

By Senator Bennett

21-962-03

1                                   A bill to be entitled  
2           An act relating to prompt payment for  
3           construction services; amending s. 218.70,  
4           F.S.; providing a short title; amending s.  
5           218.72, F.S.; redefining the term "local  
6           governmental entity," as used in part VII of  
7           ch. 218, F.S., to include community colleges;  
8           amending s. 218.735, F.S.; revising provisions  
9           relating to timely payment for purchases of  
10          construction services; revising deadlines for  
11          payment; providing procedures for project  
12          closeout and payment of retainage; providing  
13          requirements for local government construction  
14          retainage; providing that ss. 218.72-218.76,  
15          F.S., apply to the payment of any payment  
16          request for retainage; creating s. 255.0705,  
17          F.S.; providing a short title; amending s.  
18          255.071, F.S.; revising deadlines for the  
19          payment of subcontractors, sub-subcontractors,  
20          materialmen, and suppliers on construction  
21          contracts for public projects; creating ss.  
22          255.072, 255.073, 255.074, 255.075, 255.076,  
23          255.077, 255.078, F.S.; providing definitions;  
24          providing for timely payment for purchases of  
25          construction services by a public entity;  
26          providing procedures for calculating payment  
27          due dates; providing procedures for handling  
28          improper payment requests; providing for the  
29          resolution of disputes; providing for project  
30          closeout and payment of retainage; providing  
31          for public-construction retainage; providing

1           that ss. 255.072-255.076, F.S., apply to the  
2           payment of any payment request for retainage;  
3           amending s. 255.05, F.S.; providing  
4           requirements for certain notices of nonpayment  
5           served by a claimant who is not in privity with  
6           the contractor; providing limitations on a  
7           claimant's institution of certain actions  
8           against a contractor or surety; providing for  
9           the tolling of a statute of limitations for  
10          bringing suit against a contractor or surety;  
11          providing an effective date.

12  
13 Be It Enacted by the Legislature of the State of Florida:

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

17           218.70 Short title.--This part may be cited as the  
18 "Local Government Florida Prompt Payment Act."

19           Section 2. Subsection (2) of section 218.72, Florida  
20 Statutes, is amended to read:

21           218.72 Definitions.--As used in this part:

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

28           Section 3. Subsection (6) of section 218.735, Florida  
29 Statutes, is amended, present subsection (7) of that section  
30 is redesignated as subsection (9), and new subsections (7) and  
31 (8) are added to that section, to read:

1           218.735 Timely payment for purchases of construction  
2 services.--

3           (6) When a contractor receives payment from a local  
4 governmental entity for labor, services, or materials  
5 furnished by subcontractors and suppliers hired by the  
6 contractor, the contractor shall remit payment due to those  
7 subcontractors and suppliers within 10 ~~15~~ days after the  
8 contractor's receipt of payment. When a subcontractor receives  
9 payment from a contractor for labor, services, or materials  
10 furnished by subcontractors and suppliers hired by the  
11 subcontractor, the subcontractor shall remit payment due to  
12 those subcontractors and suppliers within 10 ~~15~~ days after the  
13 subcontractor's receipt of payment. Nothing herein shall  
14 prohibit a contractor or subcontractor from disputing,  
15 pursuant to the terms of the relevant contract, all or any  
16 portion of a payment alleged to be due to another party. In  
17 the event of such a dispute, the contractor or subcontractor  
18 may withhold the disputed portion of any such payment if the  
19 contractor or subcontractor notifies the party whose payment  
20 is disputed, in writing, of the amount in dispute and the  
21 actions required to cure the dispute. The contractor or  
22 subcontractor must pay all undisputed amounts due within the  
23 time limits imposed by this section.

24           (7)(a) A local governmental entity must present to the  
25 vendor a final punch list of all items required to render  
26 complete, satisfactory, and acceptable the construction  
27 services purchased, within 30 days after the earliest of the  
28 following:

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

31

1           2. Substantial completion of the construction services  
2 purchased, as defined in the contract; or

3           3. Beneficial occupancy or use of the structure,  
4 building, or facility that is the subject of the construction  
5 services purchased, as defined in the contract.

