



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

#### B. EFFECT OF PROPOSED CHANGES:

This bill extends existing local government prompt payment provisions for construction services provided in ch. 218, F.S., to community colleges and creates identical prompt pay provisions for state projects in ch. 255, F.S.. The bill revises provisions relating to timely payment for purchases of construction services, and deadlines for payment of subcontractors, sub-subcontractors, materialmen and suppliers on construction contracts for public projects.

#### Current Law

##### **Florida Prompt Payment Act**

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. The act applies to all counties and municipalities and any office, board, bureau, commission, department, branch, division or institution thereof and any project supported by county or municipal funds. In 2001, the act was amended to also specifically apply to school boards, school districts, authorities, special taxing districts or other political subdivisions. The act was substantially modified in 1995, and provisions specifically relating to construction services were placed in s. 218.735, F.S.

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.

Section 218.735, F.S. establishes timely payment standards for construction services. The due date for payment is determined as follows:

- If an agent must approve the payment request or invoice prior to submission to the local government, payment is due 25 business days after the payment or request has been stamped as received.
- If an agent does not need to approve the payment request or invoice prior to submission to the local government, payment is due 20 business days after the payment request or invoice is stamped as received.

The local government may reject the payment request or invoice within 20 days after the date it is stamped as received, but the rejection must be written and must specify the deficiency. When the contractor submits a corrected payment request or invoice, it must be paid or rejected no later than:

- Ten business days after the date it is stamped as received; or
- The first business day after the next meeting of the governing body, if the governing body must approve the payment request or invoice.

If a dispute between a local governmental entity and a contractor cannot be resolved pursuant to the procedure in this section, the dispute must be resolved in accordance with the procedure prescribed in the construction contract or in any applicable ordinance. In the absence of a prescribed procedure, the dispute must be resolved by the procedure specified in s. 218.76(2), F.S. All payments due from a local governmental entity not made within the time period specified by this section are to bear interest as specified in s. 218.74(4), F.S.

Section 218.74, F.S., requires each local governmental entity to establish procedures whereby each payment request or invoice received 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 marked shall be the date on which the invoice is received. For other than construction services, the payment due date is 45 days from the date on which the payment request or proper invoice is received or when one of the criteria specified in s. 218.73, F.S., are met. For construction services, the payment due date is as specified in s. 218.735, F.S.

Pursuant to s. 218.74, F.S., all payments, other than payments for construction services, due from a local governmental entity and not made within the time period specified are to 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 is to be considered as one month in computing interest. Unpaid interest compounds monthly. Section 218.75, F.S., provides that no contract between a local governmental entity and a vendor or a provider of construction services may prohibit the collection of late payment interest charges allowable under part VII of chapter 218, F.S.

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 payment request or invoice is submitted by a vendor, the local governmental entity has 10 days after the improper payment request or invoice is received to notify the vendor that the payment request or invoice is improper and indicate what corrective action is needed. In the event a dispute occurs between a vendor and a local governmental entity concerning payment, 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 payment request or 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, F.S. 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.

In an action to recover amounts due, the court awards court costs and reasonable attorney's fees, including fees incurred through any appeal to the prevailing party, if the court finds that the nonprevailing party withheld any portion of the payment that is the subject of the action without any reasonable basis in law or fact to dispute the prevailing party's claim to those amounts.

### **Payment to Subcontractors**

Delays in paying contractors also affect subcontractors. Section 255.071, F.S., provides that any person, firm or corporation who receives a payment from the state or any county, city or political subdivision of the state, or other public authority, for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work shall pay, in accordance with the contract terms, the undisputed contract obligations for labor, services or materials provided on account of such improvements. The section provides that the failure to pay any undisputed obligations for such labor, services or materials within 30 days after the date the labor, services or materials were furnished and payment for such labor, services or materials became due, or within 30 days after the date payment for such labor, services or materials is received, whichever last occurs, shall entitle any person providing such labor, services or materials to file a verified complaint against the contractor. After service of the complaint, the court must conduct an evidentiary hearing on the complaint, upon not less than 15 days written notice. The person providing labor, services or materials is entitled to the following remedies to the extent of the undisputed amount due for labor or services performed or materials supplied, and upon proof of each allegation in the complaint:

