

HOUSE BILL No. 1163

DIGEST OF INTRODUCED BILL

Citations Affected: IC 4-13.6-7; IC 5-16-5; IC 36-1-12.

Synopsis: Bonding and retainage in public works projects. Provides that a person who has a claim against the retainage or the payment bond of a contractor on a public works project must make the claim and deliver a copy of the claim to the contractor not later than stated times after that person performed the service or labor or supplied the materials for the public works project. Decreases the amount that may be withheld on state public works projects upon substantial completion to cover remaining uncompleted minor items. Makes stylistic and technical changes.

Effective: July 1, 2012.

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January 9, 2012, read first time and referred to Committee on Government and Regulatory Reform.

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Second Regular Session 117th General Assembly (2012)

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 2011 Regular Session of the General Assembly.

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HOUSE BILL No. 1163

A BILL FOR AN ACT to amend the Indiana Code concerning state and local administration.

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

- 1 SECTION 1. IC 4-13.6-7-3 IS AMENDED TO READ AS
- 2 FOLLOWS [EFFECTIVE JULY 1, 2012]: Sec. 3. (a) To determine the
- 3 amount of retainage to be withheld, the division shall elect one (1) of
- 4 the following options:
- 5 (1) To withhold no more than six percent (6%) of the dollar value
- 6 of all work satisfactorily completed until the public work is fifty
- 7 percent (50%) complete, and nothing further after that.
- 8 (2) To withhold no more than three percent (3%) of the dollar
- 9 value of all work satisfactorily completed until the public work is
- 10 substantially complete.
- 11 (b) ~~¶~~ Upon substantial completion of the work, **the division shall**
- 12 **withhold the following:**
- 13 (1) **If** there are any remaining uncompleted minor items, ~~the~~
- 14 ~~division shall withhold~~; until those items are completed, an
- 15 amount equal to ~~four~~ **two** hundred percent (~~400%~~) (**200%**) of the
- 16 value of each item as determined by the architect-engineer.
- 17 (2) **Any amounts required to be withheld under section 8(b) of**



1 **this chapter.**
2 SECTION 2. IC 4-13.6-7-8 IS AMENDED TO READ AS
3 FOLLOWS [EFFECTIVE JULY 1, 2012]: Sec. 8. (a) Except for
4 amounts withheld:
5 (1) from the contractor under section 3 of this chapter for
6 uncompleted minor items; **and**
7 (2) **under subsection (b);**
8 the division may make a full, final, and complete settlement with a
9 contractor, including providing for full payment of all escrowed
10 principal and escrowed income, **within not later than** sixty-one (61)
11 days following the date of substantial completion if
12 (1) the contractor has materially fulfilled all of its obligations
13 under the public works contract.
14 (2) ~~the division has received no claims from subcontractors or~~
15 ~~suppliers under this chapter; and~~
16 (3) ~~the contractor has furnished satisfactory evidence showing full~~
17 ~~payment of all subcontractors and suppliers in the performance of~~
18 ~~the contract.~~
19 **(b) If the division receives a claim from a subcontractor or a**
20 **supplier under section 9 of this chapter, the division shall withhold**
21 **the amount of the claim until the claim is resolved under section**
22 **9(c) of this chapter.**
23 ~~(b)~~ (c) After the division makes a final settlement with a contractor,
24 all claims by subcontractors and suppliers to funds withheld from that
25 contractor under section 2 of this chapter are barred.
26 SECTION 3. IC 4-13.6-7-10 IS AMENDED TO READ AS
27 FOLLOWS [EFFECTIVE JULY 1, 2012]: Sec. 10. (a) In order to
28 receive payment under section 9 of this chapter or to proceed against
29 the bond of the contractor required under section 6 of this chapter, ~~any~~
30 ~~a~~ subcontractor or supplier making a claim for payment on account of
31 having performed any labor or having furnished any material or service
32 in relation to a public works project must file a verified claim with the
33 division ~~within and deliver a copy of the claim to the contractor not~~
34 ~~later than~~ sixty (60) days ~~from after~~ the ~~date the~~ last labor ~~was~~
35 performed, ~~the~~ last material ~~was~~ furnished, or ~~the~~ last service ~~was~~
36 rendered ~~by that subcontractor or supplier.~~ The claim shall state the
37 amount due and owing to the person and shall give as much detail
38 explaining the claim as possible. The division shall notify the
39 contractor of any filed claims before taking action under section 9 of
40 this chapter.
41 (b) In order to proceed against the bond of the contractor required
42 under section 6 of this chapter, the claimant must notify the surety of

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1 the contractor by sending a copy of the claim required by subsection (a)
 2 to the surety company. The claimant shall also inform the division **and**
 3 **the contractor** that the surety has been notified. The division shall
 4 supply the claimant with any information the claimant requires to
 5 notify the surety **and the contractor**.

