February 23, 2007

SENATE BILL No. 211

DIGEST OF SB 211 (Updated February 21, 2007 4:39 pm - DI 87)

Citations Affected: IC 4-13.6; IC 5-16; IC 5-30; IC 8-15; IC 8-23; IC 36-1; noncode.

Synopsis: Bonds for public works projects. Requires the department of administration to offer instruction at least annually to small businesses, minority business enterprises, and women's business enterprises with regard to bonding requirements and securing bonding for public works projects. Increases the threshold to $200,000 for which bid, performance, and payment bonds are required for public works for state and local projects.

Effective: June 30, 2007; July 1, 2007.

Ford

January 8, 2007, read first time and referred to Committee on Local Government and Elections.
February 22, 2007, amended, reported favorably — Do Pass.

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February 23, 2007

First Regular Session 115th General Assembly (2007)

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 2006 Regular Session of the General Assembly.

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SENATE BILL No. 211

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:

SECTION 1. IC 4-13.6-2-12 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: **Sec. 12. The department shall offer instruction at least annually to:**

(1) small businesses (as defined in IC 5-22-14-1);

(2) minority business enterprises (as defined in IC 4-13-16.5-1); and

(3) women's business enterprises (as defined in IC 4-13-16.5-1.3);

with regard to bonding requirements and working with the surety industry to secure bonding for public works projects.

SECTION 2. IC 4-13.6-7-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 1. The director may apply **the retainage provisions of** this chapter to public works projects with an estimated cost less than the ~~amounts~~ **amount** specified in section 2 ~~or 7~~ of this chapter.

SECTION 3. IC 4-13.6-7-5 IS AMENDED TO READ AS

FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 5. (a) The director:

(1) may require each contractor **of a public works project with an estimated cost of not more than two hundred thousand dollars ($200,000); and**

(2) shall require each contractor of a public works project with an estimated cost of more than two hundred thousand dollars ($200,000);

to submit a good and sufficient bid bond with the bid. The bid bond may equal any percentage of the estimated cost of the public works project that the director requires.

(b) The division may accept bonds provided on forms specified by the department or on forms given by surety companies.

SECTION 4. IC 4-13.6-7-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 6. (a) If the estimated cost of the public works project is ~~at least one~~ **more than two** hundred ~~fifty~~ thousand dollars ~~($150,000),~~ **($200,000),** the division shall require the contractor to execute a good and sufficient payment bond to the department for the state in an amount equal to one hundred percent (100%) of the total contract price. The bond shall include at least the following provisions:

(1) The contractor, its successors and assigns, whether by operation of law or otherwise, and all subcontractors, their successors and assigns, whether by operation of law or otherwise, shall pay all indebtedness that may accrue to any person on account of any labor or service performed or materials furnished in relation to the public work.

(2) The bond shall directly inure to the benefit of subcontractors, laborers, suppliers, and those performing service or who may have furnished or supplied labor, material, or service in relation to the public work.

(3) No change, modification, omission, or addition in or to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the procedures preliminary to the letting and awarding of the contract shall affect or operate to release or discharge the surety in any way.

(4) The provisions and conditions of this chapter shall be a part of the terms of the contract and bond.

(b) The division may permit the bond given by the contractor to provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal the total contract price.

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(c) The division may accept bonds provided on forms specified by the division or on forms given by surety companies.

(d) The division shall hold the bond of a contractor for the use and benefit of any claimant having an interest in it and entitled to its benefits.

(e) The division shall not release sureties of a contractor until the expiration of one (1) year after the final settlement with the contractor.

(f) If the estimated cost of the public works project is less than ~~one~~ **or equal to two** hundred ~~fifty~~ thousand dollars ~~($150,000)~~ **($200,000),** the director may require one (1) of the following:

(1) The contractor must execute a good and sufficient payment bond. The director may determine the amount of the bond to be any percentage, but no more than one hundred percent (100%), of the cost of the project.

(2) The division will withhold retainage under this chapter in an amount of ten percent (10%) of the dollar value of all payments made to the contractor until the public work is substantially completed.

