

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1464

SPONSOR: Regulated Industries Committee and Senator Webster

SUBJECT: Prompt payment and retainage reform

DATE: April 18, 2000 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Bowman</u>	<u>Yeatman</u>	<u>CA</u>	<u>Fav/1 amendment</u>
2.	<u>Wiehle</u>	<u>Guthrie</u>	<u>RI</u>	<u>Favorable/CS</u>
3.	_____	_____	<u>CM</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The bill:

- Defines “payment request” and allows a payment request to suffice in lieu of an invoice throughout the prompt payment act.
- Requires that a contractor who receives payment from a local government for services or materials pay those subcontractors or material suppliers within 10 days after receipt of the payment.
- More clearly specifies when payment is due when approval of a project architect or engineer is necessary.
- Provides that no contract may prohibit the collection of late payment interest charges.
- Provides that the prevailing party in a collection action under the prompt payment act is entitled to recover attorney’s fees at trial and on appeal.
- Requires that the Office of Program Policy Analysis and Government Accountability, in consultation with the Legislative Committee on Intergovernmental Relations, conduct a study of, and make recommendations relating to, public and private construction retainage methods.

The bill amends the following sections of the Florida Statutes: 218.72, 218.73, 218.735, 218.74, 218.75, 218.76, and 255.05.

II. Present Situation:

Part VII of chapter 218, F.S., known as the “Florida Prompt Payment Act,” was enacted in 1989 to provide for prompt payments by local governmental entities to private vendors. (Section 215.422, F.S., addresses prompt payment of vendors by state agencies.)

Section 218.73, F.S., establishes timely payment standards for nonconstruction services. Payment deadlines are calculated from the latest of:

- The date on which a proper invoice is received by the chief disbursement officer of the local governmental entity after approval by the governing body, if required; or
- If a proper invoice is not received by the local governmental entity, the date:
 - On which delivery of personal property is accepted by the local governmental entity;
 - On which services are completed;
 - On which the rental period begins; or
 - On which the local governmental entity and vendor agree in a contract that may provide dates relative to payment periods.

Section 218.735, F.S. establishes timely payment standards for construction services. The due date for payment is either 20 business days after:

- The invoice is stamped as received by the government entity, if the project architect or engineer does not need to approve the invoice prior to the invoice being submitted to the entity.
- The invoice has been approved by the project architect or engineer and the invoice has been stamped as received by the government entity, in the case of projects requiring architect or engineer approval.

Each local governmental entity is required to establish procedures whereby each invoice received by the local governmental entity shall be marked as having been received on the date on which it is first delivered into the hands of an agent or employee of the local governmental entity or is first delivered to a facility or office of the local governmental entity. The date so marked shall be the date on which the invoice is received. The time at which payment shall be due from a local governmental entity shall be 45 days from the date on which the proper invoice is received or when one of the above criteria are met for the delivery of services to the local government.

All payments due from a local governmental entity and not made within 45 days shall bear interest from 30 days after the due date at the rate of 1 percent per month on the unpaid balance. The vendor must invoice the local governmental entity for any interest accrued in order to receive the interest payment. Any overdue period of less than one month shall be considered as one month in computing interest. Unpaid interest compounds monthly. With respect to each past due payment, interest ceases to accrue after interest on that payment has accrued for 12 months.

Section 218.74, F.S., provides that all payments due from a local government entity under the section that are not made in time are subject to interest from 30 days after the due date at the rate of 1 percent per month on the unpaid balance. However, with respect to each past due payment, interest ceases to accrue after interest on that payment has accrued for 12 months.

Section 218.76, F.S., outlines a process for the resolution of disputes between local government entities and vendors over payment. In any case in which an improper invoice is submitted by a vendor, the local governmental entity has 10 days after the improper invoice is received to notify the vendor that the invoice is improper and indicate what corrective action on the part of the vendor is needed to make the invoice proper. In the event a dispute occurs between a vendor and a local governmental entity concerning payment of an invoice, such disagreement shall be finally determined by the local governmental entity. Each local governmental entity is required to establish a dispute resolution procedure to be followed in cases of such disputes. Such procedure must provide that proceedings to resolve the dispute be commenced not later than 45 days after

the date on which the proper invoice was received by the local governmental entity and shall be concluded by final decision of the local governmental entity not later than 60 days after the date on which the proper invoice was received by the local governmental entity. Such procedures are not subject to chapter 120. If the dispute is resolved in favor of the local governmental entity, then interest charges shall begin to accrue 15 days after the local governmental entity's final decision. If the dispute is resolved in favor of the vendor, then interest begins to accrue as of the original date the payment became due.

