

1 of any payment request for retainage; amending
2 s. 255.05, F.S.; providing requirements for
3 certain notices of nonpayment served by a
4 claimant who is not in privity with the
5 contractor; providing limitations on a
6 claimant's institution of certain actions
7 against a contractor or surety; providing for
8 certain notices to the claimant; 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 Popular name ~~Short title~~.--This part may be
18 cited as the "Local Government Florida Prompt Payment Act."

19 Section 2. Subsections (2), (6), and (7) of section
20 218.72, Florida Statutes, are 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 (6) "Vendor" means any person who sells goods or
29 services, sells or leases personal property, or leases real
30 property directly to a local government entity.

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

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

10 218.735 Timely payment for purchases of construction
11 services.--

12 (6) When a contractor receives payment from a local
13 governmental entity for labor, services, or materials
14 furnished by subcontractors and suppliers hired by the
15 contractor, the contractor shall remit payment due to those
16 subcontractors and suppliers within 10 ~~15~~ days after the
17 contractor's receipt of payment. When a subcontractor receives
18 payment from a contractor for labor, services, or materials
19 furnished by subcontractors and suppliers hired by the
20 subcontractor, the subcontractor shall remit payment due to
21 those subcontractors and suppliers within 10 ~~15~~ days after the
22 subcontractor's receipt of payment. Nothing herein shall
23 prohibit a contractor or subcontractor from disputing,
24 pursuant to the terms of the relevant contract, all or any
25 portion of a payment alleged to be due to another party. In
26 the event of such a dispute, the contractor or subcontractor
27 may withhold the disputed portion of any such payment if the
28 contractor or subcontractor notifies the party whose payment
29 is disputed, in writing, of the amount in dispute and the
30 actions required to cure the dispute. The contractor or

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1 subcontractor must pay all undisputed amounts due within the
2 time limits imposed by this section.

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

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

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

12 3. Beneficial occupancy or use of the structure,
13 building, facility, or improvement that is the subject of the
14 construction services purchased, as defined in the contract.

15 (b) If the purchase relates to construction services
16 on more than one building or structure, the local governmental
17 entity shall prepare a final punch list for each building or
18 structure. The local governmental entity must present to the
19 vendor a final punch list with regard to each building or
20 structure within 30 days after the earliest of the following:

21 1. Issuance of a temporary or final certificate of
22 occupancy on the particular building or structure, if
23 applicable;

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

26 3. Beneficial occupancy or use of the particular
27 structure, building, facility, or improvement, as defined in
28 the contract.

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30 Unless the contract provides otherwise, the local governmental
31 entity shall pay out retainage to the vendor based upon the

1 value of the construction services rendered with regard to
2 that structure, building, facility, or improvement as compared
3 to the total value of the purchase.

4 (c) Upon completion of all items on the final punch
5 list, or within 30 days after issuance of the punchlist,
6 whichever occurs sooner, the vendor shall submit a payment
7 request for the appropriate amount of retainage. The owner may
8 withhold up to 150 percent of the cost to complete any
9 incomplete final punchlist items. Thereafter, this act applies
10 to the payment of any payment request for retainage.

11 (d) If the local governmental entity fails to present
12 to the vendor a final punch list within the time periods
13 provided in paragraph (a) or paragraph (b), the project is
14 considered to be complete and the vendor shall submit a
15 payment request for the appropriate amount of retainage.
16 Thereafter, this act applies to the payment of any payment
17 request for retainage.

18 (e) All items that require correction under the
19 contract and that are identified after the preparation and
20 delivery of the final punch list must be considered warranty
21 items or make-good items, and such items have no effect on the
22 final payment of retainage provided in this section.

23 (8)(a) From the commencement of a local government
24 construction project that is subject to this act until
25 50-percent of the contract value has been earned, a local
26 governmental entity may not withhold as retainage more than 10
27 percent of each progress payment to the vendor. When
28 50-percent of the contract value has been earned, the vendor
29 may submit a payment request to the local governmental entity
30 for up to one-half of the retainage withheld up to that time.