SECTION 5. IC 4-13.6-7-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 7. (a) If the estimated cost of the public works project is:

(1) at least ~~one hundred fifty~~ **two hundred** thousand dollars ~~($150,000)~~ **($200,000),** the division shall; **or**

(2) less than two hundred thousand dollars ($200,000), the division may;

require the contractor to execute a good and sufficient performance bond to the department for the state in an amount equal to one hundred percent (100%) of the total contract price.

(b) The bond **required under subsection (a)** shall include at least the following provisions:

(1) The contractor shall well and faithfully perform the contract.

(2) No change, modification, omission, or addition in or to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the procedures preliminary to the letting and awarding of the contract shall affect or operate to release or discharge the surety in any way.

(3) The provisions and conditions of this chapter shall be a part of the terms of the contract and bond.

~~(b)~~ **(c)** The division may permit the bond given by the contractor to provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal the total contract

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price.

~~(c)~~ **(d)** The division may accept bonds provided on forms specified by the division or on forms given by surety companies.

~~(d)~~ **(e)** The division shall not release sureties of a contractor until the expiration of one (1) year after the final settlement with the contractor.

SECTION 6. IC 5-16-5.5-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 2. To the extent that this chapter is applicable, all contracts between a contractor and a state agency concerning any public building, work, or improvement entered into after May 1, 1972, and which contracts are in excess of ~~one~~ **two** hundred thousand dollars ~~($100,000),~~ **($200,000)** are to be governed by the provisions of this chapter, as are the rights and duties among the parties to the contract and any subcontractors who do any work under the contract. **A state agency may elect to have a contract that is for not more than two hundred thousand dollars ($200,000) be governed by this chapter.** All contracts governed by the provisions of this chapter shall include provisions for the retainage of portions of payments by a state agency to contractors, by contractors to subcontractors, and for the payment of subcontractors.

SECTION 7. IC 5-30-8-4, AS ADDED BY P.L.74-2005, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 4. (a) The public agency:

(1) shall require the design-builder to furnish performance and payment bonds for the project **if the estimated cost of the project is more than two hundred thousand dollars ($200,000); and**

(2) may require the design-builder to furnish performance and payment bonds for the project if the estimated cost of the project is not more than two hundred thousand dollars ($200,000).

(b) A performance or payment bond is not required for, and does not provide coverage for, the part of a design-build contract that includes design services only.

(c) Subsection (b) does not impair the ability of the public agency to seek recovery under the contract from the design-builder for errors, omissions, or defects in the design services.

SECTION 8. IC 8-15-2-5, AS AMENDED BY P.L.47-2006, SECTION 9, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 5. The authority may do the following:

(1) Construct, maintain, repair, police, and operate toll road projects (as defined in this chapter), public improvements, and arterial streets and roads under section 1 of this chapter and

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establish rules for the use of any such toll road project, public improvement, or arterial street or road.

(2) Issue toll road revenue bonds of the state, payable solely from an allocation of money from the rural transportation road fund under IC 8-9.5-8-16 or from revenues or from the proceeds of bonds issued under this chapter and earnings thereon, or from all three (3), for the purpose of paying all or any part of the cost of any one (1) or more toll road projects or for the purpose of refunding any other toll road revenue bonds.

(3) Establish reserves from the proceeds of the sale of bonds or from other funds, or both, to secure the payment of the bonds.

(4) Fix and revise from time to time and charge and collect tolls for transit over each toll road project constructed by it.

(5) Acquire in the name of the state by purchase or otherwise, on such terms and conditions and in such manner as it may deem proper, or by the exercise of the right of condemnation in the manner as provided by this chapter, such public or private lands, including public parks, playgrounds or reservations, or parts thereof or rights therein, rights-of-way, property, rights, easements, and interests, as it may deem necessary for carrying out the provisions of this chapter. The authority may also:

(A) sell, transfer, and convey any such land or any interest therein so acquired, or any portion thereof, whether by purchase, condemnation, or otherwise, and whether such land or interest therein had been public or private, when the same shall no longer be needed for such purposes; and

(B) transfer and convey any such lands or interest therein as may be necessary or convenient for the construction and operation of any toll road project, or as otherwise required under the provisions of this chapter to a state agency or political subdivision.