- (a) An accounting of the use of any such payment from the person who received such payment.
- (b) A temporary injunction against the person who received the payment, subject to the bond requirements specified in the Florida Rules of Civil Procedure.
- (c) Prejudgment attachment against the person who received the payment, in accordance with each of the requirements of chapter 76, F.S.
- (d) Such other legal or equitable remedies as may be appropriate in accordance with the requirements of the law.

The prevailing party in any proceeding under this section is entitled to recover costs, including a reasonable attorney's fee, at trial and on appeal. The provisions of this section shall also apply to any contract between a subcontractor and a sub-subcontractor or supplier and any contract between a sub-subcontractor and supplier on any project for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work.

### **C. SECTION DIRECTORY:**

Section 1: Amends s. 218.70, F.S., providing that this part shall be known as the "Local Government Prompt Payment Act."

Section 2: Expands the definition of "local governmental entity" to include "community college."

Section 3: Amends s. 218.735, F.S., to reduce the time a contractor, who receives payment from a local governmental entity for labor, services or materials furnished by subcontractors and suppliers hired by the contractor, has to remit payment due to those subcontractors and suppliers from 15 days to 10 days.

Provides that a local governmental entity must present a final punch list to the vendor of all items required to render complete, satisfactory, and acceptable the construction services purchased within 30 days after the earliest of the following:

1. Issuance of a temporary or final certificate of occupancy, if applicable;
2. Substantial completion of the construction services purchased; or
3. Beneficial occupancy or use of the structure, building or facility.

Provides that if the purchase relates to construction services on more than one building or structure, the local governmental entity must prepare a final punch list for each building or structure, subject to the above.

Provides that unless the contract provides otherwise, the local governmental entity shall pay out retainage to the vendor based on the value of the construction services rendered with regard to that structure or building as compared to the total value of the purchase.

Provides that the vendor shall submit a payment request for the appropriate amount of retainage upon completion of all items on the final punch list, or within 30 days, whichever occurs sooner.

Provides that if the local governmental entity fails to present the vendor with a final punch list within the time periods provided for, the project is considered complete and the vendor shall submit a payment request for the appropriate amount of retainage.

Provides that all items that require correction and are identified after the preparation and delivery of the final punch list must be considered warranty items or make-good items, and have no effect on the final payment of retainage.

Provides that from the commencement of a local government construction project that is subject to this act until the project is 50 percent complete, a local governmental entity may not withhold as retainage more than 10 percent of each progress payment to the vendor. Provides that the vendor may submit a payment request to the local governmental entity for up to one-half of the retainage withheld at 50 percent completion.

Provides that after 50 percent completion, the local governmental entity may not withhold as retainage more than five percent of each progress payment to the vendor. Provides that after 50 percent completion, the vendor may withhold retainage from payments to its subcontractors at a rate higher than five percent, upon showing good cause and providing written notice to the subcontractor. Provides that the local governmental entity shall withhold from each progress payment to the vendor the same dollar amount of retainage which the vendor is withholding from that payment from those subcontractors whose work was included in the corresponding payment request.

Provides that this section does not require the payment or release of amounts that are the subject of a good-faith dispute.

Provides that this act applies to the payment of any payment request for retainage.

Section 4: Creates s. 255.0705, F.S., providing that s. 255.0705-255.078 shall be known as the "Florida Prompt Payment Act."

Section 5: Amends s. 255.071, F.S., to decrease the time from 30 days to 10 days after the date payment is received that entitles a person providing labor, services or materials to remedies and procedures.

Section 6: Provides definitions for the terms: agent, construction services, payment request, public entity, purchase and vendor.