6           (b) If the purchase relates to construction services  
7 on more than one building or structure, the local governmental  
8 entity shall prepare a final punch list for each building or  
9 structure. The local governmental entity must present to the  
10 vendor a final punch list with regard to each building or

11 structure within 30 days after the earliest of the following:

12           1. Issuance of a temporary or final certificate of  
13 occupancy on the particular building or structure, if  
14 applicable;

15           2. Substantial completion of the particular building  
16 or structure, as defined in the contract; or

17           3. Beneficial occupancy or use of the particular  
18 structure, building or facility, as defined in the contract.

19  
20 Unless the contract provides otherwise, the local governmental  
21 entity shall pay out retainage to the vendor based upon the  
22 value of the construction services rendered with regard to  
23 that structure or building as compared to the total value of  
24 the purchase.

25           (c) Upon completion of all items on the final punch  
26 list, or within 30 days, whichever occurs sooner, the vendor  
27 shall submit a payment request for the appropriate amount of  
28 retainage. Thereafter, this act applies to the payment of any  
29 payment request for retainage.

30           (d) If the local governmental entity fails to present  
31 to the vendor a final punch list within the time periods

1 provided in paragraph (a) or paragraph (b), the project is  
2 considered to be complete and the vendor shall submit a  
3 payment request for the appropriate amount of retainage.  
4 Thereafter, this act applies to the payment of any payment  
5 request for retainage.

6 (e) All items that require correction and that are  
7 identified after the preparation and delivery of the final  
8 punch list must be considered warranty items or make-good  
9 items, and such items have no effect on the final payment of  
10 retainage provided in this section.

11 (8)(a) From the commencement of a local government  
12 construction project that is subject to this act until the  
13 project is 50-percent complete, as defined in the contract  
14 between the local governmental entity and the vendor, a local  
15 governmental entity may not withhold as retainage more than 10  
16 percent of each progress payment to the vendor. At 50-percent  
17 completion, the vendor may submit a payment request to the  
18 local governmental entity for up to one-half of the retainage  
19 withheld up to that time.

20 (b) After 50-percent completion, as defined in the  
21 contract between the local governmental entity and the vendor,  
22 the local governmental entity may not withhold as retainage  
23 more than 5 percent of each progress payment to the vendor.  
24 After 50-percent completion, however, the vendor may withhold  
25 retainage from payments to its subcontractors at a rate higher  
26 than 5 percent, upon showing good cause and providing written  
27 notice to the subcontractor. The local governmental entity  
28 shall withhold from each progress payment to the vendor the  
29 same dollar amount of retainage which the vendor is  
30 withholding from that payment from those subcontractors whose  
31 work was included in the corresponding payment request.

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

4           (d) This act applies to the payment of any payment  
5 request for retainage.

6           Section 4. Section 255.0705, Florida Statutes, is  
7 created to read:

8           255.0705 Short title.--Sections 255.0705-255.078 may  
9 be cited as the "Florida Prompt Payment Act."

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

12           255.071 Payment of subcontractors, sub-subcontractors,  
13 materialmen, and suppliers on construction contracts for  
14 public projects.--

15           (2) The failure to pay any undisputed obligations for  
16 such labor, services, or materials within 30 days after the  
17 date the labor, services, or materials were furnished and  
18 payment for such labor, services, or materials became due, or  
19 within 10 ~~30~~ days after the date payment for such labor,  
20 services, or materials is received, whichever last occurs,  
21 shall entitle any person providing such labor, services, or  
22 materials to the procedures specified in subsection (3) and  
23 the remedies provided in subsection (4).

24           (3) Any person providing labor, services, or materials  
25 for the construction of a public building, for the prosecution  
26 and completion of a public work, or for repairs upon a public  
27 building or public work improvements to real property may file  
28 a verified complaint alleging:

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

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1 (b) A description of the labor, services, or materials  
2 provided and alleging that the labor, services, or materials  
3 were provided in accordance with the contract.

4 (c) The amount of the contract price.

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

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

8 (f) That the undisputed amount has remained due and  
9 payable pursuant to the contract for more than 30 days after  
10 the date the labor or services were accepted or the materials  
11 were received.

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

16 Section 6. Section 255.072, Florida Statutes, is  
17 created to read:

18 255.072 Definitions.--As used in ss. 255.073-255.078,  
19 the term:

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

23 (2) "Construction services" means all labor, services,  
24 and materials provided in connection with the construction,  
25 alteration, repair, demolition, reconstruction, or any other  
26 improvements to real property that require a license under  
27 part I or part II of chapter 489.

