

By the Committee on Regulated Industries and Senator Webster

315-2101A-00

1 A bill to be entitled
2 An act relating to prompt payment and retainage
3 reform; amending s. 218.72, F.S.; redefining
4 the terms "local governmental entity,"
5 "purchase," and "construction services" and
6 defining the terms "payment request" and
7 "agent" for the purpose of the Florida Prompt
8 Payment Act; amending s. 218.73, F.S.;
9 providing for timely payment for
10 nonconstruction services; amending s. 218.735,
11 F.S.; revising provisions governing the timely
12 payment for purchases of construction services;
13 amending s. 218.74, F.S.; revising provisions
14 relating to procedures for calculation of
15 payment due dates; amending s. 218.75, F.S.;
16 revising provisions relating to mandatory
17 interest; amending s. 218.76, F.S.; revising
18 provisions relating to improper invoices and
19 resolution of disputes; providing for the
20 recovery of court costs and attorney's fees
21 under certain circumstances; amending s.
22 255.05, F.S.; revising provisions relating to
23 the bond of a contractor constructing public
24 buildings; requiring the Office of Program
25 Policy Analysis and Government Accountability,
26 in consultation with the Legislative Committee
27 on Intergovernmental Relations, to conduct a
28 study of construction retainage methods;
29 specifying areas to be examined; requiring
30 study conclusions and recommendations;
31 requiring a report; providing effective dates.

1 Be It Enacted by the Legislature of the State of Florida:

2

3 Section 1. Subsections (2), (5), and (7) of section
4 218.72, Florida Statutes, are amended, and subsections (8) and
5 (9) are added to that section, to read:

6 218.72 Definitions.--As used in this part:

7 (2) "Local governmental entity" means a county or
8 municipal government, school board, school district,
9 authority, special taxing district, other political
10 subdivision, community college, or any office, board, bureau,
11 commission, department, branch, division, or institution
12 thereof or any project supported by county or municipal funds.

13 (5) "Purchase" means the purchase of goods, ~~or~~
14 services, or construction services, the purchase or lease of
15 personal property, or the lease of real property by a local
16 governmental entity.

17 (7) "Construction services" means all labor, services,
18 and materials provided ~~performed~~ in connection with the
19 construction, alteration, repair, demolition, reconstruction,
20 or any other improvements to real property that require a
21 license under parts I and II of chapter 489.

22 (8) "Payment request" means a request for payment for
23 construction services which conforms with all statutory
24 requirements and with all requirements specified by the local
25 governmental entity to which the payment request is submitted,
26 if:

27 (a) Such requirements have been adopted by formal
28 action of the local governmental entity taken prior to the
29 transaction to which the payment request applies.

30 (b) The local governmental entity made such
31 requirements available to vendors.

1 (9) "Agent" means project architect, project engineer,
2 or any other agency or person acting on behalf of the local
3 governmental entity.

4 Section 2. Section 218.73, Florida Statutes, is
5 amended to read:

6 218.73 Timely payment for nonconstruction
7 services.--The time at which payment is due for a purchase,
8 other than a purchase of construction services, by a local
9 governmental entity, ~~except for the purchase of construction~~
10 ~~services, is due~~ must be calculated from:

11 (1) The date on which a proper invoice is received by
12 the chief disbursement officer of the local governmental
13 entity after approval by the governing body, if required; or

14 (2) If a proper invoice is not received by the local
15 governmental entity, the date:

16 (a) On which delivery of personal property is accepted
17 by the local governmental entity;

18 (b) On which services are completed;

19 (c) On which the rental period begins; or

20 (d) On which the local governmental entity and vendor
21 agree in a contract that provides dates relative to payment
22 periods;

23
24 whichever date is latest.

25 Section 3. Section 281.735, Florida Statutes, is
26 amended to read:

27 218.735 Timely payment for purchases of construction
28 services.--

29 (1) The due date for payment for the purchase of
30 construction services by a local governmental entity is
31 determined as follows:

1 (a) If an agent ~~the project architect or project~~
2 ~~engineer~~ must approve the payment request or invoice prior to
3 the payment request or invoice being submitted to the local
4 governmental entity, payment is due 25 ~~20~~ business days after
5 the date on which the payment request or ~~architect or engineer~~
6 ~~approves the invoice and the~~ invoice is stamped as received as
7 provided in s. 218.74(1).