(6) Designate the locations and establish, limit, and control such points of ingress to and egress from each toll road project as may be necessary or desirable in the judgment of the authority to ensure the proper operation and maintenance of such projects, and to prohibit entrance to such project from any point not so designated. The authority shall not grant, for the operation of transient lodging facilities, either ingress to or egress from any project, including the service areas thereof on which are located service stations and restaurants, and including toll plazas and paved portions of the right-of-way. The authority shall cause to be erected, at its cost, at all points of ingress and egress, large and

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suitable signs facing traffic from each direction on the toll road. Such signs shall designate the number and other designations, if any, of all United States or state highways of ingress or egress, the names of all Indiana municipalities with a population of five thousand (5,000) or more within a distance of seventy-five (75) miles on such roads of ingress or egress, and the distance in miles to such designated municipalities.

(7) Make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this chapter, IC 8-9.5-8, or IC 8-15.5. When the cost under any such contract or agreement, other than:

(A) a contract for compensation for personal services;

(B) a contract with the department under IC 8-9.5-8-7;

(C) a lease with the department under IC 8-9.5-8-8; or

(D) a contract, a lease, or another agreement under IC 8-15.5;

involves an expenditure of more than ten thousand dollars ($10,000), the authority shall make a written contract with the lowest and best bidder after advertisement for not less than two (2) consecutive weeks in a newspaper of general circulation in Marion County, Indiana, and in such other publications as the authority shall determine. Such notice shall state the general character of the work and the general character of the materials to be furnished, the place where plans and specifications therefor may be examined, and the time and place of receiving bids. Each bid shall contain the full name of every person or company interested in it and shall be accompanied by a sufficient bond or certified check on a solvent bank that if the bid is accepted a contract will be entered into and the performance of its proposal secured. The authority may reject any and all bids. A bond with good and sufficient surety shall be required by the authority of all contractors in an amount equal to at least fifty percent (50%) of the contract price, conditioned upon the faithful performance of the contract. **The authority shall require a bid, performance, and payment bond from a contractor for a project if the estimated cost of the project is more than two hundred thousand dollars ($200,000). The authority may require a bid, performance, or payment bond from a contractor for a project if the estimated cost of the project is not more than two hundred thousand dollars ($200,000).**

(8) Employ consulting engineers, superintendents, managers, and such other engineers, construction and accounting experts, bond counsel, other attorneys with the approval of the attorney general,

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and other employees and agents as may be necessary in its judgment to carry out the provisions of this chapter, and to fix their compensation. However, all such expenses shall be payable solely from the proceeds of toll road revenue bonds issued under the provisions of this chapter or from revenues.

(9) Receive and accept from any federal agency, subject to IC 8-23-3, grants for or in aid of the construction of any toll road project, and receive and accept aid or contributions from any source of either money, property, labor, or other things of value, to be held, used, and applied only for the purposes for which such grants and contributions may be made, and repay any grant to the authority or to the department from a federal agency if such repayment is necessary to free the authority from restrictions which the authority determines to be in the public interest to remove.

(10) Establish fees, charges, terms, or conditions for any expenditures, loans, or other form of financial participation in projects authorized as public improvements on arterial streets and roads under section 1 of this chapter.

(11) Accept gifts, devises, bequests, grants, loans, appropriations, revenue sharing, other financing and assistance, and any other aid from any source and agree to and comply with conditions attached to the aid.

(12) Accept transfer of a state highway to the authority under IC 8-23-7-23 and pay the cost of conversion of the state highway to a toll road project.

(13) Enter into contracts or leases with the department under IC 8-9.5-8-7 or IC 8-9.5-8-8 and in connection with the contracts or leases agree with the department for coordination of the operation and the repair and maintenance of toll road projects and tollways which are contiguous parts of the same public road, including joint toll collection facilities and equitable division of tolls.