28 (3) "Payment request" means an invoice or request for  
29 payment for construction services which conforms with all  
30 statutory requirements and with all requirements specified by  
31 the public entity to which the payment request is submitted.

1           (4) "Public entity" means the state, a state  
2 university, or any office, board, bureau, commission,  
3 department, branch, division, or institution thereof, or any  
4 project supported by state funds.

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

7           (6) "Vendor" means any person providing construction  
8 services to a public entity.

9           Section 7. Section 255.073, Florida Statutes, is  
10 created to read:

11           255.073 Timely payment for purchases of construction  
12 services.--

13           (1) Except as otherwise provided in ss.  
14 255.072-255.078, s. 215.422 governs the timely payment for  
15 construction services by a public entity under this act.

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

19           (3) When a vendor receives payment from a public  
20 entity for labor, services, or materials furnished by  
21 subcontractors and suppliers hired by the vendor, the vendor  
22 shall remit payment due to those subcontractors and suppliers  
23 within 10 days after the vendor's receipt of payment. When a  
24 subcontractor receives payment from a vendor for labor,  
25 services, or materials furnished by subcontractors and  
26 suppliers hired by the subcontractor, the subcontractor shall  
27 remit payment due to those subcontractors and suppliers within  
28 10 days after the subcontractor's receipt of payment. This  
29 subsection does not prohibit a vendor or subcontractor from  
30 disputing, pursuant to the terms of the relevant contract, all  
31 or any portion of a payment alleged to be due to another



1 party. If such a dispute occurs, the vendor or subcontractor  
2 may withhold the disputed portion of any such payment if the  
3 vendor or subcontractor notifies the party whose payment is  
4 disputed, in writing, of the amount in dispute and the actions  
5 required to cure the dispute. The vendor or subcontractor must  
6 pay all undisputed amounts due within the time limits imposed  
7 by this section.

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

12 Section 8. Section 255.074, Florida Statutes, is  
13 created to read:

14 255.074 Procedures for calculation of payment due  
15 dates.--

16 (1) Each public entity shall establish procedures  
17 whereby each payment request received by the public entity is  
18 marked as received on the date on which it is delivered to an  
19 agent or employee of the public entity or of a facility or  
20 office of the public entity.

21 (2) If the terms under which a purchase is made allow  
22 for partial deliveries and a payment request is submitted for  
23 a partial delivery, the time for payment for the partial  
24 delivery must be calculated from the time of the partial  
25 delivery and the submission of the payment request in the same  
26 manner as provided in s. 255.073.

27 (3) The public entity must submit a payment request to  
28 the comptroller for payment no more than 25 days after receipt  
29 of the payment request.

30 Section 9. Section 255.075, Florida Statutes, is  
31 created to read:

1           255.075 Mandatory interest.--A contract between a  
2 public entity and a vendor or a provider of construction  
3 services may not prohibit the collection of late payment  
4 interest charges allowable under ss. 255.072-255.078.

5           Section 10. Section 255.076, Florida Statutes, is  
6 created to read:

7           255.076 Improper payment request; resolution of  
8 disputes.--

9           (1) If a vendor submits an improper payment request,  
10 the public entity shall, within 10 days after receiving the  
11 improper payment request, notify the vendor that the payment  
12 request is improper and indicate what corrective action on the  
13 part of the vendor is needed to make the payment request  
14 proper.

15           (2) If a dispute occurs between a vendor and a public  
16 entity concerning payment of a payment request, the dispute  
17 must be resolved as provided in this section. Each public  
18 entity shall establish a dispute resolution procedure to be  
19 followed by the public entity if such a dispute occurs. The  
20 procedure must provide that proceedings to resolve the dispute  
21 must commence not later than 45 days after the date on which  
22 the public entity received the payment request and must  
23 conclude by final decision of the public entity not later than  
24 60 days after the date on which the public entity received the  
25 payment request. Such procedures are not subject to chapter  
26 120 and do not constitute an administrative proceeding that  
27 prohibits a court from deciding de novo any action arising out  
28 of the dispute. If the dispute is resolved in favor of the  
29 public entity, interest charges begin to accrue 15 days after  
30 the public entity's final decision. If the dispute is resolved

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1 in favor of the vendor, interest begins to accrue as of the  
2 original date the payment became due.