Section 7: Creates s. 255.073, F.S., to provide that except as provided in s. 255.072-255.078, F.S., s. 215.422, F.S., governs the timely payment for construction services by a public entity under this act.

Provides that if a public entity disputes a portion of a payment request, the undisputed portion must be timely paid.

Provides that when a vendor or subcontractor receives payment from a public entity for labor, services or materials furnished by subcontractors and suppliers, the vendor must submit payment to the subcontractors and suppliers within 10 days of receipt of payment.

Provides that a vendor or subcontractor is not prohibited from disputing, pursuant to the terms of the relevant contract, all or any portion of a payment alleged to be due to another party. Provides that if such a dispute occurs, the vendor or subcontractor may withhold the disputed portion of any such payment if he notifies the party whose payment is disputed in writing.

Provides that all payments due under this section and not made within the specified time periods shall bear interest at the rate of one percent per month or a rate specified by the contract, whichever is greater.

Section 8: Creates s. 255.074, F.S., providing procedures for calculation of payment due dates.

Section 9: Creates s. 255.075, F.S., providing for mandatory interest.

Section 10: Creates s. 255.076, F.S., providing that a public entity that receives an improper payment request from a public entity must provide notification within 10 days and indicate necessary corrective action.

Provides that if a dispute occurs between a vendor and a public entity concerning payment of a payment request, such dispute must be resolved as provided in this section. Requires public entities to establish dispute resolution procedures which are not subject to chapter 120 and do not constitute an administrative proceeding that prohibits a court from deciding de novo any action arising out of the dispute.

Provides that if a dispute is resolved in favor of a public entity that interest begins to accrue 15 days after the public entities' final decision.

Provides that if the dispute is resolved in favor of the vendor, that interest begins to accrue as of the original date the payment was due.

Provides that in an action to recover amounts due, a court shall award court costs and reasonable attorney's fees.

Section 11: Creates s. 255.077, F.S., providing for project closeout and payment of retainage.

Provides that a public entity present a vendor a final punch list within 30 days after the earliest of the following:

1. Issuance of a temporary or final certificate of occupancy, if applicable;

2. Substantial completion of the construction services purchased; or
3. Beneficial occupancy or use of the structure, building or facility.

Provides that if the purchase relates to construction services on more than one building or structure, the public entity shall prepare a final punch list for each building or structure, subject to the above.

Provides that unless the contract provides otherwise, the public entity shall pay out retainage to the vendor based on the value of the construction services rendered with regard to that structure or building as compared to the total value of the purchase.

Provides that the vendor submit a payment request for the appropriate amount of retainage upon completion of all items on the final punch list, or within 30 days, whichever occurs sooner.

Provides that if the public entity fails to present the vendor with a final punch list within the time periods provided for, the project is considered to be complete and the vendor shall submit a payment request for the appropriate amount of retainage.

Provides that all items that require correction and that are identified after the preparation and delivery of the final punch list must be considered warranty items or make-good items, and such items have no effect on the final payment of retainage.

Section 12: Creates s. 255.078, F.S., relating to public construction retainage.

Provides that from the commencement of a public construction project that is subject to this act until the project is 50 percent complete, a public entity may not withhold as retainage more than 10 percent of each progress payment to the vendor. Provides that the vendor may submit a payment request to the public entity for up to one-half of the retainage withheld at 50 percent completion.

Provides that after 50 percent completion, the public entity may not withhold as retainage more than five percent of each progress payment to the vendor. Provides that after 50 percent completion, the vendor may withhold retainage from payments to its subcontractors at a rate higher than five percent, upon showing good cause and providing written notice to the subcontractor. Provides that the local public entity withhold from each progress payment to the vendor the same dollar amount of retainage which the vendor is withholding from that payment from those subcontractors whose work was included in the corresponding payment request.

Provides that the section does not require the payment or release of amounts that are the subject of a good-faith dispute.

Provides that s. 255.072-255.076 , F.S., applies to the payment of any payment request for retainage.