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1 (b) After 50-percent of the contract value has been
2 earned, the local governmental entity may not withhold as
3 retainage more than 5 percent of each progress payment to the
4 vendor. However, the vendor may withhold retainage from
5 payments to its subcontractors at a rate higher than 5
6 percent. The specific amount to be withheld must be determined
7 on a case-by-case basis and must be based on the vendor's
8 assessment of the subcontractor's past performance, the
9 likelihood that such performance will continue, and the
10 vendor's ability to rely on other safeguards. The vendor shall
11 notify the subcontractor, in writing, of its determination to
12 withhold more than 5 percent of the progress payment and the
13 reasons for making that determination.

14 (c) This section does not require the payment or
15 release of amounts that are the subject of a good-faith
16 dispute.

17 (d) This act applies to the payment of any payment
18 request for retainage.

19 Section 4. Section 255.0705, Florida Statutes, is
20 created to read:

21 255.0705 Short title.--Sections 255.0705-255.078 may
22 be cited as the "Florida Prompt Payment Act."

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

25 255.071 Payment of subcontractors, sub-subcontractors,
26 materialmen, and suppliers on construction contracts for
27 public projects.--

28 (2) The failure to pay any undisputed obligations for
29 such labor, services, or materials within 30 days after the
30 date the labor, services, or materials were furnished and
31 payment for such labor, services, or materials became due, or

1 within 10 ~~30~~ days after the date payment for such labor,
2 services, or materials is received, whichever last occurs,
3 shall entitle any person providing such labor, services, or
4 materials to the procedures specified in subsection (3) and
5 the remedies provided in subsection (4).

6 (3) Any person providing labor, services, or materials
7 for the construction of a public building, for the prosecution
8 and completion of a public work, or for repairs upon a public
9 building or public work improvements to real property may file
10 a verified complaint alleging:

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

13 (b) A description of the labor, services, or materials
14 provided and alleging that the labor, services, or materials
15 were provided in accordance with the contract.

16 (c) The amount of the contract price.

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

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

20 (f) That the undisputed amount has remained due and
21 payable pursuant to the contract for more than 30 days after
22 the date the labor or services were accepted or the materials
23 were received.

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

28 Section 6. Section 255.072, Florida Statutes, is
29 created to read:

30 255.072 Definitions.--As used in ss. 255.073-255.078,
31 the term:

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

4 (2) "Construction services" means all labor, services,
5 and materials provided in connection with the construction,
6 alteration, repair, demolition, reconstruction, or any other
7 improvements to real property. The term "construction
8 services" does not include contracts or work performed for the
9 Department of Transportation.

10 (3) "Payment request" means an invoice or request for
11 payment for construction services which conforms with all
12 statutory requirements and with all requirements specified by
13 the public entity to which the payment request is submitted.

14 (4) "Public entity" means the state, a state
15 university, or any office, board, bureau, commission,
16 department, branch, division, or institution thereof, or any
17 project supported by state funds, but does not include a local
18 government entity as defined in s. 218.72.

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

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

23 Section 7. Section 255.073, Florida Statutes, is
24 created to read:

25 255.073 Timely payment for purchases of construction
26 services.--

27 (1) Except as otherwise provided in ss.
28 255.072-255.078, s. 215.422 governs the timely payment for
29 construction services by a public entity under this act.

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

4 (3) When a vendor receives payment from a public
5 entity for labor, services, or materials furnished by
6 subcontractors and suppliers hired by the vendor, the vendor
7 shall remit payment due to those subcontractors and suppliers
8 within 10 days after the vendor's receipt of payment. When a
9 subcontractor receives payment from a vendor for labor,
10 services, or materials furnished by subcontractors and
11 suppliers hired by the subcontractor, the subcontractor shall
12 remit payment due to those subcontractors and suppliers within
13 10 days after the subcontractor's receipt of payment. This
14 subsection does not prohibit a vendor or subcontractor from
15 disputing, pursuant to the terms of the relevant contract, all
16 or any portion of a payment alleged to be due to another
17 party. If such a dispute occurs, the vendor or subcontractor
18 may withhold the disputed portion of any such payment if the
19 vendor or subcontractor notifies the party whose payment is
20 disputed, in writing, of the amount in dispute and the actions
21 required to cure the dispute. The vendor or subcontractor must
22 pay all undisputed amounts due within the time limits imposed
23 by this section.