6 (c) The claimant may not file suit against the contractor's surety on
 7 the contractor's bond ~~until the expiration of~~ **before** thirty (30) days after
 8 filing of the claim with the division **and delivering a copy of the**
 9 **claim to the contractor**. If the claim is not paid in full at the expiration
 10 of the thirty (30) day period, the claimant may bring an action in a court
 11 of competent jurisdiction in the claimant's own name upon the bond.

12 SECTION 4. IC 5-16-5-0.4 IS ADDED TO THE INDIANA CODE
 13 AS A **NEW SECTION TO READ AS FOLLOWS** [EFFECTIVE JULY
 14 1, 2012]: **Sec. 0.4. As used in this chapter, "person" includes a firm,**
 15 **limited liability company, or corporation.**

16 SECTION 5. IC 5-16-5-0.5 IS ADDED TO THE INDIANA CODE
 17 AS A **NEW SECTION TO READ AS FOLLOWS** [EFFECTIVE JULY
 18 1, 2012]: **Sec. 0.5. As used in this chapter, "public body" refers to**
 19 **a board, commission, trustee, officer, or agent acting on behalf of**
 20 **the state or a commission created by law.**

21 SECTION 6. IC 5-16-5-0.6 IS ADDED TO THE INDIANA CODE
 22 AS A **NEW SECTION TO READ AS FOLLOWS** [EFFECTIVE JULY
 23 1, 2012]: **Sec. 0.6. As used in this chapter, "public work" refers to**
 24 **the construction, erection, alteration, or repair of a public building,**
 25 **public improvement, or other public work, the cost of which is paid**
 26 **for by funds derived from taxation. The term includes all roads,**
 27 **highways, streets, alleys, bridges, sewers, drains, or other public**
 28 **improvements.**

29 SECTION 7. IC 5-16-5-1 IS AMENDED TO READ AS FOLLOWS
 30 [EFFECTIVE JULY 1, 2012]: Sec. 1. (a) Except as hereinafter
 31 otherwise provided **in this chapter**, when ~~any public building or other~~
 32 a public work or public improvement of any character whatsoever is
 33 being constructed, erected, altered or repaired **is performed** under
 34 contract at the expense of the state or a commission created by law, it
 35 shall be the duty of any such board, ~~commission, trustee, officer or~~
 36 agent acting on behalf of the state or commission created by law, **to the**
 37 **public body shall** withhold final payment to the contractor until ~~such~~
 38 **the contractor has paid to: the subcontractor or**

39 (1) **all subcontractors; materialmen**

40 (2) **all suppliers of materials** for material furnished;

41 (3) **all labor employed in such construction or the public work;**
 42 **and**

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1 **(4) all those** furnishing any service in relation to or in connection
 2 with ~~such construction, erection, alteration or repair, the public~~
 3 **work;**

4 all bills due and owing ~~the same~~; ~~Provided, That there is a sufficient~~
 5 sum owing to the contractor to pay all such bills; ~~and to the persons~~
 6 **described in subdivisions (1) through (4) who have filed a claim**
 7 **under subsection (c).**

8 **(b)** If there is not a sufficient sum owing to ~~such the~~ contractor on
 9 ~~such the~~ contract to pay all ~~such the~~ bills, then the sum owing on ~~such~~
 10 **the** contract shall be prorated in payment of all ~~such the~~ bills among
 11 the ~~parties~~ **persons** entitled thereto; ~~Provided, That such subcontractor~~
 12 or subcontractors, ~~materialmen, laborers or those furnishing service as~~
 13 herein ~~provided shall to payment.~~

14 **(c)** A person claiming payment under this section must file with
 15 any such board, commission, trustee, officer, or agent acting on behalf
 16 of such state or commission created by law, ~~their~~ **the public body** a
 17 claim ~~within not later than sixty (60) days from after~~ the last labor is
 18 performed, ~~the last material is furnished, or the last service is rendered~~
 19 by ~~them~~; ~~that person~~, as provided in section 2 of this chapter. ~~Where~~
 20 no

21 **(d)** If there is no dispute shall arise between any parties interested
 22 in such funds so withheld; the board, commission, trustee, officer or
 23 agent acting on behalf of said state or commission created by law;
 24 **among the claimants, the public body** shall pay said claim or all
 25 claims out of the funds due ~~such the~~ contractor and take a receipt
 26 therefor, ~~which sum or sums for each payment. The total of amounts~~
 27 **paid under this subsection** shall be deducted from the contract price.
 28 ~~Where~~