(14) Enter into public-private agreements under IC 8-15.5 and do all acts and things necessary or proper to carry out the purposes set forth in IC 8-15.5.

(15) Do all acts and things necessary or proper to carry out this chapter.

SECTION 9. IC 8-23-7-19 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 19. (a) If an exchange under section 17 of this chapter includes improvements to be constructed on either parcel of real property, the department shall enter

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into an agreement with the owner of the parcel of property that the department will receive. An agreement under this section must include the following:

(1) The appraisal required under section 18 of this chapter must include the value of improvements constructed or to be constructed on the property.

(2) The construction contract for improvements under this section must be guaranteed by a construction or performance bond issued by a surety company approved by the department. **The department:**

(A) shall require a performance bond from a contractor for a project if the estimated cost of the project is more than two hundred thousand dollars ($200,000); and

(B) may require a performance bond from a contractor for a project if the estimated cost of the project is not more than two hundred thousand dollars ($200,000).

(3) The plans and specifications for improvements under this section must be certified by a licensed architect or engineer.

(b) The department must approve in writing the construction contract, bond, plans, and specifications for the improvements before entering into an exchange agreement under this section.

SECTION 10. IC 8-23-9-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 8. **The department:**

(1) shall require each bidder ~~must~~ **to** submit a bid guarantee and a performance bond payable to the state with the bidder's proposal **if the estimated cost of the project is more than two hundred thousand dollars ($200,000); and**

(2) may require a bidder to submit a bid guarantee and a performance bond payable to the state with the bidder's proposal if the estimated cost of the project is not more than two hundred thousand dollars ($200,000).

~~On contracts of one hundred thousand dollars ($100,000) or less the commissioner may waive the bond requirements.~~ Instead of the bond, the department may establish by rule the requirements that, in its discretion, are necessary to assure payment of subcontractors, suppliers, and employees by the contractor.

SECTION 11. IC 36-1-12-4.5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 4.5. (a) **The political subdivision or agency:**

(1) shall require a bond or a certified check ~~shall~~ **to** be filed with each bid by a bidder in the amount determined and specified by the board in the notice of the letting **if the cost of the public**

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work is estimated to be more than two hundred thousand dollars ($200,000); and

(2) may require a bond or a certified check to be filed with each bid by a bidder in the amount determined and specified by the board in the notice of the letting if the cost of the public work is estimated to be not more than two hundred thousand dollars ($200,000).

(b) The amount of the bond or certified check may not be set at more than ten percent (10%) of the contract price. The bond or certified check shall be made payable to the political subdivision or agency.

(c) All checks of unsuccessful bidders shall be returned to them by the board upon selection of successful bidders. Checks of successful bidders shall be held until delivery of the performance bond, as provided in section 14(e) of this chapter.

SECTION 12. IC 36-1-12-13.1, AS AMENDED BY P.L.120-2006, SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 13.1. (a) Except as provided in subsection ~~(f),~~ **(e),** ~~this section applies to contracts for public work only if the cost of the public work is estimated to be more than one hundred thousand dollars ($100,000). (b)~~ **the appropriate political subdivision or agency:**

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

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

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

~~(c)~~ **(b)** The payment bond shall be deposited with the board. The payment bond must specify that:

(1) a modification, omission, or addition to the terms and conditions of the public work contract, plans, specifications,

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drawings, or profile;

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

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

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

~~(d)~~ **(c)** A person to whom money is due for labor performed, material furnished, or services provided shall, within sixty (60) days after the completion of the labor or service, or within sixty (60) days after the last item of material has been furnished, file with the board signed duplicate statements of the amount due. The board shall forward to the surety of the payment bond one (1) of the signed duplicate statements. However, failure of the board to forward a signed duplicate statement does not affect the rights of a person to whom money is due. In addition, a failure to forward the statement does not operate as a defense for the surety.