8 (b) If an agent ~~the project architect or project~~
9 ~~engineer~~ need not approve the payment request or invoice which
10 is submitted by the contractor, payment is due 20 business
11 days after the date on which the payment request or invoice is
12 stamped as received as provided in s. 218.74(1).

13 (2) The local governmental entity may reject the
14 payment request or invoice within 20 business days after the
15 date on which the payment request or invoice is stamped as
16 received as provided in s. 218.74(1). The rejection must be
17 written and must specify the deficiency in the payment request
18 or invoice and the action necessary to make the payment
19 request or invoice proper.

20 (3) If a payment request or ~~an~~ invoice is rejected
21 under subsection (2) ~~or this subsection~~ and the contractor
22 submits a corrected payment request or invoice that corrects
23 the deficiency specified in writing by the local governmental
24 entity, the corrected payment request or invoice must be paid
25 or rejected on the later of:

26 (a) Ten business days after the date the corrected
27 payment request or invoice is stamped as received as provided
28 in s. 218.74(1); or

29 (b) If the governing body is required by ordinance,
30 charter, or other law to approve or reject the corrected
31 payment request or invoice, the first business day after the

1 next regularly scheduled meeting of the governing body held
2 after the corrected payment request or invoice is stamped as
3 received as provided in s. 218.74(1).

4 (4) If a dispute between the local governmental entity
5 and the contractor cannot be resolved by the procedure in
6 subsection (3), the dispute must be resolved in accordance
7 with the dispute resolution procedure prescribed in the
8 construction contract or in any applicable ordinance. In the
9 absence of a prescribed procedure, the dispute must be
10 resolved by the procedure specified in s. 218.76(2).

11 (5) If a local governmental entity disputes a portion
12 of a payment request or invoice, the undisputed portion must
13 be paid timely in accordance with subsection (1).~~The payment~~
14 ~~time periods provided in this section for construction~~
15 ~~services purchased by a local governmental entity shall not~~
16 ~~affect contractual provisions or contractual covenants of a~~
17 ~~local governmental entity in effect on September 30, 1995.~~

18 (6) When a contractor receives payment from a local
19 governmental entity for labor, services, and materials
20 furnished by subcontractors and suppliers hired by the
21 contractor, the contractor shall remit payment to those
22 subcontractors and suppliers within 10 days after the
23 contractor's receipt of payment.

24 (7)~~(6)~~ All payments due under this section ~~from a~~
25 ~~local governmental entity~~ and not made within the time periods
26 ~~period~~ specified by this section shall bear interest at the
27 rate of 1 percent per month or the rate specified by contract,
28 whichever is greater ~~as specified in s. 218.74(4).~~

29 Section 4. Section 218.74, Florida Statutes, is
30 amended to read:

31

1 218.74 Procedures for calculation of payment due
2 dates.--

3 (1) Each local governmental entity shall establish
4 procedures whereby each payment request or invoice received by
5 the local governmental entity is marked as received on the
6 date on which it is delivered to an agent or employee of the
7 local governmental entity or of a facility or office of the
8 local governmental entity.

9 (2) The payment due date for a local governmental
10 entity for the purchase of goods or services other than
11 construction services is 45 days after the date specified in
12 s. 218.73. The payment due date for the purchase of
13 construction services is specified in s. 218.735.

14 (3) If the terms under which a purchase is made allow
15 for partial deliveries and a payment request or proper invoice
16 is submitted for a partial delivery, the time for payment for
17 the partial delivery must be calculated from the time of the
18 partial delivery and the submission of the payment request or
19 invoice in the same manner as provided in s. 218.73 or s.
20 218.735.

21 (4) All payments, other than payments for construction
22 services, due from a local governmental entity and not made
23 within the time specified by this section bear interest from
24 30 days after the due date at the rate of 1 percent per month
25 on the unpaid balance. The vendor must invoice the local
26 governmental entity for any interest accrued in order to
27 receive the interest payment. Any overdue period of less than
28 1 month is considered as 1 month in computing interest.
29 Unpaid interest is compounded monthly. ~~With respect to each~~
30 ~~past due payment, interest ceases to accrue after interest on~~
31 ~~that payment has accrued for 12 months.~~For the purposes of

1 | this section, the term "1 month" means a period beginning on
2 | any day of one month and ending on the same day of the
3 | following month.

