

Amendment No. (for drafter's use only)

CHAMBER ACTION

Senate

House

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Representative Reagan offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause, and insert:

Section 1. Section 218.70, Florida Statutes, is amended to read:

218.70 Popular name ~~Short title~~.--This part may be cited as the "Local Government Florida Prompt Payment Act."

Section 2. Subsections (2), (6), and (7) of section 218.72, Florida Statutes, are amended 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.

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28 (6) "Vendor" means any person who sells goods or services,
29 sells or leases personal property, or leases real property
30 directly to a local government entity.

31 (7) "Construction services" means all labor, services, and
32 materials provided in connection with the construction,
33 alteration, repair, demolition, reconstruction, or any other
34 improvements to real property ~~that require a license under parts~~
35 ~~I and II of chapter 489.~~

36 Section 3. Subsection (6) of section 218.735, Florida
37 Statutes, is amended, present subsection (7) of that section is
38 redesignated as subsection (9), and new subsections (7) and (8)
39 are added to that section, to read:

40 218.735 Timely payment for purchases of construction
41 services.--

42 (6) When a contractor receives payment from a local
43 governmental entity for labor, services, or materials furnished
44 by subcontractors and suppliers hired by the contractor, the
45 contractor shall remit payment due to those subcontractors and
46 suppliers within 10 ~~15~~ days after the contractor's receipt of
47 payment. When a subcontractor receives payment from a contractor
48 for labor, services, or materials furnished by subcontractors
49 and suppliers hired by the subcontractor, the subcontractor
50 shall remit payment due to those subcontractors and suppliers
51 within 10 ~~15~~ days after the subcontractor's receipt of payment.
52 Nothing herein shall prohibit a contractor or subcontractor from
53 disputing, pursuant to the terms of the relevant contract, all
54 or any portion of a payment alleged to be due to another party.
55 In the event of such a dispute, the contractor or subcontractor
56 may withhold the disputed portion of any such payment if the

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57 contractor or subcontractor notifies the party whose payment is
58 disputed, in writing, of the amount in dispute and the actions
59 required to cure the dispute. The contractor or subcontractor
60 must pay all undisputed amounts due within the time limits
61 imposed by this section.

62 (7)(a) Each contract for construction services between a
63 local government entity and vendor must provide for the
64 development of a list of items required to render complete,
65 satisfactory, and acceptable the construction services purchased
66 by the local government. The contract must specify the process
67 for the development of the list, including responsibilities of
68 the local government and vendor in developing and reviewing the
69 list and a reasonable time for developing such list as follows:

70 1. For construction projects with an estimated cost less
71 than \$10 million, within 30 days after reaching substantial
72 completion of the construction services purchased as defined in
73 the contract, or, if not defined in the contract, upon reaching
74 beneficial occupancy or use; or

75 2. For construction projects with an estimated cost of \$10
76 million or more, within 30 days, unless otherwise extended by
77 contract not to exceed 90 days, after reaching substantial
78 completion of the construction services purchased as defined in
79 the contract, or, if not defined in the contract, upon reaching
80 beneficial occupancy or use.

81 (b) If the contract between the local government entity
82 and vendor relates to the purchase of construction services on
83 more than one building or structure, or involves a multiphased
84 project, the contract shall provide for the development of a
85 list of items required to render complete, satisfactory, and

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86 acceptable the construction services purchased for each
87 building, structure, or phase of the project in accordance with
88 the timeframes specified in subparagraph (a)1. or subparagraph
89 (a)2.

90 (c) The failure to include any corrective work or pending
91 items not yet completed on the list developed pursuant to this
92 subsection shall not alter the responsibility of the vendor to
93 complete all the purchased construction services as defined in
94 the contract.

95 (d) Upon completion of all items on the list, or such
96 other time defined in the contract, the vendor may submit a
97 payment request for the appropriate amount of retainage. The
98 local government may withhold an amount not to exceed 150
99 percent of the total costs to complete any incomplete items on
100 the list.

101 (e) All items that require correction under the contract
102 and that are identified after the preparation and delivery of
103 the list shall remain the obligation of the vendor as defined by
104 the contract.