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

28 Section 8. Section 255.074, Florida Statutes, is
29 created to read:

30 255.074 Procedures for calculation of payment due
31 dates.--

1 (1) Each public entity shall establish procedures
2 whereby each payment request received by the public entity is
3 marked as received on the date on which it is delivered to an
4 agent or employee of the public entity or of a facility or
5 office of the public entity.

6 (2) If the terms under which a purchase is made allow
7 for partial deliveries and a payment request is submitted for
8 a partial delivery, the time for payment for the partial
9 delivery must be calculated from the time of the partial
10 delivery and the submission of the payment request in the same
11 manner as provided in s. 255.073.

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

15 Section 9. Section 255.075, Florida Statutes, is
16 created to read:

17 255.075 Mandatory interest.--A contract between a
18 public entity and a vendor or a provider of construction
19 services may not prohibit the collection of late payment
20 interest charges allowable under ss. 255.072-255.078.

21 Section 10. Section 255.076, Florida Statutes, is
22 created to read:

23 255.076 Improper payment request; resolution of
24 disputes.--

25 (1) If a vendor submits an improper payment request,
26 the public entity shall, within 10 days after receiving the
27 improper payment request, notify the vendor that the payment
28 request is improper and indicate what corrective action on the
29 part of the vendor is needed to make the payment request
30 proper.

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1 (2) If a dispute occurs between a vendor and a public
2 entity concerning payment of a payment request, the dispute
3 must be resolved as provided in this section. Each public
4 entity shall establish a dispute resolution procedure to be
5 followed by the public entity if such a dispute occurs. The
6 procedure must provide that proceedings to resolve the dispute
7 must commence not later than 45 days after the date on which
8 the public entity received the payment request and must
9 conclude by final decision of the public entity not later than
10 60 days after the date on which the public entity received the
11 payment request. Such procedures are not subject to chapter
12 120 and do not constitute an administrative proceeding that
13 prohibits a court from deciding de novo any action arising out
14 of the dispute. If the dispute is resolved in favor of the
15 public entity, interest charges begin to accrue 15 days after
16 the public entity's final decision. If the dispute is resolved
17 in favor of the vendor, interest begins to accrue as of the
18 original date the payment became due.

19 (3) In an action to recover amounts due under ss.
20 255.072-255.078, the court shall award court costs and
21 reasonable attorney's fees, including fees incurred through
22 any appeal, to the prevailing party, if the court finds that
23 the nonprevailing party withheld any portion of the payment
24 that is the subject of the action without any reasonable basis
25 in law or fact to dispute the prevailing party's claim to
26 those amounts.

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

29 255.077 Project closeout and payment of retainage.--

30 (1) A public entity must present to the vendor a final
31 punch list of all items required to render complete,

1 satisfactory, and acceptable the construction services
2 purchased, within 30 days after the earliest of the following:
3 (a) Issuance of a temporary or final certificate of
4 occupancy, if applicable;
5 (b) Substantial completion of the construction
6 services purchased, as defined in the contract; or
7 (c) Beneficial occupancy or use of the structure,
8 building, facility, or improvement that is the subject of the
9 construction services purchased, as defined in the contract.
10 (2) If the purchase relates to construction services
11 on more than one building or structure, the public entity
12 shall prepare a final punch list for each building or
13 structure. The public entity must present to the vendor a
14 final punch list with regard to each building or structure
15 within 30 days after the earliest of the following:
16 (a) Issuance of a temporary or final certificate of
17 occupancy on the particular building or structure, if
18 applicable;
19 (b) Substantial completion of the particular building
20 or structure, as defined in the contract; or
21 (c) Beneficial occupancy or use of the particular
22 structure, building, facility, or improvement, as defined in
23 the contract.
24
25 Unless the contract provides otherwise, the public entity
26 shall pay out retainage to the vendor based upon the value of
27 the construction services rendered with regard to that
28 structure, building, facility, or improvement as compared to
29 the total value of the purchase.
30 (3) Upon completion of all items on the final punch
31 list or within 30 days after issuance of the punch list,