29 **(e)** If there is a dispute between any of the parties claiming to be
 30 entitled to such funds so withheld; or any part thereof; **among the**
 31 **claimants, the public body shall retain** sufficient funds shall be
 32 retained by such board, commission, trustee, officer or agent acting on
 33 behalf of said state or commission created by law until ~~such the~~ dispute
 34 is settled, ~~and the correct amount is~~ **amounts are** determined, ~~when~~
 35 **and** payment of those amounts shall be made as aforesaid; ~~Provided;~~
 36 however, ~~That nothing in as provided in subsection (d).~~

37 **(f)** Except for amounts required to be withheld under subsection
 38 **(e) or as otherwise provided in this chapter**, this chapter ~~contained~~
 39 shall ~~prevent or does not~~ preclude a full, final, and complete settlement
 40 upon a contract with ~~the a~~ contractor or contractors after thirty (30)
 41 days from the date of the completion and acceptance of the work as
 42 completed. ~~upon the furnishing of satisfactory evidence showing the~~

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1 payment in full of all subcontractors; materialmen; laborers; or those
2 furnishing services in the performance of said contract. Provided;
3 further; That

4 (g) The surety of ~~said a contractor or contractors~~ shall ~~may~~ not be
5 released until the expiration of one (1) year after the final settlement
6 with ~~said contractor or all~~ contractors. The terms "public building,"
7 "public work" and "public improvement," or combinations thereof, as
8 used in this chapter, shall be construed to include all buildings, work
9 or improvements the cost of which is paid for by funds derived from
10 taxation.

11 SECTION 8. IC 5-16-5-2 IS AMENDED TO READ AS FOLLOWS
12 [EFFECTIVE JULY 1, 2012]: Sec. 2. (a) ~~In all contracts~~ **A contract**
13 ~~awarded contractors for the construction, erection, alteration, or repair~~
14 ~~of a public building or other a public work or improvement as provided~~
15 ~~in section † of this chapter, the contract must provide for the payment~~
16 ~~of subcontractors, labor, materialmen, suppliers of materials, and~~
17 ~~those performing service in connection with the construction, erection,~~
18 ~~alteration, or repair.~~ **public work.** The contract must provide for the
19 payment of subcontractors by withholding by the ~~board, commission;~~
20 ~~trustee, officer, or agent acting on behalf of the state or commission;~~
21 **public body** funds sufficient from the contract price to pay the
22 ~~subcontractor, subcontractors, labor, materialmen, suppliers of~~
23 ~~materials, and those furnishing service in relation to or in connection~~
24 ~~with construction, erection, alteration, or repair.~~ **the public work. The**
25 **contractor shall execute** a bond shall be executed by the contractor to
26 the state, approved by the ~~board, commission, trustee, officer, or agent~~
27 ~~acting on behalf of the state or commission;~~ **public body** in an amount
28 equal to the total contract price. The bond shall be conditioned for
29 payment by the contractor, the contractor's successors and assigns, and
30 by the subcontractors, their successors and assigns, of all indebtedness,
31 which may accrue to any person ~~firm, limited liability company, or~~
32 ~~corporation on account of~~ **for** any labor or service performed, materials
33 furnished, or service rendered in the ~~construction, erection, alteration,~~
34 ~~or repair of a building, work, or improvement, including all road,~~
35 ~~highway, street, alley, bridge, sewer, drain, or other public~~
36 ~~improvement.~~ **public work.** The bond by its terms shall be conditioned
37 to directly inure to the benefit of subcontractors, laborers, ~~materialmen;~~
38 **suppliers of materials,** and those performing service who have
39 furnished or supplied labor, material, or service for the ~~construction of~~
40 ~~any public work. or improvement.~~

41 (b) The bond required under subsection (a) shall be deposited with
42 the ~~board, commission, trustee, officer, or agent acting on behalf of the~~

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1 ~~state or commission public body~~ for the benefit of a person ~~firm;~~
 2 ~~limited liability company; or corporation~~ interested in and entitled to
 3 the bond. The bond shall be conditioned that:

4 (1) a change, modification, omission, or addition in and to the
 5 terms or conditions of the contract, plans, specifications,
 6 drawings, or profile; or

7 (2) any irregularity or defect in the contract or in the proceedings
 8 preliminary to the letting and awarding of the contract;

9 ~~shall does~~ not affect or operate to release or discharge the surety.