105 (f) Warranty items may not affect the final payment of
106 retainage as provided in this section or as may be provided in
107 the contract between the vendor and its subcontractors and
108 suppliers.

109 (g) If a local government entity fails to comply with its
110 responsibilities to develop the list required under paragraph
111 (a) or paragraph(b), as defined in the contract, and the
112 timeframes provided in subparagraph(a)1. or subparagraph (a)2.,
113 the vendor may submit a payment request for the appropriate
114 amount of retainage. The local government entity shall not be

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115 required to pay or process any request for payment of retainage
116 if the vendor has, in whole or in part, failed to cooperate with
117 the local government in the development of the list; failed to
118 perform its contractual responsibilities, if any, with regard to
119 the development of the list; or if paragraph (8)(d) applies.

120 (8)(a) In any public construction project, a local
121 government entity may withhold an amount not exceeding 10
122 percent of each progress payment made to the vendor until the
123 local government project has reached 50-percent completion.
124 After reaching 50-percent completion, the local government must
125 reduce to 5 percent the amount of retainage withheld from each
126 subsequent progress payment made to the vendor. However,
127 notwithstanding the provisions of this subsection, a
128 municipality with a population of 25,000 or fewer, or a county
129 with a population of 100,000 or fewer, may withhold retainage in
130 an amount not exceeding 10 percent of each progress payment made
131 to the vendor until final completion and acceptance of the
132 project by the local government. For purposes of this
133 subsection, the term "50-percent completion" means as defined in
134 the contract between the local government entity and the vendor,
135 or, if not defined in the contract, the point at which the local
136 government has expended 50 percent of the total project costs
137 identified in the contract, plus all change orders and other
138 additions issued subsequent to the approval of the contract by
139 the governing body of the local government, and the level of
140 actual project construction is equivalent to such expenditure of
141 funds.

142 (b) After 50-percent completion, the vendor may present to
143 the local government entity a payment request for up to one-half

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144 of the retainage amount held by the local government. The local
145 government entity shall promptly make payment to the vendor,
146 unless the local government has grounds, pursuant to the
147 contract or as provided in paragraph (d), for withholding the
148 payment of retainage. If the local government makes payment of
149 retainage to the vendor under this paragraph, the vendor shall
150 timely remit payment of such retainage to the appropriate
151 subcontractors and suppliers.

152 (c) After 50-percent completion, the vendor may elect to
153 withhold retainage from payments to its subcontractors at a rate
154 higher than 5 percent. The specific amount to be withheld must
155 be determined on a case-by-case basis and must be based on the
156 vendor's assessment of the subcontractor's past performance, the
157 likelihood that such performance will continue, and the vendor's
158 ability to rely on other safeguards. The vendor shall notify the
159 subcontractor, in writing, of its determination to withhold more
160 than 5 percent of the progress payment and the reasons for
161 making that determination, and the vendor may not request the
162 release of such retained funds from the local government.

163 (d) Nothing in this section requires the local government
164 to pay or release any amounts that are the subject of a good-
165 faith dispute, the subject of an action brought pursuant to s.
166 255.05, or otherwise the subject of a claim or demand by the
167 local government or vendor.

168 (e) The timeframes set forth in this section for payment
169 of payment requests apply to any payment request for retainage
170 made pursuant to this subsection.

171 Section 4. Section 255.0705, Florida Statutes, is created
172 to read:

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173 255.0705 Short title.--Sections 255.0705-255.078 may be
174 cited as the "Florida Prompt Payment Act."

175 Section 5. Subsections (2) and (3) of section 255.071,
176 Florida Statutes, are amended to read:

177 255.071 Payment of subcontractors, sub-subcontractors,
178 materialmen, and suppliers on construction contracts for public
179 projects.--

180 (2) The failure to pay any undisputed obligations for such
181 labor, services, or materials within 30 days after the date the
182 labor, services, or materials were furnished and payment for
183 such labor, services, or materials became due, or within 10 ~~30~~
184 days after the date payment for such labor, services, or
185 materials is received, whichever last occurs, shall entitle any
186 person providing such labor, services, or materials to the
187 procedures specified in subsection (3) and the remedies provided
188 in subsection(4).