4 | Section 5. Section 218.75, Florida Statutes, is
5 | amended to read:

6 | 218.75 Mandatory interest.--No contract between a
7 | local governmental entity and a vendor or a provider of
8 | construction services shall prohibit the collection of ~~vendor~~
9 | ~~from invoicing the local governmental entity for~~ late payment
10 | interest charges allowable under this part.

11 | Section 6. Section 218.76, Florida Statutes, is
12 | amended to read:

13 | 218.76 Improper invoice; resolution of disputes.--

14 | (1) In any case in which an improper payment request
15 | or invoice is submitted by a vendor, the local governmental
16 | entity shall, within 10 days after the improper payment
17 | request or invoice is received by it, notify the vendor that
18 | the payment request or invoice is improper and indicate what
19 | corrective action on the part of the vendor is needed to make
20 | the payment request or invoice proper.

21 | (2) In the event a dispute occurs between a vendor and
22 | a local governmental entity concerning payment of a payment
23 | request or ~~an~~ invoice, such disagreement shall be finally
24 | determined by the local governmental entity as provided in
25 | this section. Each local governmental entity shall establish
26 | a dispute resolution procedure to be followed by the local
27 | governmental entity in cases of such disputes. Such procedure
28 | shall provide that proceedings to resolve the dispute shall be
29 | commenced not later than 45 days after the date on which the
30 | payment request or proper invoice was received by the local
31 | governmental entity and shall be concluded by final decision

1 of the local governmental entity not later than 60 days after
2 the date on which the payment request or proper invoice was
3 received by the local governmental entity. Such procedures
4 shall not be subject to chapter 120, and such procedures shall
5 not constitute an administrative proceeding which prohibits a
6 court from deciding de novo any action arising out of the
7 dispute. If the dispute is resolved in favor of the local
8 governmental entity, then interest charges shall begin to
9 accrue 10 ~~15~~ days after the local governmental entity's final
10 decision. If the dispute is resolved in favor of the vendor,
11 then interest shall begin to accrue as of the original date
12 the payment became due.

13 (3) In an action to recover amounts due under ss.
14 218.70-218.75, the prevailing party is entitled to recover
15 court costs and attorney's fees at trial and on appeal.

16 Section 7. Paragraph (a) of subsection (1) and
17 paragraph (a) of subsection (2) of section 255.05, Florida
18 Statutes, are amended to read:

19 255.05 Bond of contractor constructing public
20 buildings; form; action by materialmen.--

21 (1)(a) Any person entering into a formal contract with
22 the state or any county, city, or political subdivision
23 thereof, or other public authority, for the construction of a
24 public building, for the prosecution and completion of a
25 public work, or for repairs upon a public building or public
26 work shall be required, before commencing the work or before
27 recommencing the work after a default or abandonment, to
28 execute, deliver to the public owner, and record in the public
29 records of the county where the improvement is located, a
30 payment and performance bond with a surety insurer authorized
31 to do business in this state as surety. The bond must state on

1 | its front page: the name, principal business address, and
2 | phone number of the contractor, the surety, the owner of the
3 | property being improved, and, if different from the owner, the
4 | contracting public entity; the contract number assigned by the
5 | contracting public entity; and a description of the project
6 | sufficient to identify it, such as including, if applicable,a
7 | legal description or ~~and~~ the street address of the property
8 | being improved, ~~and~~ a general description of the improvement.
9 | Such bond shall be conditioned solely upon the contractor's
10 | performance of the construction work ~~that the contractor~~
11 | ~~perform the contract~~ in the time and manner prescribed in the
12 | contract and the contractor's prompt payment ~~promptly make~~
13 | ~~payments~~ to all persons defined in s. 713.01 who furnished
14 | labor, services, or materials for ~~whose claims derive directly~~
15 | ~~or indirectly~~ from the prosecution of the work provided for in
16 | the contract. Any claimant may apply to the governmental
17 | entity having charge of the work for copies of the contract
18 | and bond and shall thereupon be furnished with a certified
19 | copy of the contract and bond. The claimant shall have a right
20 | of action against the contractor and surety for the amount due
21 | him or her, including unpaid finance charges due under the
22 | claimant's contract. Such action shall not involve the public
23 | authority in any expense. When such work is done for the state
24 | and the contract is for \$100,000 or less, no payment and
25 | performance bond shall be required. At the discretion of the
26 | official or board awarding such contract when such work is
27 | done for any county, city, political subdivision, or public
28 | authority, any person entering into such a contract which is
29 | for \$200,000 or less may be exempted from executing the
30 | payment and performance bond. When such work is done for the
31 | state, the Secretary of the Department of Management Services