10 (c) The provisions of this chapter ~~shall~~ become a part of the terms
 11 of a contract awarded under this chapter. A bond for a public work ~~or~~
 12 ~~improvement~~ is subject to ~~the provisions of~~ this chapter.

13 (d) A person ~~firm; limited liability company; or corporation~~ to whom
 14 money is due ~~on account of for~~ having performed labor or having
 15 furnished material or service ~~in the construction, erection, alteration;~~
 16 ~~or repair of a building; for a public work or improvement~~ under this
 17 chapter ~~shall; within must, not later than~~ sixty (60) days after the
 18 completion of ~~that person completed~~ the labor or service or ~~within~~
 19 ~~sixty (60) days after that person furnished~~ the last item of material:
 20 has been furnished;

21 (1) file with the ~~board; commission; trustee; officer; clerk; or~~
 22 ~~agent of the state or commission that entered into contract with~~
 23 ~~the principal contractor for the public work or improvement~~
 24 **public body** duplicate verified statements of the amount due to
 25 the subcontractor; ~~person; and~~

26 (2) **deliver a copy of the statement to the contractor.**

27 The ~~board; commission; trustee; officer; authorized clerk; or agent of~~
 28 ~~the state public body~~ shall deliver to the surety or sureties on the bond
 29 one (1) of the duplicate statements. The failure to deliver a duplicate
 30 statement by a ~~board; commission; trustee; officer; authorized clerk; or~~
 31 ~~agent of the state the public body~~ does not affect or invalidate the
 32 rights of the person ~~firm; limited liability company; or corporation~~ to
 33 whom money is due, ~~on account of having performed labor or service~~
 34 ~~or having furnished material;~~ nor does the failure to deliver a duplicate
 35 statement operate as a defense for the surety.

36 (e) ~~No~~ A suit ~~shall may not~~ be brought against a surety or sureties
 37 on a bond under this section ~~until the expiration of before~~ thirty (30)
 38 days after **both of the following have occurred:**

39 (1) The filing of the verified duplicate statement.

40 (2) **A copy of the notice has been delivered to the contractor.**

41 If the indebtedness is not paid in full at the expiration of ~~after~~ thirty
 42 (30) days, the person, ~~firm; limited liability company; or corporation~~

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1 may bring an action in a court of competent jurisdiction upon the bond.
 2 The action must be ~~commenced within~~ **brought not later than** sixty
 3 (60) days ~~from after~~ the date of the final completion and acceptance of
 4 the ~~public building or public work. and unless commenced within sixty~~
 5 ~~(60) days; An~~ action on the bond against ~~the a~~ surety ~~or sureties~~ is
 6 **barred if not brought within this time.**

7 (f) **IC 8-23-9, and not this chapter, applies to bonds** on state
 8 highway road and bridge contracts. ~~the provisions of the Indiana~~
 9 ~~department of transportation law (IC 8-23-9) with respect to the bond~~
 10 ~~shall govern.~~

11 SECTION 9. IC 36-1-12-12 IS AMENDED TO READ AS
 12 FOLLOWS [EFFECTIVE JULY 1, 2012]: Sec. 12. (a) When a public
 13 work project is to be performed, the board shall withhold final payment
 14 to the contractor until the contractor has paid the subcontractors,
 15 material suppliers, laborers, ~~or and~~ those furnishing services. However,
 16 if there is not a sufficient sum owed to the contractor to pay those bills,
 17 the sum owed to the contractor shall be prorated in payment of the bills
 18 among the ~~parties~~ **claimants entitled to payment.**

19 (b) To receive payment ~~the a~~ subcontractor, ~~or subcontractors;~~
 20 material ~~suppliers; supplier,~~ laborers, ~~laborer,~~ or those ~~person~~
 21 furnishing services ~~shall must~~ file their ~~claims a claim~~ with the board
 22 ~~within not later than~~ sixty (60) days after ~~the that~~ person performed
 23 ~~the last labor, performed; furnished the last material, furnished; or~~
 24 ~~performed the last service rendered; by them;~~ as provided in section
 25 13 of this chapter.

26 (c) If there is no dispute ~~between among~~ the ~~parties claiming to be~~
 27 ~~entitled to the money withheld; claimants,~~ the board shall pay the
 28 claim from the money due the contractor and deduct ~~it the amount of~~
 29 ~~the claims~~ from the contract price. The board shall take a receipt for
 30 ~~each~~ payment made on a claim.

