

By the Committee on Governmental Oversight and Accountability;
and Senator Hooper

585-02352-19

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1 A bill to be entitled
2 An act relating to public construction; amending s.
3 218.735, F.S.; revising the amounts of retainage that
4 local governmental entities and contractors may
5 withhold from progress payments for any construction
6 services contract; amending s. 255.05, F.S.; revising
7 requirements for Department of Management Services
8 rules governing certain contracts; amending s.
9 255.078, F.S.; revising the amounts of retainage that
10 certain public entities and contractors may withhold
11 from progress payments for any construction services
12 contract; specifying nonapplicability of the act;
13 providing an effective date.

14
15 Be It Enacted by the Legislature of the State of Florida:

16
17 Section 1. Subsection (8) of section 218.735, Florida
18 Statutes, is amended to read:

19 218.735 Timely payment for purchases of construction
20 services.—

21 (8) (a) With regard to any contract for construction
22 services, a local governmental entity may withhold from each
23 progress payment made to the contractor an amount not exceeding
24 5 ~~10~~ percent of the payment as retainage until 50-percent
25 completion of such services.

26 (b) After 50-percent completion of the construction
27 services purchased pursuant to the contract, the local
28 governmental entity must reduce to 2.5 ~~5~~ percent the amount of
29 retainage withheld from each subsequent progress payment made to

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30 the contractor. For purposes of this subsection, the term "50-
31 percent completion" has the meaning set forth in the contract
32 between the local governmental entity and the contractor or, if
33 not defined in the contract, the point at which the local
34 governmental entity has expended 50 percent of the total cost of
35 the construction services purchased as identified in the
36 contract together with all costs associated with existing change
37 orders and other additions or modifications to the construction
38 services provided for in the contract. However, notwithstanding
39 this subsection, a municipality having a population of 25,000 or
40 fewer, or a county having a population of 100,000 or fewer, may
41 withhold retainage in an amount not exceeding 5 ~~10~~ percent of
42 each progress payment made to the contractor until final
43 completion and acceptance of the project by the local
44 governmental entity.

45 (c) After 50-percent completion of the construction
46 services purchased pursuant to the contract, the contractor may
47 elect to withhold retainage from payments to its subcontractors
48 at a rate higher than 2.5 ~~5~~ percent. The specific amount to be
49 withheld must be determined on a case-by-case basis and must be
50 based on the contractor's assessment of the subcontractor's past
51 performance, the likelihood that such performance will continue,
52 and the contractor's ability to rely on other safeguards. The
53 contractor shall notify the subcontractor, in writing, of its
54 determination to withhold more than 2.5 ~~5~~ percent of the
55 progress payment and the reasons for making that determination,
56 and the contractor may not request the release of such retained
57 funds from the local governmental entity.

58 (d) After 50-percent completion of the construction

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59 services purchased pursuant to the contract, the contractor may
60 present to the local governmental entity a payment request for
61 up to one-half of the retainage held by the local governmental
62 entity. The local governmental entity shall promptly make
63 payment to the contractor, unless the local governmental entity
64 has grounds, pursuant to paragraph (f), for withholding the
65 payment of retainage. If the local governmental entity makes
66 payment of retainage to the contractor under this paragraph
67 which is attributable to the labor, services, or materials
68 supplied by one or more subcontractors or suppliers, the
69 contractor shall timely remit payment of such retainage to those
70 subcontractors and suppliers.

71 (e) This section does not prohibit a local governmental
72 entity from withholding retainage at a rate less than 5 ~~10~~
73 percent of each progress payment, from incrementally reducing
74 the rate of retainage pursuant to a schedule provided for in the
75 contract, or from releasing at any point all or a portion of any
76 retainage withheld by the local governmental entity which is
77 attributable to the labor, services, or materials supplied by
78 the contractor or by one or more subcontractors or suppliers. If
79 a local governmental entity makes any payment of retainage to
80 the contractor which is attributable to the labor, services, or
81 materials supplied by one or more subcontractors or suppliers,
82 the contractor shall timely remit payment of such retainage to
83 those subcontractors and suppliers.

84 (f) This section does not require the local governmental
85 entity to pay or release any amounts that are the subject of a
86 good faith dispute, the subject of a claim brought pursuant to
87 s. 255.05, or otherwise the subject of a claim or demand by the

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88 local governmental entity or contractor.

89 (g) The time limitations set forth in this section for
90 payment of payment requests apply to any payment request for
91 retainage made pursuant to this section.

92 (h) Paragraphs (a)-(d) do not apply to construction
93 services purchased by a local governmental entity which are paid
94 for, in whole or in part, with federal funds and are subject to
95 federal grantor laws and regulations or requirements that are
96 contrary to any provision of the Local Government Prompt Payment
97 Act.