Currently, there is concern that the process does not work for the payment of construction services because disputes frequently arise concerning when a project is actually complete. Often a project is completed in stages and disputes arise concerning when services should be paid. These disputes can delay payment of a contractor as much as 60 days. Delays in paying contractors also affect subcontractors. Section 255.071, F.S., requires that subcontractors be paid 30 days after the date the labor, services, or materials were furnished or within 30 days after the date payment for such is received, whichever is later. Delays of up to 60 days in payment of contractors cause fiscal stress on subcontractors, which usually are small businesses.

A 1992 report prepared by the Department of Construction Management at Florida International University, entitled "Alternatives to 10% Retainage," found that while a flat 10 % retainage is the most common method of retainage used for construction projects in Florida, that practice hurts the cash flow of contractors, subcontractors and suppliers. The report states that according to industry experts consulted, the timely reimbursement of both progress payments and retained funds largely would solve the cash flow problem. The report recommends:

- Decreasing the rate of retainage as the project progresses.
- Releasing retained money periodically based on satisfactory performance
- Basing retainage on trades or work subdivisions and releasing retained funds as these subdivisions of the project are completed.

The Florida Department of Management Services (DMS) is the state agency that has the primary responsibility for construction and maintenance of state buildings. The DMS has a policy of charging a 10% retainage on the first half of a project, and 5% on the remaining portion. Local governments entities in Florida vary in their practices regarding the amount of retainage.

III. Effect of Proposed Changes:

Section 1 amends s. 218.72, F.S., to add or change the following definitions:

- "Local governmental entity" is changed to include school board, school district, authority, special taxing district, other political subdivision, and community college, in addition to a county or municipal government or any office, board, bureau, commission, department, branch, division, or institution thereof or any project supported by county or municipal funds.
- "Purchase" is changed to include purchase of construction services, in addition to the purchase of goods or services, the purchase or lease of personal property, or the lease of real property by a local governmental entity.

- “Construction services” is changed to include labor and materials provided, in addition to the purchase of goods or services provided in connection with the construction, alteration, repair, demolition, reconstruction to real property.
- “Payment request” is added to mean a request for payment for construction services that conforms with all statutory requirements and with all requirements specified by the local governmental entity to which the payment request is submitted if:
 - (a) Such requirements have been adopted by formal action of the local governmental entity taken prior to the transaction to which the payment request applies.
 - (b) The local governmental entity made such requirements available to vendors.
- “Agent” is added to mean a project architect, engineer, or any other agency or person acting on behalf of the local government entity.

Section 2 amends s. 218.73, F.S., to require that a contractor who receives payment from a local governmental entity for labor, services, or materials furnished by subcontractors and materials suppliers hired by the contractor pay those subcontractors or material suppliers within 10 days after receipt of the payment. The bill also clarifies how timely payments are recalculated for purchases other than construction services.

Section 3 amends s. 218.735, F.S., to revise the prompt payment process for construction services, labor and materials. The bill adds “payment request” throughout the statute, so that a contractor may use either a payment request or an invoice.

Currently, local governments have 20 business days to pay invoices and the payment deadline countdown does not begin until, if applicable, the project architect or engineer approves the payment. The bill retains the 20 business day period for payment requests or invoices not requiring such approval, with a 25 business day period if approval is required.

The bill provides that if a local government disputes a portion of a payment request or invoice, the undisputed portion shall be paid in a timely fashion. It also provides that all payments not made on time accrue interest at the rate of one percent per month (as under current law) *or* at the rate specified in the contract, whichever is greater.

Section 4 amends s. 218.74, F.S., to allow a payment request to suffice in lieu of an invoice, to provide that the section applies to the purchase of goods and services other than construction services, and to delete a provision that interest on past due payments ceases to accrue after interest has accrued for 12 months.

Section 5 amends s. 218.75, F.S., to include providers of construction services and to provide that no contract may prohibit the collection of late payment interest charges.

Section 6 amends s. 218.76, F.S., to allow a payment request to suffice in lieu of an invoice and to provide that the prevailing party in a collection action under the prompt payment act is entitled to recover attorney’s fees at trial and on appeal.

Section 7 amends s. 255.05, F.S., relating to bond of a public construction contractor, to delete the current prohibition against service of a notice of nonpayment prior to 45 days after the first furnishing of labor, services, or materials.

Section 8 requires that, effective upon the bill becoming a law, the Office of Program Policy Analysis and Government Accountability (OPPAGA), in consultation with the Legislative Committee on Intergovernmental Relations, is to conduct a study of public and private construction retainage methods and draw conclusions and make recommendations with regard to the specified issues. OPPAGA is to report to the President of the Senate, the Speaker of the House of Representatives, minority leaders of both houses, and chairs of the House Business Regulation & Consumer Affairs Committee and the Senate Regulated Industries Committee by January 1, 2001.

Section 9 provides that, other than the OPPAGA study provisions, the bill shall take effect July 1, 2000, and that it applies to contracts entered into on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