189 (3) Any person providing labor, services, or materials for
190 the construction of a public building, for the prosecution and
191 completion of a public work, or for repairs upon a public
192 building or public work improvements to real property may file a
193 verified complaint alleging:

194 (a) The existence of a contract for providing such labor,
195 services, or materials to improve real property.

196 (b) A description of the labor, services, or materials
197 provided and alleging that the labor, services, or materials
198 were provided in accordance with the contract.

199 (c) The amount of the contract price.

200 (d) The amount, if any, paid pursuant to the contract.

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201 (e) The amount that remains unpaid pursuant to the
202 contract and the amount thereof that is undisputed.

203 (f) That the undisputed amount has remained due and
204 payable pursuant to the contract for more than 30 days after the
205 date the labor or services were accepted or the materials were
206 received.

207 (g) That the person against whom the complaint was filed
208 has received payment on account of the labor, services, or
209 materials described in the complaint more than 10 ~~30~~ days prior
210 to the date the complaint was filed.

211 Section 6. Section 255.072, Florida Statutes, is created
212 to read:

213 255.072 Definitions.--As used in ss. 255.073-255.078, the
214 term:

215 (1) "Agent" means project architect, project engineer, or
216 any other agency or person acting on behalf of a public entity.

217 (2) "Construction services" means all labor, services, and
218 materials provided in connection with the construction,
219 alteration, repair, demolition, reconstruction, or any other
220 improvements to real property. The term "construction services"
221 does not include contracts or work performed for the Department
222 of Transportation.

223 (3) "Payment request" means an invoice or request for
224 payment for construction services which conforms with all
225 statutory requirements and with all requirements specified by
226 the public entity to which the payment request is submitted.

227 (4) "Public entity" means the state, a state university,
228 or any office, board, bureau, commission, department, branch,
229 division, or institution thereof, or any project supported by

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230 state funds, but does not include a local government entity as
231 defined in s. 218.72.

232 (5) "Purchase" means the purchase of construction
233 services.

234 (6) "Vendor" means any person providing construction
235 services directly to a public entity.

236 Section 7. Section 255.073, Florida Statutes, is created
237 to read:

238 255.073 Timely payment for purchases of construction
239 services.--

240 (1) Except as otherwise provided in ss. 255.072-255.078,
241 s. 215.422 governs the timely payment for construction services
242 by a public entity under this act.

243 (2) If a public entity disputes a portion of a payment
244 request, the undisputed portion must be timely paid, in
245 accordance with subsection(1).

246 (3) When a vendor receives payment from a public entity
247 for labor, services, or materials furnished by subcontractors
248 and suppliers hired by the vendor, the vendor shall remit
249 payment due to those subcontractors and suppliers within 10 days
250 after the vendor's receipt of payment. When a subcontractor
251 receives payment from a vendor for labor, services, or materials
252 furnished by subcontractors and suppliers hired by the
253 subcontractor, the subcontractor shall remit payment due to
254 those subcontractors and suppliers within 10 days after the
255 subcontractor's receipt of payment. This subsection does not
256 prohibit a vendor or subcontractor from disputing, pursuant to
257 the terms of the relevant contract, all or any portion of a
258 payment alleged to be due to another party. If such a dispute

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259 occurs, the vendor or subcontractor may withhold the disputed
260 portion of any such payment if the vendor or subcontractor
261 notifies the party whose payment is disputed, in writing, of the
262 amount in dispute and the actions required to cure the dispute.
263 The vendor or subcontractor must pay all undisputed amounts due
264 within the time limits imposed by this section.

265 (4) All payments due under this section and not made
266 within the time periods specified by this section shall bear
267 interest at the rate of 1 percent per month, or the rate
268 specified by contract, whichever is greater.

269 Section 8. Section 255.074, Florida Statutes, is created
270 to read:

271 255.074 Procedures for calculation of payment due dates.--

272 (1) Each public entity shall establish procedures whereby
273 each payment request received by the public entity is marked as
274 received on the date on which it is delivered to an agent or
275 employee of the public entity or of a facility or office of the
276 public entity.

277 (2) If the terms under which a purchase is made allow for
278 partial deliveries and a payment request is submitted for a
279 partial delivery, the time for payment for the partial delivery
280 must be calculated from the time of the partial delivery and the
281 submission of the payment request in the same manner as provided
282 in s. 255.073.