~~(e)~~ **(d)** An action may not be brought against the surety until thirty (30) days after the filing of the signed duplicate statements with the board. If the indebtedness is not paid in full at the end of that thirty (30) day period the person may bring an action in court. The court action must be brought within sixty (60) days after the date of the final completion and acceptance of the public work.

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

(1) that:

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

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

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

SECTION 13. IC 36-1-12-14, AS AMENDED BY P.L.120-2006, SECTION 5, AND AS AMENDED BY P.L.2-2006, SECTION 189, IS CORRECTED AND AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 14. (a) This section applies to

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public work contracts in excess of ~~one~~ **two** hundred thousand dollars ~~($100,000)~~ **($200,000)** for projects other than highways, roads, streets, alleys, bridges, and appurtenant structures situated on streets, alleys, and dedicated highway rights-of-way. **A board may require a contractor and subcontractor to include contract provisions for retainage as set forth in this section for contracts that are not more than two hundred thousand dollars ($200,000).** This section also applies to a lessor corporation qualifying under ~~IC *21-5-11*~~ *IC 20-47-2* or ~~IC *21-5-12*~~ *IC 20-47-3* 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. At the discretion of the contractor, the retainage shall be held by the board or shall 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.

(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,

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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) *Except as provided by* ~~*subsection*~~ **subsections** *(i)* **and (h),** 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

(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 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

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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.

(i)This subsection applies to the Indiana stadium and convention building authority created by IC 5-1-17-6. The board awarding the contract for a capital improvement project may waive any performance bond requirement if the board, after public notice and hearing, determines:

(1) that:

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

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

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

SECTION 14. [EFFECTIVE JUNE 30, 2007] **IC 4-13.6-7, IC 5-16-5.5-2, IC 5-30-8-4, IC 8-15-2-5, IC 8-23-7-19, IC 8-23-9-8, and IC 36-1-12, all as amended by this act, apply only to public works contracts entered into after June 30, 2007.**

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COMMITTEE REPORT

Madam President: The Senate Committee on Local Government and Elections, to which was referred Senate Bill No. 211, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 1, between the enacting clause and line 1, begin a new paragraph and insert:

"SECTION 1. IC 4-13.6-2-12 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: **Sec. 12. The department shall offer instruction at least annually to:**

(1) small businesses (as defined in IC 5-22-14-1);

(2) minority business enterprises (as defined in IC 4-13-16.5-1); and

(3) women's business enterprises (as defined in IC 4-13-16.5-1.3);

with regard to bonding requirements and working with the surety industry to secure bonding for public works projects.".

Page 1, delete lines 6 through 16, begin a new paragraph and insert:

"SECTION 3. IC 4-13.6-7-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 5. (a) The director:

(1) may require each contractor **of a public works project with an estimated cost of not more than two hundred thousand dollars ($200,000); and**

(2) shall require each contractor of a public works project with an estimated cost of more than two hundred thousand dollars ($200,000);

to submit a good and sufficient bid bond with the bid. The bid bond may equal any percentage of the estimated cost of the public works project that the director requires.

(b) The division may accept bonds provided on forms specified by the department or on forms given by surety companies.".

Page 2, line 2, delete "five" and insert "**two**".

Page 2, line 3, delete "($500,000)," and insert "**($200,000),**".

Page 2, line 38, delete "five" and insert "**two**".

Page 2, line 38, delete "($500,000)," and insert "**($200,000),**".

Page 2, line 39, reset in roman "one (1) of the following:".

Page 2, reset in roman lines 40 through 42.

Page 3, reset in roman line 1.

Page 3, line 2, reset in roman "(2)".

Page 3, line 2, delete "the" and insert "The".

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Page 3, line 2, reset in roman "will".

Page 3, line 2, delete "to".

Page 3, delete lines 6 through 30, begin a new paragraph and insert:

"SECTION 5. IC 4-13.6-7-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 7. (a) If the estimated cost of the public works project is:

(1) at least ~~one hundred fifty~~ **two hundred** thousand dollars ~~($150,000)~~ **($200,000),** the division shall; **or**

(2) less than two hundred thousand dollars ($200,000), the division may;

require the contractor to execute a good and sufficient performance bond to the department for the state in an amount equal to one hundred percent (100%) of the total contract price.