98 (i) This subsection does not apply to any construction
99 services purchased by a local governmental entity if the total
100 cost of the construction services purchased as identified in the
101 contract is \$200,000 or less.

102 Section 2. Paragraph (f) of subsection (1) of section
103 255.05, Florida Statutes, is amended to read:

104 255.05 Bond of contractor constructing public buildings;
105 form; action by claimants.—

106 (1) A person entering into a formal contract with the state
107 or any county, city, or political subdivision thereof, or other
108 public authority or private entity, for the construction of a
109 public building, for the prosecution and completion of a public
110 work, or for repairs upon a public building or public work shall
111 be required, before commencing the work or before recommencing
112 the work after a default or abandonment, to execute and record
113 in the public records of the county where the improvement is
114 located, a payment and performance bond with a surety insurer
115 authorized to do business in this state as surety. A public
116 entity may not require a contractor to secure a surety bond

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117 under this section from a specific agent or bonding company.

118 (f) The Department of Management Services shall adopt rules
119 with respect to all contracts for \$200,000 or less, to provide:

120 1. Procedures for retaining up to 5 ~~10~~ percent of each
121 request for payment submitted by a contractor and procedures for
122 determining disbursements from the amount retained on a pro rata
123 basis to laborers, materialmen, and subcontractors, as defined
124 in s. 713.01.

125 2. Procedures for requiring certification from laborers,
126 materialmen, and subcontractors, as defined in s. 713.01, before
127 final payment to the contractor that such laborers, materialmen,
128 and subcontractors have no claims against the contractor
129 resulting from the completion of the work provided for in the
130 contract.

131
132 The state is not liable to any laborer, materialman, or
133 subcontractor for any amounts greater than the pro rata share as
134 determined under this section.

135 Section 3. Subsections (1), (2), (3), and (5) of section
136 255.078, Florida Statutes, are amended to read:

137 255.078 Public construction retainage.—

138 (1) With regard to any contract for construction services,
139 a public entity may withhold from each progress payment made to
140 the contractor an amount not exceeding 5 ~~10~~ percent of the
141 payment as retainage until 50-percent completion of such
142 services.

143 (2) After 50-percent completion of the construction
144 services purchased pursuant to the contract, the public entity
145 must reduce to 2.5 ~~5~~ percent the amount of retainage withheld

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146 from each subsequent progress payment made to the contractor.
147 For purposes of this section, the term "50-percent completion"
148 means the definition that is provided ~~has the meaning set forth~~
149 in the contract between the public entity and the contractor or,
150 if not defined in the contract, the point at which the public
151 entity has expended 50 percent of the total cost of the
152 construction services purchased as identified in the contract
153 together with all costs associated with existing change orders
154 and other additions or modifications to the construction
155 services provided for in the contract.

156 (3) After 50-percent completion of the construction
157 services purchased pursuant to the contract, the contractor may
158 elect to withhold retainage from payments to its subcontractors
159 at a rate higher than 2.5 ~~5~~ percent. The specific amount to be
160 withheld must be determined on a case-by-case basis and must be
161 based on the contractor's assessment of the subcontractor's past
162 performance, the likelihood that such performance will continue,
163 and the contractor's ability to rely on other safeguards. The
164 contractor shall notify the subcontractor, in writing, of its
165 determination to withhold more than 2.5 ~~5~~ percent of the
166 progress payment and the reasons for making that determination,
167 and the contractor may not request the release of such retained
168 funds from the public entity.

169 (5) ~~Neither~~ This section and ~~nor~~ s. 255.077 do not prohibit
170 ~~prohibits~~ a public entity from withholding retainage at a rate
171 less than 5 ~~10~~ percent of each progress payment, from
172 incrementally reducing the rate of retainage pursuant to a
173 schedule provided for in the contract, or from releasing at any
174 point all or a portion of any retainage withheld by the public

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175 entity which is attributable to the labor, services, or
176 materials supplied by the contractor or by one or more
177 subcontractors or suppliers. If a public entity makes any
178 payment of retainage to the contractor which is attributable to
179 the labor, services, or materials supplied by one or more
180 subcontractors or suppliers, the contractor must ~~shall~~ timely
181 remit payment of such retainage to those subcontractors and
182 suppliers.

183 Section 4. (1) This act does not apply to any contract for
184 construction services which is entered into or is pending
185 approval by a public entity, as defined in s. 255.072, Florida
186 Statutes, or to any construction services project advertised for
187 bid by the public entity, on or before July 1, 2019.

188 (2) The amendments made to ss. 255.05 and 255.078, Florida
189 Statutes, by this act do not apply to contracts executed under
190 chapter 337, Florida Statutes.

191 Section 5. This act shall take effect July 1, 2019.