283 (3) The public entity must submit a payment request to the
284 Chief Financial Officer for payment no more than 25 days after
285 receipt of the payment request.

286 Section 9. Section 255.075, Florida Statutes, is created
287 to read:

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288 255.075 Mandatory interest.--A contract between a public
289 entity and a vendor or a provider of construction services may
290 not prohibit the collection of late payment interest charges
291 allowable under ss. 255.072-255.078.

292 Section 10. Section 255.076, Florida Statutes, is created
293 to read:

294 255.076 Improper payment request; resolution of
295 disputes.--

296 (1) If a vendor submits an improper payment request, the
297 public entity shall, within 10 days after receiving the improper
298 payment request, notify the vendor that the payment request is
299 improper and indicate what corrective action on the part of the
300 vendor is needed to make the payment request proper.

301 (2) If a dispute occurs between a vendor and a public
302 entity concerning payment of a payment request, the dispute must
303 be resolved as provided in this section. Each public entity
304 shall establish a dispute resolution procedure to be followed by
305 the public entity if such a dispute occurs. The procedure must
306 provide that proceedings to resolve the dispute must commence
307 not later than 45 days after the date on which the public entity
308 received the payment request and must conclude by final decision
309 of the public entity not later than 60 days after the date on
310 which the public entity received the payment request. Such
311 procedures are not subject to chapter 120 and do not constitute
312 an administrative proceeding that prohibits a court from
313 deciding de novo any action arising out of the dispute. If the
314 dispute is resolved in favor of the public entity, interest
315 charges begin to accrue 15 days after the public entity's final
316 decision. If the dispute is resolved in favor of the vendor,

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317 interest begins to accrue as of the original date the payment
318 became due.

319 (3) In an action to recover amounts due under ss. 255.072-
320 255.078, the court shall award court costs and reasonable
321 attorney's fees, including fees incurred through any appeal, to
322 the prevailing party, if the court finds that the nonprevailing
323 party withheld any portion of the payment that is the subject of
324 the action without any reasonable basis in law or fact to
325 dispute the prevailing party's claim to those amounts.

326 Section 11. Section 255.077, Florida Statutes, is created
327 to read:

328 255.077 Project closeout and payment of retainage.--

329 (1) A public entity must present to the vendor a final
330 punch list of all items required to render complete,
331 satisfactory, and acceptable the construction services
332 purchased, within 30 days after the earliest of the following:

333 (a) Issuance of a temporary or final certificate of
334 occupancy, if applicable;

335 (b) Substantial completion of the construction services
336 purchased, as defined in the contract; or

337 (c) Beneficial occupancy or use of the structure,
338 building, facility, or improvement that is the subject of the
339 construction services purchased, as defined in the contract.

340 (2) If the purchase relates to construction services on
341 more than one building or structure, the public entity shall
342 prepare a final punch list for each building or structure. The
343 public entity must present to the vendor a final punch list with
344 regard to each building or structure within 30 days after the
345 earliest of the following:

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346 (a) Issuance of a temporary or final certificate of
347 occupancy on the particular building or structure, if
348 applicable;

349 (b) Substantial completion of the particular building or
350 structure, as defined in the contract; or

351 (c) Beneficial occupancy or use of the particular
352 structure, building, facility, or improvement, as defined in the
353 contract.

354
355 Unless the contract provides otherwise, the public entity shall
356 pay out retainage to the vendor based upon the value of the
357 construction services rendered with regard to that structure,
358 building, facility, or improvement as compared to the total
359 value of the purchase.

360 (3) Upon completion of all items on the final punch list
361 or within 30 days after issuance of the punch list, whichever
362 occurs sooner, the vendor shall submit a payment request for the
363 appropriate amount of retainage. The owner may withhold up to
364 150 percent of the cost to complete any incomplete final
365 punchlist items. Thereafter, ss. 255.072-255.076 apply to the
366 payment of any payment request for retainage.

367 (4) If the public entity fails to present to the vendor a
368 final punch list within the time periods provided in subsection
369 (1) or subsection (2), the project is considered to be complete
370 and the vendor shall submit a payment request for the
371 appropriate amount of retainage. Thereafter, ss. 255.072-255.076
372 apply to the payment of any payment request for retainage.