Section 13: Amends s. 255.05, F.S., to provide that any notice of nonpayment served by a claimant who is not in privity with the contractor which includes sums for retainage must specify the portion of the amount claimed for retainage.

Provides that notwithstanding any other provision of law to the contrary, a claimant may not institute an action for the sole purpose of recovery of retainage against the contractor or against the surety issuing a payment or performance bond until the public entity has paid out that retainage to the contractor and the time provided for payment of that retainage to the claimant has expired or the claimant has completed all work under its contract, including the items identified on the owner's final punch list, and 60 days have passed since the owner's receipt of the contractor's final payment request.

Provides that notwithstanding any other provisions of law to the contrary, the statute of limitations for bringing suit against a contractor or a surety shall not run if the contractor has failed to comply with the payment provisions set forth in s. 255.072-255.078, F.S.

Section 14: Provides an effective date of upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may require local governments to spend funds if prompt payment timelines are not met, and interest payments are required. As the number of instances in which a local government would fail to meet deadlines for payment cannot be predicted, the amount of interest cannot be projected.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The economic impact on the private sector should be positive. Contractors, subcontractors and materials suppliers will receive payment in a more timely fashion.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill may require municipalities or counties to spend funds or to take an action requiring the expenditure of funds. The expenditures will occur if the new time lines on prompt payment are not met, and a local government is required to pay interest. As the number of instances in which a local government would fail to meet the deadlines for payment cannot be predicted, the amount of interest cannot be projected.

2. Other:

None.

### B. RULE-MAKING AUTHORITY:

Not applicable.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

## Drafting Issues

Section 3 of the bill amends s. 218.72, F.S., and requires that vendors contracting with local government entities submit a payment request upon completion of all items on the final punch list, or within 30 days, whichever occurs sooner. This language would take away any incentive for vendors to complete items on a final punch list.

Section 11 amends s. 255.077, F.S., to provide the same disincentive to vendors contracting with public entities.

## Comments

The Office of Program Policy Analysis and Government Accountability, an office of the Florida Legislature, stated in a December 2000 report<sup>1</sup>:

- Retainage is a common construction contracting practice whereby a certain percentage of compensation is withheld by the project owner from the general contractor and, in turn, by the general contractor from subcontractors until the project is completed satisfactorily. Retainage is also used as leverage to assure timely completion.
- Florida's subcontractors, who felt that retainage often creates undue financial hardships, asked the 2000 Legislature to consider limiting the allowable percentage of compensation that could be retained. In response, the Legislature requested OPPAGA to evaluate retainage and other construction practices identified by subcontractors.
- OPPAGA determined that limiting retainage may have the harmful unintended side effect of thwarting the development of new business or retarding the growth of existing businesses. In addition, owners and prime contractors may use other means to minimize risk, which may be less favorable than retainage.
- The fiscal impact of retainage on subcontractors can be lessened through the payment of interest on their percentage of compensation that has been retained. Although the Legislature could require payment of interest by law, ideally, this would be negotiated as part of the contracting process. Consideration of such legislation should take into account the fiscal impact to the state of Florida and other units of government.
- OPPAGA also recommends that the Department of Management Services identify and disseminate best construction practices that, if implemented, would facilitate final project completion and release of retainage.

The American Subcontractors Association of Florida<sup>2</sup> has stated that they believe the current system of holding 10 percent retainage for an indefinite period of time is an outdated practice that strains relationships between the parties to a project, raises bids, and is often used in lieu of best management practices. Using money that is rightfully due to a party who has fully performed to guarantee the work of another party who failed to satisfactorily perform is harmful to the industry as a whole and does not promote completion of projects in a timely and successful manner. Although OPPAGA's Report No. 00-26 did not favor legislation that would place restrictions on the amount of retainage that can be held and/or the timing of its release, it is interesting to note that all but seven states have enacted legislation that places some limitations on these practices.

## **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

None.

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<sup>1</sup> Report No. 00-26.

<sup>2</sup> Deborah E. Lawson, Executive Director (May 15, 2002).