31 (d) If there is a dispute ~~between among~~ the ~~parties claiming to be~~
 32 ~~entitled to the money withheld; claimants,~~ the board shall retain
 33 sufficient money to pay the claims until the dispute is settled and the
 34 correct amount is determined. However, the board may make a final
 35 and complete settlement with the contractor after thirty (30) days after
 36 the date of the completion and acceptance of the public work if the
 37 board is furnished with satisfactory evidence indicating the payment in
 38 full of all subcontractors, material suppliers, laborers, or those
 39 ~~furnishing services. contractor has materially fulfilled all of its~~
 40 **obligations under the public works contract.**

41 (e) **If the board receives a claim from a subcontractor or a**
 42 **material supplier under this section, the board shall withhold the**

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1 **amount of the claim until the claim is resolved under this section.**

2 (e) (f) A claim form must be signed by an individual from the
3 political subdivision or agency who is directly responsible for the
4 project and who can verify:

5 (1) the quantity of a purchased item; or

6 (2) the weight or volume of the material applied, in the case of a
7 road, street, or bridge project.

8 SECTION 10. IC 36-1-12-13.1, AS AMENDED BY P.L.133-2007,
9 SECTION 13, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
10 JULY 1, 2012]: Sec. 13.1. (a) Except as provided in subsection (e), the
11 appropriate political subdivision or agency:

12 (1) shall require the contractor to execute a payment bond to the
13 appropriate political subdivision or agency, approved by and for
14 the benefit of the political subdivision or agency, in an amount
15 equal to the contract price if the cost of the public work is
16 estimated to be more than two hundred thousand dollars
17 (\$200,000); and

18 (2) may require the contractor to execute a payment bond to the
19 appropriate political subdivision or agency, approved by and for
20 the benefit of the political subdivision or agency, in an amount
21 equal to the contract price if the cost of the public work is
22 estimated to be not more than two hundred thousand dollars
23 (\$200,000).

24 The payment bond is binding on the contractor, the subcontractor, and
25 their successors and assigns for the payment of all indebtedness to a
26 person for labor and service performed, material furnished, or services
27 rendered. The payment bond must state that it is for the benefit of the
28 subcontractors, laborers, material suppliers, and those performing
29 services.

30 (b) The payment bond shall be deposited with the board. The
31 payment bond must specify that:

32 (1) a modification, omission, or addition to the terms and
33 conditions of the public work contract, plans, specifications,
34 drawings, or profile;

35 (2) a defect in the public work contract; or

36 (3) a defect in the proceedings preliminary to the letting and
37 awarding of the public work contract;

38 does not discharge the surety. The surety of the payment bond may not
39 be released until one (1) year after the board's final settlement with the
40 contractor.

41 (c) A person to whom money is due for labor performed, material
42 furnished, or services provided ~~shall, within~~ **must, not later than** sixty

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1 (60) days after ~~the completion of that person completed~~ the labor or
 2 service or ~~within sixty (60) days after the~~ **that person furnished the**
 3 last item of material: ~~has been furnished:~~

4 (1) file with the board signed duplicate statements of the amount
 5 due; **and**

6 (2) **deliver a copy of the statement to the contractor.**

7 The board shall forward to the surety of the payment bond one (1) of
 8 the signed duplicate statements. However, failure of the board to
 9 forward a signed duplicate statement does not affect the rights of a
 10 person to whom money is due. In addition, a failure **of the board** to
 11 forward the statement does not operate as a defense for the surety.

12 (d) An action may not be brought against the surety ~~until~~ **before**
 13 thirty (30) days after:

14 (1) the filing of the signed duplicate statements with the board;
 15 **and**

16 (2) **delivery of a copy of the statement to the contractor.**

17 If the indebtedness is not paid in full at the end of that thirty (30) day
 18 period the person may bring an action in court. The court action must
 19 be brought ~~within~~ **not later than** sixty (60) days after the date of the
 20 final completion and acceptance of the public work.

21 (e) This subsection applies to contracts for a capital improvement
 22 entered into by, for, or on behalf of the Indiana stadium and convention
 23 building authority created by IC 5-1-17-6. The board awarding the
 24 contract for the capital improvement project may waive any payment
 25 bond requirement if the board, after public notice and hearing,
 26 determines:

27 (1) that:

28 (A) an otherwise responsive and responsible bidder is unable
 29 to provide the payment bond; or

30 (B) the cost or coverage of the payment bond is not in the best
 31 interest of the project; and

32 (2) that an adequate alternative is provided through a letter of
 33 credit, additional retainage of at least ten percent (10%) of the
 34 contract amount, a joint payable check system, or other sufficient
 35 protective mechanism.

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