373 (5) All items that require correction under the contract
374 which are identified subsequent to preparation and delivery of

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375 the final punch list must be considered warranty items or make-
376 good items, and such items have no effect on the final payment
377 of retainage provided in this section.

378 Section 12. Section 255.078, Florida Statutes, is created
379 to read:

380 255.078 Public construction retainage.--

381 (1) From the commencement of a public construction project
382 that is subject to ss. 255.072-255.078 until 50-percent of the
383 contract value has been earned, a public entity may not withhold
384 as retainage more than 10 percent of each progress payment to
385 the vendor. When 50-percent of the contract value has been
386 earned, the vendor may submit a payment request to the public
387 entity for up to one-half of the retainage withheld up to that
388 time.

389 (2) After 50-percent of the contract value has been
390 earned, the public entity may not withhold as retainage more
391 than 5 percent of each progress payment to the vendor. However,
392 the vendor may withhold retainage from payments to its
393 subcontractors at a rate higher than 5 percent. The specific
394 amount to be withheld must be determined on a case-by-case basis
395 and must be based on the vendor's assessment of the
396 subcontractor's past performance, the likelihood that such
397 performance will continue, and the vendor's ability to rely on
398 other safeguards. The vendor shall notify the subcontractor, in
399 writing, of its determination to withhold more than 5 percent of
400 the progress payment and the reasons for making that
401 determination.

402 (3) This section does not require the payment or release
403 of amounts that are the subject of a good-faith dispute.

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404 (4) Sections 255.072-255.076 apply to the payment of any
405 payment request for retainage.

406 Section 13. Paragraph (a) of subsection (2) is amended and
407 subsections (10) and (11) are added to section 255.05, Florida
408 Statutes, to read:

409 255.05 Bond of contractor constructing public buildings;
410 form; action by materialmen.--

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

418
419 NOTICE OF CONTEST OF CLAIM AGAINST PAYMENT BOND

420
421 To: . . . (Name and address of claimant) . . .

422
423 You are notified that the undersigned contests your notice
424 of nonpayment, dated _____, _____, and served on the
425 undersigned on _____, _____, and that the time within
426 which you may file suit to enforce your claim is limited to 60
427 days after the date of service of this notice.

428
429 DATED on _____, _____.

430
431 Signed: . . . (Contractor or Attorney) . . .
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433 The claim of any claimant upon whom such notice is served and
434 who fails to institute a suit to enforce his or her claim
435 against the payment bond within 60 days after service of such
436 notice shall be extinguished automatically. The clerk shall mail
437 a copy of the notice of contest to the claimant at the address
438 shown in the notice of nonpayment or most recent amendment
439 thereto and shall certify to such service on the face of such
440 notice and record the notice. Service is complete upon mailing.

441 2. A claimant, except a laborer, who is not in privity
442 with the contractor shall, before commencing or not later than
443 45 days after commencing to furnish labor, materials, or
444 supplies for the prosecution of the work, furnish the contractor
445 with a notice that he or she intends to look to the bond for
446 protection. A claimant who is not in privity with the contractor
447 and who has not received payment for his or her labor,
448 materials, or supplies shall deliver to the contractor and to
449 the surety written notice of the performance of the labor or
450 delivery of the materials or supplies and of the nonpayment. The
451 notice of nonpayment may be served at any time during the
452 progress of the work or thereafter but not before 45 days after
453 the first furnishing of labor, services, or materials, and not
454 later than 90 days after the final furnishing of the labor,
455 services, or materials by the claimant or, with respect to
456 rental equipment, not later than 90 days after the date that the
457 rental equipment was last on the job site available for use. Any
458 notice of nonpayment served by a claimant who is not in privity
459 with the contractor which includes sums for retainage must
460 specify the portion of the amount claimed for retainage. No
461 action for the labor, materials, or supplies may be instituted