1 may delegate to state agencies the authority to exempt any
2 person entering into such a contract amounting to more than
3 \$100,000 but less than \$200,000 from executing the payment and
4 performance bond. In the event such exemption is granted, the
5 officer or officials shall not be personally liable to persons
6 suffering loss because of granting such exemption. The
7 Department of Management Services shall maintain information
8 on the number of requests by state agencies for delegation of
9 authority to waive the bond requirements by agency and project
10 number and whether any request for delegation was denied and
11 the justification for the denial.

12 (2)(a)1. If a claimant is no longer furnishing labor,
13 services, or materials on a project, a contractor or the
14 contractor's agent or attorney may elect to shorten the
15 prescribed time in this paragraph within which an action to
16 enforce any claim against a payment bond provided pursuant to
17 this section may be commenced by recording in the clerk's
18 office a notice in substantially the following form:

19
20 NOTICE OF CONTEST OF CLAIM
21 AGAINST PAYMENT BOND
22
23

24 To: ...(Name and address of claimant)...

25 You are notified that the undersigned contests your
26 notice of nonpayment, dated,, and served
27 on the undersigned on,, and that the
28 time within which you may file suit to enforce your claim is
29 limited to 60 days after the date of service of this notice.

30
31 DATED on,

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2
3 Signed:...(Contractor or Attorney)...

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6 The claim of any claimant upon whom such notice is served and
7 who fails to institute a suit to enforce his or her claim
8 against the payment bond within 60 days after service of such
9 notice shall be extinguished automatically. The clerk shall
10 mail a copy of the notice of contest to the claimant at the
11 address shown in the notice of nonpayment or most recent
12 amendment thereto and shall certify to such service on the
13 face of such notice and record the notice. Service is complete
14 upon mailing.

15 2. A claimant, except a laborer, who is not in privity
16 with the contractor shall, before commencing or not later than
17 45 days after commencing to furnish labor, materials, or
18 supplies for the prosecution of the work, furnish the
19 contractor with a notice that he or she intends to look to the
20 bond for protection. A claimant who is not in privity with the
21 contractor and who has not received payment for his or her
22 labor, materials, or supplies shall deliver to the contractor
23 and to the surety written notice of the performance of the
24 labor or delivery of the materials or supplies and of the
25 nonpayment. The notice of nonpayment may be served at any time
26 during the progress of the work or thereafter but ~~not before~~
27 ~~45 days after the first furnishing of labor, services, or~~
28 ~~materials, and not later than 90 days after the final~~
29 furnishing of the labor, services, or materials by the
30 claimant or, with respect to rental equipment, not later than
31 90 days after the date that the rental equipment was last on

1 | the job site available for use. No action for the labor,
2 | materials, or supplies may be instituted against the
3 | contractor or the surety unless both notices have been given.
4 | Notices required or permitted under this section may be served
5 | in accordance with s. 713.18. An action, except for an action
6 | exclusively for recovery of retainage, must be instituted
7 | against the contractor or the surety on the payment bond or
8 | the payment provisions of a combined payment and performance
9 | bond within 1 year after the performance of the labor or
10 | completion of delivery of the materials or supplies. An action
11 | exclusively for recovery of retainage must be instituted
12 | against the contractor or the surety within 1 year after the
13 | performance of the labor or completion of delivery of the
14 | materials or supplies, or within 90 days after ~~the~~
15 | ~~contractor's~~ receipt of final payment (or the payment estimate
16 | containing the owner's final reconciliation of quantities if
17 | no further payment is earned and due as a result of deductive
18 | adjustments) by the contractor or surety, whichever comes
19 | last. A claimant may not waive in advance his or her right to
20 | bring an action under the bond against the surety. In any
21 | action brought to enforce a claim against a payment bond under
22 | this section, the prevailing party is entitled to recover a
23 | reasonable fee for the services of his or her attorney for
24 | trial and appeal or for arbitration, in an amount to be
25 | determined by the court, which fee must be taxed as part of
26 | the prevailing party's costs, as allowed in equitable actions.
27 | The time periods for service of a notice of nonpayment or for
28 | bringing an action against a contractor or a surety shall be
29 | measured from the last day of furnishing labor, services, or
30 | materials by the claimant and shall not be measured by other
31 |

1 standards, such as the issuance of a certificate of occupancy
2 or the issuance of a certificate of substantial completion.

