

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 1169 w/CS Construction Services/Prompt Payment  
**SPONSOR(S):** Reagan  
**TIED BILLS:** **IDEN./SIM. BILLS:**

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Local Government &amp; Veterans' Affairs</u>	<u>16 Y, 0 N w/CS</u>	<u>Nelson</u>	<u>Highsmith-Smith</u>
2) <u>Business Regulation</u>	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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**SUMMARY ANALYSIS**

This bill extends existing local government prompt payment provisions for construction services to community colleges, and creates identical prompt pay provisions for state projects. 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.

The economic impact of this bill is indeterminate.

## 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 one 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 ch. 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 ch. 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 ch. 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 re-designated from the "Florida Prompt Payment Act" to the "Local Government Prompt Payment Act."

Section 2: Amends s. 218.72, F.S., to expand the definition of "local governmental entity" to include "community college," thereby making community colleges subject to the "Local Government Prompt Payment Act."

Amends the definition of "vendor" to encompass only those who deal directly with a local governmental entity.

Amends the definition of "construction services" to delete language referring to the requirement of a license under parts I and II of chapter 489.

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, has to remit payment due to those subcontractors and suppliers from the 15 days provided in current law to 10 days.

Creates a new subsection (7) that requires a local governmental entity to present a final punch list to vendors 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, building, facility or improvement 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 a penalty provision for contractors failing to complete tasks on the final punch list: i.e, that an owner may withhold up to 150 percent of the cost to complete any incomplete final punch list.

Provides that if the local governmental entity fails to present the vendor with a final punch list within the designated time periods, 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.

Creates a new subsection (8) which provides that from the commencement of a local government construction project that is subject to this act until 50 percent of the contract value has been earned, a local governmental entity may not withhold more than 10 percent of each progress payment to the vendor as retainage. Provides that the vendor may submit a payment request to the local governmental entity for up to one-half of the retainage withheld when 50 percent of the contract value has been earned.

Provides that after 50 percent of the contract value has been earned, the local governmental entity may not withhold more than five percent of each progress payment to the vendor as retainage. Provides that after 50 percent completion, the vendor may withhold retainage from payments to its subcontractors at a rate higher than five percent. Provides that the specific amount to be withheld must be determined on a case-by-case basis and based on the vendor's assessment of the subcontractor's past performance, the likelihood that such performance will continue, and the vendor's ability to rely on other safeguards. Provides that the contractor notify the subcontractor in writing and provide its reasons for withholding more than five percent of the progress payment.

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: Creates s. 255.072, F.S., providing definitions for the terms: agent, construction services, payment request, public entity, purchase and vendor.

Exempts the Florida Department of Transportation projects from the requirements of the act by specifying that the term "construction services" does not include contracts or work performed for the Department of Transportation.

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 vendor 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, building, facility, or improvement 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 50 percent of the contract value has been earned, 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 when 50 percent of the contract value has been earned.

Provides that after 50 percent of the contract value has been earned, the public entity may not withhold as retainage more than five percent of each progress payment to the vendor. Provides that after 50 percent of the contract value has been earned, the vendor may withhold retainage from payments to its subcontractors at a rate higher than five percent, to be determined on a case-by-case basis based on the vendor's assessment of the subcontractor's past performance, the likelihood that such performance will continue, and the vendor's ability to rely on other safeguards. Provides that the contractor notify the subcontractor in writing and provide its reasons for withholding more than five percent of the progress payment.

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.

Adds subsection (10) providing that a claimant may not institute an action for the sole purpose of recovery of retainage against a 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, and, if the contractor submitted its final payment request, 60 days have passed since the owner's receipt of the final payment request.

Adds subsection (11) providing that an owner furnish in writing to a claimant within five days after receiving a written request:

- the dates of all payment requests received from the contractor;
- the dates of all payments made by the owner to the contractor; and
- whether the contractor's final payment request has been received and, if so, the date of receipt.

Adds subsection (12) to provide that an owner has a duty to notify all claimants in writing that the final payment has been made to the contractor, or, if no further payment is earned by the contractor, a statement that no further payment will be made voluntarily by the owner to the contractor and the date which the owner provided the contractor with the final reconciliation. This notice must be made within five days after the final payment of reconciliation.

Adds subsection (13) to provide that an owner who fails to furnish any information required by this section is liable directly to a claimant for any damages sustained, plus costs, interest and attorney's fees.

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:

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.

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

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.

A representative of the Florida Department of Management Services<sup>3</sup> stated that she did not foresee any additional impact other than the changes made in the bill to the payment processes and the responsibilities of general contractors. She opined that she did not think that a 10-day payment requirement is very practical, especially on large state projects.

A representative of the Florida Community College system<sup>4</sup> provided the following:

Two years ago, it was suggested that community colleges become subject to the prompt pay laws, and the sponsors of the bill and the legislature decided that it was not appropriate to specifically include community colleges to prompt pay laws. Their unique structures were recognized to be unlike either local government or state agencies for these purposes. Despite the fact that nothing has occurred in the intervening years to suggest that a problem has erupted with community college construction projects that demands this type of remediation, it seems that community colleges are once again being swept into an inapplicable law. Community colleges do not have a distinct negotiating advantage over contractors, as do many of the local and state entities currently covered by ss. 218 and 255, F.S., and community colleges and their contractors have negotiated and administered construction contracts fairly for mutual benefit. This major change in the law would have a negative impact on community colleges.

The Prompt Payment Act as now enacted in s. 218 F.S., is clearly and expressly directed at entities and projects supported by county and municipal funds. No community college, or community college construction project, is supported by county or municipal funds. The entities identified as "local governmental entities" share some common characteristics, including taxing authority and elected governing boards. Community colleges share NONE of these characteristics. Community colleges are NOT local governmental entities as contemplated by this statute. The Prompt Payment Act as proposed to be enacted in s. 255 F.S., is the state agency version of the local governmental prompt pay law found in s. 218, F.S. Community colleges are not state agencies, and they should not be treated as such. The proposed language is drafted in a manner as to be most applicable to state agencies.

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

The Local Government & Veterans' Affairs Committee adopted a strike-all amendment at its meeting on April 2, 2003. This amendment:

- includes additional definitions in the proposed Local Government Prompt Payment Act;
- includes a penalty provision in the proposed Florida Prompt Payment Act for contractors failing to complete tasks on the final punch list;

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

<sup>3</sup> Cindi Marsiglio, Director, Legislative Affairs, Florida Department of Management Services.

<sup>4</sup> William J. Mallowney, Vice President for Policy & General Counsel, Valencia Community College.

- replaces the threshold “when 50% of the project is complete” with the more precise threshold of “when 50% of the contract value has been earned” in the retainage provisions;
- deletes the requirement that the vendor show “good cause” for withholding retainage from subcontractors, and includes general standards for establishing the amount of retainage to be withheld from subcontractors, and deletes the requirement that state and local governments withhold the corresponding retainage from the vendor (prime contractor);
- requires property owners to provide payment history information to claimants (subcontractors or suppliers) when these claimants make a written request;
- requires property owners to notify claimants (subcontractors or suppliers) that a final payment has been made to the vendor (prime contractor) when these claimants have made a written request and imposes a penalty for failure to provide such information;
- deletes the provision in the bill which provides that the statute of limitations for bringing suit against the contractor or a surety shall not run if the contractor fails to comply with the requirements of the Local Government and Florida Prompt Payment Acts;
- exempts DOT projects from the requirement of the proposed Florida Prompt Payment Act; and
- includes technical or clarifying changes to the bill as filed.