

Amendment No. 1 (for drafter's use only)

	<u>Senate</u>	CHAMBER ACTION	<u>House</u>
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ORIGINAL STAMP BELOW

The Committee on Community Affairs offered the following:

Amendment (with title amendment)

Remove from the bill: Everything after the enacting clause
and insert in lieu thereof:

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

218.72 Definitions.--As used in this part:

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

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

(7) "Construction services" means all labor, services,

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1 and materials provided ~~performed~~ in connection with the
2 construction, alteration, repair, demolition, reconstruction,
3 or any other improvements to real property that require a
4 license under parts I and II of chapter 489.

5 (8) "Payment request" means a contractor's written
6 request for payment for construction services provided through
7 a date certain.

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

11 Section 2. Section 218.73, Florida Statutes, is
12 amended to read:

13 218.73 Timely payment for nonconstruction
14 services.--The time at which payment is due for a purchase
15 other than construction services by a local governmental
16 entity, ~~except for the purchase of construction services, is~~
17 due must be calculated from:

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

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

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

25 (b) On which services are completed;

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

27 (d) On which the local governmental entity and vendor
28 agree in a contract that provides dates relative to payment
29 periods;

30

31 whichever date is latest.

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1 Section 3. Section 218.735, Florida Statutes, is
2 amended to read:

3 218.735 Timely payment for purchases of construction
4 services.--

5 (1) The due date for payment for the purchase of
6 construction services by a local governmental entity is
7 determined as follows:

8 (a) If an agent ~~the project architect or project~~
9 ~~engineer~~ must approve the payment request or invoice prior to
10 the payment request or invoice being submitted to the local
11 governmental entity, payment is due ~~2520~~ business days after
12 the date on which the payment request or ~~architect or engineer~~
13 ~~approves the invoice and the~~ invoice is stamped as received as
14 provided in s. 218.74(1).

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

20 (2) The local governmental entity may reject the
21 payment request or invoice within 20 business days after the
22 date on which the payment request or invoice is stamped as
23 received as provided in s. 218.74(1). The rejection must be
24 written and must specify the deficiency in the payment request
25 or invoice and the action necessary to make the payment
26 request or invoice proper.

27 (3) If a payment request or an invoice is rejected
28 under subsection (2) ~~or this subsection~~ and the contractor
29 submits a corrected payment request or invoice which corrects
30 the deficiency specified in writing by the local governmental
31 entity, the corrected payment request or invoice must be paid

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1 or rejected on the later of:

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

5 (b) If the governing body is required by ordinance,
6 charter, or other law to approve or reject the corrected
7 payment request or invoice, the first business day after the
8 next regularly scheduled meeting of the governing body held
9 after the corrected payment request or invoice is stamped as
10 received as provided in s. 218.74(1).

11 (4) If a dispute between the local governmental entity
12 and the contractor cannot be resolved by the procedure in
13 subsection (3), the dispute must be resolved in accordance
14 with the dispute resolution procedure prescribed in the
15 construction contract or in any applicable ordinance. In the
16 absence of a prescribed procedure, the dispute must be
17 resolved by the procedure specified in s. 218.76(2).

18 (5) If a local governmental entity disputes a portion
19 of a payment request or an invoice, the undisputed portion
20 shall be paid timely, in accordance with subsection (1).~~The~~
21 ~~payment time periods provided in this section for construction~~
22 ~~services purchased by a local governmental entity shall not~~
23 ~~affect contractual provisions or contractual covenants of a~~
24 ~~local governmental entity in effect on September 30, 1995.~~

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

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

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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

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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 payment request or invoice; resolution
14 of disputes.--

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

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

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

14 (3) In an action to recover amounts due under ss.
15 218.70-218.80, the prevailing party shall be entitled to
16 recover court costs and attorney's fees at trial and on
17 appeal.

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

21 255.05 Bond of contractor constructing public
22 buildings; form; action by materialmen.--

23 (1)(a) Any person entering into a formal contract with
24 the state or any county, city, or political subdivision
25 thereof, or other public authority, for the construction of a
26 public building, for the prosecution and completion of a
27 public work, or for repairs upon a public building or public
28 work shall be required, before commencing the work or before
29 recommencing the work after a default or abandonment, to
30 execute, deliver to the public owner, and record in the public
31 records of the county where the improvement is located, a

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

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

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

21
22 NOTICE OF CONTEST OF CLAIM
23 AGAINST PAYMENT BOND
24

25
26 To: ...(Name and address of claimant)...

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

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DATED on,

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

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

2. A claimant, except a laborer, who is not in privity with the contractor shall, before commencing or not later than 45 days after commencing to furnish labor, materials, or supplies for the prosecution of the work, furnish the contractor with a notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for his or her labor, materials, or supplies shall deliver to the contractor and to the surety written notice of the performance of the labor or delivery of the materials or supplies and of the nonpayment. The notice of nonpayment may be served at any time during the progress of the work or thereafter but ~~not before 45 days after the first furnishing of labor, services, or materials,~~ and not later than 90 days after the final furnishing of the labor, services, or materials by the

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

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1 materials by the claimant and shall not be measured by other
2 standards, such as the issuance of a certificate of occupancy
3 or the issuance of a certificate of substantial completion.

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

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

12 (a) Information from various state and local
13 governmental entities, public universities and community
14 colleges within the state of Florida.

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

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

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

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

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

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1 (b) The positive and negative impacts of the current
2 systems of retainage being utilized throughout the state of
3 Florida as applied to public sector and private sector
4 construction contracts, and as between owners and contractors,
5 between contractors and subcontractors, and between
6 subcontractors and 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 may be an appropriate percentage of retainage
11 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 insure that construction projects are progressing in a
21 satisfactory manner, 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 utilized.

25 (h) What protections are currently in place or could
26 be adopted for owners, contractors, and subcontractors through
27 the utilization 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 and/or standardized to

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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 can be held on public and/or
5 private construction projects.

6 (k) Whether the Legislature should provide for
7 periodic release of retainage on public and/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) OPPAGA shall present a report of its findings and
14 recommendations to the President of the Senate, the Speaker of
15 the House of Representatives, minority leaders of the Senate
16 and House of Representatives, and chairs of the House Business
17 Regulation & Consumer Affairs Committee and the Senate
18 Regulated Industries Committee by January 1, 2001.

19 Section 9. Except as otherwise specifically provided
20 in this act, this act shall take effect July 1, 2000, and
21 shall apply to construction contracts entered into on or after
22 the effective date.

23
24
25 ===== T I T L E A M E N D M E N T =====

26 And the title is amended as follows:
27 remove from the title of the bill: Everything before the
28 enacting clause

29
30 and insert in lieu thereof:

31 A bill to be entitled

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