(b) The bond **required under subsection (a)** shall include at least the following provisions:

(1) The contractor shall well and faithfully perform the contract.

(2) No change, modification, omission, or addition in or to the terms or conditions of the contract, plans, specifications, drawings, or profile or any irregularity or defect in the contract or in the procedures preliminary to the letting and awarding of the contract shall affect or operate to release or discharge the surety in any way.

(3) The provisions and conditions of this chapter shall be a part of the terms of the contract and bond.

~~(b)~~ **(c)** The division may permit the bond given by the contractor to provide for incremental bonding in the form of multiple or chronological bonds that, if taken as a whole, equal the total contract price.

~~(c)~~ **(d)** The division may accept bonds provided on forms specified by the division or on forms given by surety companies.

~~(d)~~ **(e)** The division shall not release sureties of a contractor until the expiration of one (1) year after the final settlement with the contractor.".

Page 3, line 35, delete "five" and insert "**two**".

Page 3, line 36, delete "($500,000)" and insert "**($200,000)**".

Page 3, line 39, after "contract." insert "**A state agency may elect to have a contract that is for not more than two hundred thousand dollars ($200,000) be governed by this chapter.**".

Page 4, delete lines 1 through 13, begin a new paragraph and insert:

"SECTION 7. IC 5-30-8-4, AS ADDED BY P.L.74-2005, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 4. (a) The public agency:

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(1) shall require the design-builder to furnish performance and payment bonds for the project **if the estimated cost of the project is more than two hundred thousand dollars ($200,000); and**

(2) may require the design-builder to furnish performance and payment bonds for the project if the estimated cost of the project is not more than two hundred thousand dollars ($200,000).

(b) A performance or payment bond is not required for, and does not provide coverage for, the part of a design-build contract that includes design services only.

(c) Subsection (b) does not impair the ability of the public agency to seek recovery under the contract from the design-builder for errors, omissions, or defects in the design services.".

Page 6, line 10, delete "may not" and insert "**shall**".

Page 6, line 11, delete "or" and insert "**and**".

Page 6, line 12, delete "unless" and insert "**if**".

Page 6, line 13, delete "five" and insert "**two**".

Page 6, line 13, delete "($500,000)." and insert "**($200,000). The authority may require a bid, performance, or payment bond from a contractor for a project if the estimated cost of the project is not more than two hundred thousand dollars ($200,000).**".

Page 7, delete lines 13 through 42, begin a new paragraph and insert:

"SECTION 8. IC 8-23-7-19 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 19. (a) If an exchange under section 17 of this chapter includes improvements to be constructed on either parcel of real property, the department shall enter into an agreement with the owner of the parcel of property that the department will receive. An agreement under this section must include the following:

(1) The appraisal required under section 18 of this chapter must include the value of improvements constructed or to be constructed on the property.

(2) The construction contract for improvements under this section must be guaranteed by a construction or performance bond issued by a surety company approved by the department. **The department:**

(A) shall require a performance bond from a contractor for a project if the estimated cost of the project is more than two hundred thousand dollars ($200,000); and

(B) may require a performance bond from a contractor for

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a project if the estimated cost of the project is not more than two hundred thousand dollars ($200,000).

(3) The plans and specifications for improvements under this section must be certified by a licensed architect or engineer.

(b) The department must approve in writing the construction contract, bond, plans, and specifications for the improvements before entering into an exchange agreement under this section.

SECTION 9. IC 8-23-9-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 8. **The department:**

(1) shall require each bidder ~~must~~ **to** submit a bid guarantee and a performance bond payable to the state with the bidder's proposal **if the estimated cost of the project is more than two hundred thousand dollars ($200,000); and**

(2) may require a bidder to submit a bid guarantee and a performance bond payable to the state with the bidder's proposal if the estimated cost of the project is not more than two hundred thousand dollars ($200,000).