3 (3) In an action to recover amounts due under ss.  
4 255.072-255.078, the court shall award court costs and  
5 reasonable attorney's fees, including fees incurred through  
6 any appeal, to the prevailing party, if the court finds that  
7 the nonprevailing party withheld any portion of the payment  
8 that is the subject of the action without any reasonable basis  
9 in law or fact to dispute the prevailing party's claim to  
10 those amounts.

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

13 255.077 Project closeout and payment of retainage.--

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

18 (a) Issuance of a temporary or final certificate of  
19 occupancy, if applicable;

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

22 (c) Beneficial occupancy or use of the structure,  
23 building or facility that is the subject of the construction  
24 services purchased, as defined in the contract.

25 (2) If the purchase relates to construction services  
26 on more than one building or structure, the public entity  
27 shall prepare a final punch list for each building or  
28 structure. The public entity must present to the vendor a  
29 final punch list with regard to each building or structure  
30 within 30 days after the earliest of the following:

31

1           (a) Issuance of a temporary or final certificate of  
2 occupancy on the particular building or structure, if  
3 applicable;

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

6           (c) Beneficial occupancy or use of the particular  
7 structure, building or facility, as defined in the contract.

8  
9 Unless the contract provides otherwise, the public entity  
10 shall pay out retainage to the vendor based upon the value of  
11 the construction services rendered with regard to that  
12 structure or building as compared to the total value of the  
13 purchase.

14           (3) Upon completion of all items on the final punch  
15 list or within 30 days, whichever occurs sooner, the vendor  
16 shall submit a payment request for the appropriate amount of  
17 retainage. Thereafter, ss. 255.072-255.076 apply to the  
18 payment of any payment request for retainage.

19           (4) If the public entity fails to present to the  
20 vendor a final punch list within the time periods provided in  
21 subsection (1) or subsection (2), the project is considered to  
22 be complete and the vendor shall submit a payment request for  
23 the appropriate amount of retainage. Thereafter, ss.  
24 255.072-255.076 apply to the payment of any payment request  
25 for retainage.

26           (5) All items that require correction which are  
27 identified subsequent to preparation and delivery of the final  
28 punch list must be considered warranty items or make-good  
29 items, and such items have no effect on the final payment of  
30 retainage provided in this section.

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1           Section 12. Section 255.078, Florida Statutes, is  
2 created to read:

3           255.078 Public construction retainage.--

4           (1) From the commencement of a public construction  
5 project that is subject to ss. 255.072-255.078 until the  
6 project is 50-percent complete, as defined in the contract  
7 between the public entity and the vendor, a public entity may  
8 not withhold as retainage more than 10 percent of each  
9 progress payment to the vendor. At 50-percent completion, the  
10 vendor may submit a payment request to the public entity for  
11 up to one-half of the retainage withheld up to that time.

12           (2) After 50-percent completion, as defined in the  
13 contract between the public entity and the vendor, the public  
14 entity may not withhold as retainage more than 5 percent of  
15 each progress payment to the vendor. After 50-percent  
16 completion, however, the vendor may withhold retainage from  
17 payments to its subcontractors at a rate higher than 5  
18 percent, upon showing good cause and providing written notice  
19 to the subcontractor. The public entity shall withhold from  
20 each progress payment to the vendor the same dollar amount of  
21 retainage the vendor is withholding from that payment from  
22 those subcontractors whose work was included in the  
23 corresponding payment request.

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

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

29           Section 13. Paragraph (a) of subsection (2) is  
30 amended, and subsections (10) and (11) are added to section  
31 255.05, Florida Statutes, to read:

1           255.05 Bond of contractor constructing public  
2 buildings; form; action by materialmen.--

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

10  
11                               NOTICE OF CONTEST OF CLAIM  
12                               AGAINST PAYMENT BOND  
13

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

15  
16           You are notified that the undersigned contests your  
17 notice of nonpayment, dated ....., ....., and served  
18 on the undersigned on ....., ....., and that the  
19 time within which you may file suit to enforce your claim is  
20 limited to 60 days after the date of service of this notice.

21  
22           DATED on ....., .....

23  
24 Signed:...(Contractor or Attorney)...