1 whichever occurs sooner, the vendor shall submit a payment
2 request for the appropriate amount of retainage. The owner may
3 withhold up to 150 percent of the cost to complete any
4 incomplete final punchlist items. Thereafter, ss.
5 255.072-255.076 apply to the payment of any payment request
6 for retainage.

7 (4) If the public entity fails to present to the
8 vendor a final punch list within the time periods provided in
9 subsection (1) or subsection (2), the project is considered to
10 be complete and the vendor shall submit a payment request for
11 the appropriate amount of retainage. Thereafter, ss.
12 255.072-255.076 apply to the payment of any payment request
13 for retainage.

14 (5) All items that require correction under the
15 contract which are identified subsequent to preparation and
16 delivery of the final punch list must be considered warranty
17 items or make-good items, and such items have no effect on the
18 final payment of retainage provided in this section.

19 Section 12. Section 255.078, Florida Statutes, is
20 created to read:

21 255.078 Public construction retainage.--

22 (1) From the commencement of a public construction
23 project that is subject to ss. 255.072-255.078 until
24 50-percent of the contract value has been earned, a public
25 entity may not withhold as retainage more than 10 percent of
26 each progress payment to the vendor. When 50-percent of the
27 contract value has been earned, the vendor may submit a
28 payment request to the public entity for up to one-half of the
29 retainage withheld up to that time.

30 (2) After 50-percent of the contract value has been
31 earned, the public entity may not withhold as retainage more

1 than 5 percent of each progress payment to the vendor.
2 However, the vendor may withhold retainage from payments to
3 its subcontractors at a rate higher than 5 percent. The
4 specific amount to be withheld must be determined on a
5 case-by-case basis and must be based on the vendor's
6 assessment of the subcontractor's past performance, the
7 likelihood that such performance will continue, and the
8 vendor's ability to rely on other safeguards. The vendor shall
9 notify the subcontractor, in writing, of its determination to
10 withhold more than 5 percent of the progress payment and the
11 reasons for making that determination.

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

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

17 Section 13. Paragraph (a) of subsection (2) is
18 amended, and subsections (10) and (11) are added to section
19 255.05, Florida Statutes, to read:

20 255.05 Bond of contractor constructing public
21 buildings; form; action by materialmen.--

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

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30 NOTICE OF CONTEST OF CLAIM
31 AGAINST PAYMENT BOND

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

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

DATED on,

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

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

2. A claimant, except a laborer, who is not in privity with the contractor shall, before commencing or not later than 45 days after commencing to furnish labor, materials, or supplies for the prosecution of the work, furnish the contractor with a notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for his or her labor, materials, or supplies shall deliver to the contractor and to the surety written notice of the performance of the

1 labor or delivery of the materials or supplies and of the
2 nonpayment. The notice of nonpayment may be served at any time
3 during the progress of the work or thereafter but not before
4 45 days after the first furnishing of labor, services, or
5 materials, and not later than 90 days after the final
6 furnishing of the labor, services, or materials by the
7 claimant or, with respect to rental equipment, not later than
8 90 days after the date that the rental equipment was last on
9 the job site available for use. Any notice of nonpayment
10 served by a claimant who is not in privity with the contractor
11 which includes sums for retainage must specify the portion of
12 the amount claimed for retainage.No action for the labor,
13 materials, or supplies may be instituted against the
14 contractor or the surety unless both notices have been given.
15 Notices required or permitted under this section may be served
16 in accordance with s. 713.18. An action, except for an action
17 exclusively for recovery of retainage, must be instituted
18 against the contractor or the surety on the payment bond or
19 the payment provisions of a combined payment and performance
20 bond within 1 year after the performance of the labor or
21 completion of delivery of the materials or supplies. An action
22 exclusively for recovery of retainage must be instituted
23 against the contractor or the surety within 1 year after the
24 performance of the labor or completion of delivery of the
25 materials or supplies, or within 90 days after receipt of
26 final payment (or the payment estimate containing the owner's
27 final reconciliation of quantities if no further payment is
28 earned and due as a result of deductive adjustments) by the
29 contractor or surety, whichever comes last. A claimant may not
30 waive in advance his or her right to bring an action under the
31 bond against the surety. In any action brought to enforce a

