subcontractor, specifying the part of the escrowed principal to be released from the escrow and the person to whom that portion is to be released. After receipt of the notice, the escrow agent shall remit the designated part of escrowed principal and the same proportion of then escrowed income to the person specified in the notice.
- (3) The escrow agent shall be compensated for the agent's services. The parties may agree on a reasonable fee comparable with fees being charged for the handling of escrow accounts of similar size and duration. The fee shall be paid from the escrowed income.

The escrow agreement may include other terms and conditions consistent with this subsection, including provisions authorizing the escrow agent to commingle the escrowed funds with funds held in other escrow accounts and limiting the liability of the escrow agent.

(e) The contractor shall furnish the board with a performance bond equal to the contract price. If acceptable to the board, the performance bond may provide for incremental bonding in the form of multiple or chronological bonds that, when taken as a whole, equal the contract price. The surety on the performance bond may not be released until one (1) year after the date of the board's final settlement with the contractor. The performance bond must specify that:

- (1) a modification, omission, or addition to the terms and conditions of the public work contract, plans, specifications, drawings, or profile;
- (2) a defect in the public work contract; or

ES 152—LS 6306/DI 14+



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(3) a defect in the proceedings preliminary to the letting and awarding of the public work contract; does not discharge the surety.

(f) The **board or escrow agent shall pay the contractor** ~~shall be paid in full, including all escrowed principal and escrowed income, by the board and escrow agent,~~ within sixty-one (61) days after the date of substantial completion, subject to sections 11 and 12 of this chapter. **Payment by the escrow agent shall include all escrowed principal and escrowed income.** If within sixty-one (61) days after the date of substantial completion there remain uncompleted minor items, an amount equal to two hundred percent (200%) of the value of each item as determined by the architect-engineer shall be withheld until the item is completed. Required warranties begin not later than the date of substantial completion.

(g) Actions against a surety on a performance bond must be brought within one (1) year after the date of the board's final settlement with the contractor.

(h) This subsection applies to public work contracts of less than two hundred fifty thousand dollars (\$250,000). The board may waive the performance bond requirement of subsection (e) and accept from a contractor an irrevocable letter of credit for an equivalent amount from an Indiana financial institution approved by the department of financial institutions instead of a performance bond. Subsections (e) through (g) apply to a letter of credit submitted under this subsection.

SECTION 7. IC 36-1-12-22 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2002]: **Sec. 22. (a) For purposes of this section, the "actual cost" of a public work project includes:**

- (1) the actual cost of materials, labor equipment, and rental used in;**
- (2) a reasonable rate for trucks and heavy equipment that are owned by the municipality or county and are used in; and**
- (3) other expenses incidental to;**

the performance of the project.

(b) For purposes of this section, the "excess cost" of a public work project is the amount by which the actual cost of a public work project performed by a municipality or county with its own workforce under section 3 or 3.1 of this chapter exceeds one hundred five percent (105%) of the amount permitted under section 3.1(b) of this chapter.

(c) The state board of accounts shall calculate the excess costs incurred by a municipality or a county pursuant to its examination

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under IC 5-11-1-26.

(d) The auditor shall withhold from the distribution of motor vehicle highway account funds an amount equaling the sum of the excess costs incurred by a municipality or a county in the preceding fiscal year."

Renumber all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to SB 152 as printed January 18, 2002.)

KUZMAN, Chair

Committee Vote: yeas 10, nays 0.

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