25  
26 The claim of any claimant upon whom such notice is served and  
27 who fails to institute a suit to enforce his or her claim  
28 against the payment bond within 60 days after service of such  
29 notice shall be extinguished automatically. The clerk shall  
30 mail a copy of the notice of contest to the claimant at the  
31 address shown in the notice of nonpayment or most recent

1 amendment thereto and shall certify to such service on the  
2 face of such notice and record the notice. Service is complete  
3 upon mailing.

4           2. A claimant, except a laborer, who is not in privity  
5 with the contractor shall, before commencing or not later than  
6 45 days after commencing to furnish labor, materials, or  
7 supplies for the prosecution of the work, furnish the  
8 contractor with a notice that he or she intends to look to the  
9 bond for protection. A claimant who is not in privity with the  
10 contractor and who has not received payment for his or her  
11 labor, materials, or supplies shall deliver to the contractor  
12 and to the surety written notice of the performance of the  
13 labor or delivery of the materials or supplies and of the  
14 nonpayment. The notice of nonpayment may be served at any time  
15 during the progress of the work or thereafter but not before  
16 45 days after the first furnishing of labor, services, or  
17 materials, and not later than 90 days after the final  
18 furnishing of the labor, services, or materials by the  
19 claimant or, with respect to rental equipment, not later than  
20 90 days after the date that the rental equipment was last on  
21 the job site available for use. Any notice of nonpayment  
22 served by a claimant who is not in privity with the contractor  
23 which includes sums for retainage must specify the portion of  
24 the amount claimed for retainage.No action for the labor,  
25 materials, or supplies may be instituted against the  
26 contractor or the surety unless both notices have been given.  
27 Notices required or permitted under this section may be served  
28 in accordance with s. 713.18. An action, except for an action  
29 exclusively for recovery of retainage, must be instituted  
30 against the contractor or the surety on the payment bond or  
31 the payment provisions of a combined payment and performance

1 bond within 1 year after the performance of the labor or  
2 completion of delivery of the materials or supplies. An action  
3 exclusively for recovery of retainage must be instituted  
4 against the contractor or the surety within 1 year after the  
5 performance of the labor or completion of delivery of the  
6 materials or supplies, or within 90 days after receipt of  
7 final payment (or the payment estimate containing the owner's  
8 final reconciliation of quantities if no further payment is  
9 earned and due as a result of deductive adjustments) by the  
10 contractor or surety, whichever comes last. A claimant may not  
11 waive in advance his or her right to bring an action under the  
12 bond against the surety. In any action brought to enforce a  
13 claim against a payment bond under this section, the  
14 prevailing party is entitled to recover a reasonable fee for  
15 the services of his or her attorney for trial and appeal or  
16 for arbitration, in an amount to be determined by the court,  
17 which fee must be taxed as part of the prevailing party's  
18 costs, as allowed in equitable actions. The time periods for  
19 service of a notice of nonpayment or for bringing an action  
20 against a contractor or a surety shall be measured from the  
21 last day of furnishing labor, services, or materials by the  
22 claimant and shall not be measured by other standards, such as  
23 the issuance of a certificate of occupancy or the issuance of  
24 a certificate of substantial completion.

25 (10) Notwithstanding any other provision of law to the  
26 contrary, a claimant may not institute an action for the sole  
27 purpose of recovery of retainage against the contractor or  
28 against the surety issuing a payment or performance bond  
29 pursuant to this section until:

30 (a) The public entity has paid out that retainage to  
31 the contractor and the time provided under ss. 218.70-218.76



1 or ss. 255.072-255.078 for payment of that retainage to the  
2 claimant has expired; or  
3 (b) The claimant has completed all work under its  
4 contract, including the items identified on the owner's final  
5 punch list, and 60 days have passed since the owner's receipt  
6 of the contractor's final payment request.  
7 (11) Notwithstanding any other provision of law to the  
8 contrary, the statute of limitations for bringing suit against  
9 a contractor or a surety shall not run if the contractor has  
10 failed to comply with the payment provisions set forth in ss.  
11 255.072-255.078.

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

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SENATE SUMMARY

Revises provisions relating to prompt payment for construction services. Redesignates part VII of ch. 218, F.S., as the "Local Government Prompt Payment Act," rather than the "Florida Prompt Payment Act." Creates ss. 255.0705 and ss. 255.072-255.078, F.S., and designates ss. 255.0705-255.078, F.S., as the "Florida Prompt Payment Act." Provides procedures for payment of retainage and for settling disputes relating thereto.