3 Section 8. Effective upon this act becoming a law, the
4 Office of Program Policy Analysis and Government
5 Accountability (OPPAGA), in consultation with the Legislative
6 Committee on Intergovernmental Relations, shall:

7 (1) Conduct a study of construction retainage methods
8 for public and private construction within this state. OPPAGA
9 shall examine all relevant information, including, but not
10 limited to, the following:

11 (a) Information from various state and local
12 governmental entities, public universities, and community
13 colleges within this state.

14 (b) Information from the Federal Government and from
15 other states that have addressed construction payment or
16 retainage issues, including states that are comparable in size
17 to this state or that have a comparable amount of public or
18 private construction activity as this state.

19 (c) Information from public and private owners,
20 general contractors, subcontractors, material suppliers,
21 construction managers, design-build professionals, architects,
22 and engineers.

23 (d) Information from lenders and surety companies that
24 are involved in public and private construction.

25 (2) Draw conclusions and make recommendations, as
26 appropriate, with regard to the following issues:

27 (a) Whether the state should adopt new laws or modify
28 existing laws to address the specific issues set forth below,
29 and whether any existing statutes will require modification or
30 repeal.

31

1 (b) The positive and negative effects of the current
2 systems of retainage being used throughout the state, as
3 applied to public-sector and private-sector construction
4 contracts, and as between owners and contractors, between
5 contractors and subcontractors, and between subcontractors and
6 sub-subcontractors.

7 (c) Whether the traditional 10-percent-retainage
8 practice in construction is equitable and whether there are
9 viable alternatives to this practice.

10 (d) What would be an appropriate percentage of
11 retainage to be held on all construction projects.

12 (e) What the purposes of retainage are for
13 construction projects.

14 (f) Whether it is appropriate to hold all retainage
15 until the end of a construction project or whether periodic
16 release of retainage or release of retainage for specific
17 divisions of work on a construction project is appropriate and
18 reasonably manageable.

19 (g) What protections are currently in place for owners
20 to ensure that construction projects are progressing
21 satisfactorily, including, but not limited to, project
22 management techniques, periodic inspections, services of
23 project architects and engineers, and whether those
24 protections are being adequately and properly used.

25 (h) What protections are currently in place or could
26 be adopted for owners, contractors, and subcontractors through
27 the use of construction payment and performance bonds.

28 (i) Whether the documentation required for
29 construction projects contributes to delays in progress
30 payments, final payments, and release of retainage; whether
31 such requirements could be simplified or standardized to

1 streamline the process; and whether it is appropriate for the
2 Legislature to address this issue.

3 (j) Whether the Legislature should limit the
4 percentage of retainage that may be held on public or private
5 construction projects.

6 (k) Whether the Legislature should provide for
7 periodic release of retainage on public or private
8 construction projects.

9 (l) Whether the Legislature should establish
10 requirements and time limits for owners and contractors to
11 release final payment and retainage on all construction
12 projects.

13 (3) Present a report of its findings and
14 recommendations to the President of the Senate, the Speaker of
15 the House of Representatives, the minority leaders of the
16 Senate and the House of Representatives, the chair of the
17 House Business Regulation and Consumer Affairs Committee, and
18 the chair of the Senate Regulated Industries Committee by
19 January 1, 2001.

20 Section 9. Except as otherwise specifically provided
21 in this act, this act shall take effect July 1, 2000, and
22 shall apply to construction contracts entered into on or after
23 the effective date.
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STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
COMMITTEE SUBSTITUTE FOR
Senate Bill 1464

The Committee Substitute for Senate Bill 1464:

- Deletes provisions on retainage.
- 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.
- Revises the definition of "payment request."
- Provides that when a contractor receives a payment from a local governmental entity, the contractor must pay the relevant subcontractors and suppliers within 10 days after receipt of payment.