~~On contracts of one hundred thousand dollars ($100,000) or less the commissioner may waive the bond requirements.~~ Instead of the bond, the department may establish by rule the requirements that, in its discretion, are necessary to assure payment of subcontractors, suppliers, and employees by the contractor.

SECTION 10. IC 36-1-12-4.5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 4.5. (a) **The political subdivision or agency:**

(1) shall require a bond or a certified check ~~shall~~ **to** be filed with each bid by a bidder in the amount determined and specified by the board in the notice of the letting **if the cost of the public work is estimated to be more than two hundred thousand dollars ($200,000); and**

(2) may require a bond or a certified check to be filed with each bid by a bidder in the amount determined and specified by the board in the notice of the letting if the cost of the public work is estimated to be not more than two hundred thousand dollars ($200,000).

(b) The amount of the bond or certified check may not be set at more than ten percent (10%) of the contract price. The bond or certified check shall be made payable to the political subdivision or agency.

(c) All checks of unsuccessful bidders shall be returned to them by the board upon selection of successful bidders. Checks of successful bidders shall be held until delivery of the performance bond, as provided in section 14(e) of this chapter.

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SECTION 11. IC 36-1-12-13.1, AS AMENDED BY P.L.120-2006, SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 13.1. (a) Except as provided in subsection ~~(f),~~ **(e),** ~~this section applies to contracts for public work only if the cost of the public work is estimated to be more than one hundred thousand dollars ($100,000).~~ ~~(b)~~ **the appropriate political subdivision or agency:**

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

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

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

~~(c)~~ **(b)** The payment bond shall be deposited with the board. The payment 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

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

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

~~(d)~~ **(c)** A person to whom money is due for labor performed, material furnished, or services provided shall, within sixty (60) days after the completion of the labor or service, or within sixty (60) days after the last item of material has been furnished, file with the board signed duplicate statements of the amount due. The board shall forward to the surety of the payment bond one (1) of the signed duplicate statements. However, failure of the board to forward a signed duplicate

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statement does not affect the rights of a person to whom money is due. In addition, a failure to forward the statement does not operate as a defense for the surety.

~~(c)~~ **(d)** An action may not be brought against the surety until thirty (30) days after the filing of the signed duplicate statements with the board. If the indebtedness is not paid in full at the end of that thirty (30) day period the person may bring an action in court. The court action must be brought within sixty (60) days after the date of the final completion and acceptance of the public work.

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

(1) that:

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

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

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

SECTION 12. IC 36-1-12-14, AS AMENDED BY P.L.120-2006, SECTION 5, AND AS AMENDED BY P.L.2-2006, SECTION 189, IS CORRECTED AND AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2007]: Sec. 14. (a) This section applies to public work contracts in excess of ~~one~~ **two** hundred thousand dollars ~~($100,000)~~ **($200,000)** for projects other than highways, roads, streets, alleys, bridges, and appurtenant structures situated on streets, alleys, and dedicated highway rights-of-way. **A board may require a contractor and subcontractor to include contract provisions for retainage as set forth in this section for contracts that are not more than two hundred thousand dollars ($200,000).** This section also applies to a lessor corporation qualifying under ~~IC *21-5-11*~~ *IC 20-47-2* or ~~IC *21-5-12*~~ *IC 20-47-3* 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

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payments by the board to contractors, by contractors to subcontractors, and for the payment of subcontractors. At the discretion of the contractor, the retainage shall be held by the board or shall 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.

(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

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other escrow accounts and limiting the liability of the escrow agent.

(e) *Except as provided by* ~~*subsection*~~ **subsections** *(i)* **and (h),** 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

(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 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.

(i)This subsection applies to the Indiana stadium and convention building authority created by IC 5-1-17-6. The board awarding the contract for a capital improvement project may waive any performance bond requirement if the board, after public notice and hearing, determines:

(1) that:

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

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

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

Delete pages 8 through11.

Page 12, delete lines 1 through 14.

Renumber all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to SB 211 as introduced.)

LAWSON C, Chairperson

Committee Vote: Yeas 9, Nays 0.

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