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462 against the contractor or the surety unless both notices have
463 been given. Notices required or permitted under this section may
464 be served in accordance with s. 713.18. An action, except for an
465 action exclusively for recovery of retainage, must be instituted
466 against the contractor or the surety on the payment bond or the
467 payment provisions of a combined payment and performance bond
468 within 1 year after the performance of the labor or completion
469 of delivery of the materials or supplies. An action exclusively
470 for recovery of retainage must be instituted against the
471 contractor or the surety within 1 year after the performance of
472 the labor or completion of delivery of the materials or
473 supplies, or within 90 days after receipt of final payment (or
474 the payment estimate containing the owner's final reconciliation
475 of quantities if no further payment is earned and due as a
476 result of deductive adjustments) by the contractor or surety,
477 whichever comes last. A claimant may not waive in advance his or
478 her right to bring an action under the bond against the surety.
479 In any action brought to enforce a claim against a payment bond
480 under this section, the prevailing party is entitled to recover
481 a reasonable fee for the services of his or her attorney for
482 trial and appeal or for arbitration, in an amount to be
483 determined by the court, which fee must be taxed as part of the
484 prevailing party's costs, as allowed in equitable actions. The
485 time periods for service of a notice of nonpayment or for
486 bringing an action against a contractor or a surety shall be
487 measured from the last day of furnishing labor, services, or
488 materials by the claimant and shall not be measured by other
489 standards, such as the issuance of a certificate of occupancy or
490 the issuance of a certificate of substantial completion.

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491 (10) Notwithstanding any other provision of law to the
492 contrary, a claimant may not institute an action for the sole
493 purpose of recovery of retainage against the contractor or
494 against the surety issuing a payment or performance bond
495 pursuant to this section until:

496 (a) The public entity has paid out that retainage to the
497 contractor and the time provided under ss. 218.70-218.76 or ss.
498 255.072-255.078 for payment of that retainage to the claimant
499 has expired;

500 (b) The claimant has completed all work required under its
501 contract and 90 days have passed since the owner's receipt of
502 the contractor's last payment request; or

503 (c) The claimant has made the written request to the owner
504 provided in subsection (11) and has not timely received the
505 requested information from the owner.

506 (11) An owner shall furnish in writing to a claimant who
507 has provided labor, services, or materials to a project, within
508 5 business days after receipt of a written request from that
509 claimant, the following information:

510 (a) The dates of all payment requests received by the
511 owner from the contractor.

512 (b) The dates of all payments made by the owner to the
513 contractor.

514 (c) Whether the owner has received the contractor's final
515 payment request and, if so, the date the final payment request
516 was submitted by the contractor to the owner.

517 Section 14. This act shall take effect July 1, 2003.

518
519 ===== T I T L E A M E N D M E N T =====

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520 Remove the entire title, and insert:
521 A bill to be entitled
522 An act relating to prompt payment for construction
523 services; amending s. 218.70, F.S.; providing a short
524 title; amending s. 218.72, F.S.; redefining terms used in
525 part VII of ch. 218, F.S.; amending s. 218.735, F.S.;
526 revising provisions relating to timely payment for
527 purchases of construction services; revising deadlines for
528 payment; providing procedures for project closeout and
529 payment of retainage; providing requirements for local
530 government construction retainage; providing that ss.
531 218.72-218.76, F.S., apply to the payment of any payment
532 request for retainage; creating s. 255.0705, F.S.;
533 providing a short title; amending s. 255.071, F.S.;
534 revising deadlines for the payment of subcontractors, sub-
535 subcontractors, materialmen, and suppliers on construction
536 contracts for public projects; creating ss. 255.072,
537 255.073, 255.074, 255.075, 255.076, 255.077, 255.078,
538 F.S.; providing definitions; providing for timely payment
539 for purchases of construction services by a public entity;
540 providing procedures for calculating payment due dates;
541 providing procedures for handling improper payment
542 requests; providing for the resolution of disputes;
543 providing for project closeout and payment of retainage;
544 providing for public-construction retainage; providing
545 that ss. 255.072-255.076, F.S., apply to the payment of
546 any payment request for retainage; amending s. 255.05,
547 F.S.; providing requirements for certain notices of
548 nonpayment served by a claimant who is not in privity with

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549 the contractor; providing limitations on a claimant's
550 institution of certain actions against a contractor or
551 surety; providing for certain notices to the claimant;
552 providing an effective date.