1 claim against a payment bond under this section, the
2 prevailing party is entitled to recover a reasonable fee for
3 the services of his or her attorney for trial and appeal or
4 for arbitration, in an amount to be determined by the court,
5 which fee must be taxed as part of the prevailing party's
6 costs, as allowed in equitable actions. The time periods for
7 service of a notice of nonpayment or for bringing an action
8 against a contractor or a surety shall be measured from the
9 last day of furnishing labor, services, or materials by the
10 claimant and shall not be measured by other standards, such as
11 the issuance of a certificate of occupancy or the issuance of
12 a certificate of substantial completion.

13 (10) Notwithstanding any other provision of law to the
14 contrary, a claimant may not institute an action for the sole
15 purpose of recovery of retainage against the contractor or
16 against the surety issuing a payment or performance bond
17 pursuant to this section until:

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

22 (b) The claimant has completed all work required under
23 its contract and, if the contractor submitted its final
24 payment request in accordance with this act, 60 days have
25 passed since the owner's receipt of the contractor's final
26 payment request; or

27 (c) The contractor has provided the claimant with a
28 written statement pursuant to subsection (12) that no further
29 payment is owed to the contractor.

30 (11) An owner shall furnish in writing to a claimant
31 who has provided labor, services, or materials to a project,

1 within 5 business days after receipt of a written request from
2 that claimant, the following information:

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

5 (b) The dates of all payments made by the owner to the
6 contractor.

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

10 (12) The contractor has a duty to notify all claimants
11 of record for the project, in writing, that final payment has
12 been received from the owner or, if no further payment is
13 earned by the contractor, a statement that no further payment
14 is owed to the contractor and the date on which the owner
15 provided the contractor with the final reconciliation of
16 quantities. The notice to claimants must be made in writing
17 within 10 days after final payment has been received or the
18 final reconciliation of quantities has been provided to the
19 contractor. Notwithstanding any provision of law to the
20 contrary, the statute of limitations for filing a claim
21 against the contractor's payment bond may not be tolled for
22 any claimant who was not provided the written notice required
23 in this subsection.

24 Section 14. This act shall take effect July 1, 2003.
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1 STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
2 COMMITTEE SUBSTITUTE FOR
3 Senate Bill 1724

- 4 * Amends a definition of "construction services" in current
5 law, to make the prompt payment provisions available to
6 contractors other than those licensed under Parts I & II
7 of ch. 489, F.S.;
- 8 * Includes a penalty provision in the proposed Local
9 Government and Florida Prompt Payment Acts for
10 contractors failing to complete tasks on the final punch
11 list;
- 12 * Deletes the requirement that the vendor show "good cause"
13 for withholding retainage from subcontractors, includes
14 general standards for establishing the amount of
15 retainage to be withheld from subcontractors, and deletes
16 the requirement that the state and local governments
17 withhold the corresponding retainage from the vendor
18 (prime contractor);
- 19 * Exempts DOT projects from the requirement of the proposed
20 Florida Prompt Payment Act;
- 21 * Requires property owners to provide payment history
22 information to claimants (subcontractors or suppliers)
23 upon the request of the claimant; and clarifies that
24 property owners have 5 business days, rather than 5 days,
25 to provide such payment history;
- 26 * Requires the contractor to notify claimants that a final
27 payment has been made to the vendor upon the request of
28 the claimants; and
- 29 * Adds a third condition to be satisfied before a claimant
30 may institute an action to recover retainage, to include
31 that the contractor has provided the claimant with a
 written statement that no further payment is owed to the
 contractor.