

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 544

SPONSOR: Governmental Oversight and Productivity Committee, Comprehensive Planning Committee and Senator Bennett

SUBJECT: Construction Services

DATE: April 2, 2004

REVISED: 04/13/04

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cooper	Yeatman	CP	Favorable/CS
2.	White	Wilson	GO	Favorable/CS
3.	Cibula	Lang	JU	Fav/1 amendment
4.			RI	
5.				
6.				

I. Summary:

The bill renames the Florida Prompt Payment Act as the Local Government Prompt Payment Act and creates a new Florida Prompt Payment Act. The bill amends provisions of law providing for timeframes in which payments must be made from state and local governments to contractors and timeframes in which payments must be made from contractors to subcontractors.

Additionally, the bill specifies funds that may be retained by state and local governments in progress payments to contractors and subcontractors to ensure that construction projects are completed.

This bill amends the following sections of the Florida Statutes: 95.11, 218.70, 218.72, 218.735, 255.05, and 255.071.

This bill creates the following sections of the Florida Statutes: ss. 255.0705, 255.072, 255.073, 255.074, 255.075, 255.076, 255.077, 255.078, and 725.09.

II. Present Situation:

Prompt Payment of Vendors by State Agencies

Section 215.422, F.S., addresses prompt payment of vendors by state agencies and the judicial branch. Vouchers authorizing payment of an invoice must be filed with the Comptroller not later than 20 days after receipt of the invoice. The Comptroller is required to issue a warrant in payment of the invoice, not later than 10 days after filing the voucher. Partial payments to contractors are authorized.

Section 215.422(3)(b), F.S., specifies that disputes over payments between the state agency and vendors are to be resolved in accordance with rules developed and adopted by the Chief Justice for the judicial branch, and rules adopted by the Department of Financial Services or in a formal administrative proceeding before an administrative law judge of the Division of Administrative Hearings for state agencies.

Section 255.071, F.S., addresses disputes between contractors and subcontractors and suppliers for public works projects. When the contractor receives payments from the state or “any county, city, or political subdivision of the state, or other public authority...” for the construction of a public building, they are required to pay, in accordance with the contract terms, the undisputed contract obligations for labor, services, or materials provided for the project. If the contractor fails to pay these undisputed obligations to the subcontractor or supplier within 30 days of the required payment date, the subcontractor or supplier is entitled to the procedures and remedies provided in subsections (3) and (4).

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.

Section 218.72.(2), F.S., defines the term local governmental entity to mean, “a county or municipal government, school board, school district, authority, special taxing district, other political subdivision, or any office, board, bureau, commission, department, branch, division, or institution thereof or any project supported by county or municipal funds.” The act does not apply to community colleges.

Section 218.73, F.S., provides that payments for non-construction services by a local governmental entity must be calculated from 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 latter date of:

- 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 that provides dates relative to payment periods.

Section 218.735, F.S., specifies the due-dates for payment of construction services.

Subsection (5) requires that if a local governmental entity disputes a portion of a payment request or an invoice, the undisputed portion must be paid timely, in accordance with the requirements of subsection (1). Subsection (6) requires that when a contractor receives payment from a local governmental entity for labor, services, or materials furnished by subcontractors and suppliers hired by the contractor, the contractor must remit payment due to those subcontractors and suppliers within 15 days after the contractor's receipt of payment. Similarly, when a subcontractor receives payment from a contractor for labor, services, or materials furnished by subcontractors and suppliers hired by the subcontractor, the subcontractor must remit payment due to those subcontractors and suppliers within 15 days after the subcontractor's receipt of payment.

Subsection (7) specifies that all payments due under this section and not made within the specified time shall bear interest at the rate of 1 percent per month, or the rate specified by contract, whichever is greater.

Section 218.74, F.S., requires each local governmental entity to establish procedures to mark each payment request or invoice as received on the date on which it is delivered to the local government.

Section 218.75, F.S., provides that no contract between a local government entity and a vendor¹ may prohibit the vendor from invoicing the local government entity for interest allowable under ch. 218, part VII, 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 on the part of the vendor is needed to make the payment request or invoice proper.

Subsection (2) governs disputes between a vendor and a local governmental entity over payment of a payment request or invoice. 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 proper payment request or invoice was received by the local governmental entity and be concluded by final decision of the local governmental entity not later than 60 days after the date on which the proper payment request or invoice was received. 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 begin to accrue 15 days after the local governmental entity's final decision. If the dispute is resolved in favor of the vendor, interest begins to accrue as of the original date the payment became due.

Subsection (3) provides that the prevailing party in a collection action under the prompt payment act is entitled to recover court costs and reasonable attorney's fees under certain circumstances.

Retainage on Construction Projects²

“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 established by contract between the prime-builder and the entity contracting for the project. Proponents of this practice claim it is necessary as leverage to assure timely completion of construction projects. Opponents of retainage claim that payment procedures on large public

¹ “Vendor” is defined as a person who sells goods or services, sells or leases personal property, or leases real property to a local government entity. See s. 218.71(6), F.S.

² This information is taken from OPPAGA *Special Review: Inflexibility in Contracting and Retainage Practices Could Hurt Construction Industry*, Report No. 00-26, December 2000.

projects can be lengthy and complex and that final payment to the subcontractors can be delayed for months when problems with one aspect of the project remain unresolved.

Florida's subcontractors, who claim 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 the Office of Program Policy Analysis and Government Accountability (OPPAGA) to evaluate retainage and other construction practices identified by subcontractors.

The 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 OPPAGA found that 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. The OPPAGA suggested that consideration of such legislation should take into account the fiscal impact to the state of Florida and other units of government.

The OPPAGA also recommended the Department of Management Services identify and disseminate best construction practices that, if implemented, would facilitate final project completion and release of retainage.

Industry representatives report that Florida is one of only seven states that have no laws regulating retainage. Payment procedures on large public projects can be lengthy and complex, and in particular, final payment can be delayed for months for even one small problem that remains unresolved.

Bonds of Contractors on Public Buildings

In Florida, "surety insurance" is defined to include payment and performance bonds.³ Such bonds are contracts in which a surety company, which is paid a premium by a principal, e.g., a general contractor, agrees to stand in the place of the principal in the event the principal defaults either as to performance of the contract or as to payment of its subcontractors/suppliers.⁴

Chapter 255, F.S., deals with public property and publicly owned buildings. Section 255.05, F.S., requires a payment and performance bond from any person who enters into a formal contract with the state or any local government, 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.

³ Section 624.606(1), F.S.

⁴ *Surety Bonds: A Basic User's Guide for Payment Bond Claimants and Obligees*, Construction Lawyer, Daniel Toomey and Tamara McNulty, Winter, 2002.

Section 255.05(2), F.S., provides procedures for subcontractors and suppliers to make claims against a payment bond. This section also provides an outline for a notice form, deadlines for action, and consequences for improper notice or failure to act within specified guidelines.

III. Effect of Proposed Changes:

The bill renames the Florida Prompt Payment Act as the Local Government Prompt Payment Act and creates a new Florida Prompt Payment Act. The bill amends provisions of law providing for timeframes in which payments must be made from state and local governments to contractors and timeframes in which payments must be made from contractors to subcontractors. Additionally, the bill specifies funds that may be retained by state and local governments in progress payments to contractors and subcontractors to ensure that construction projects are completed.

The provisions of the Local Government Prompt Payment Act and the Florida Prompt Payment Act provided in the bill are similar. However, the former applies to construction contracts funded by local governments and the latter applies to construction contracts funded by the state government.

Prompt Payment Acts

Payments to Subcontractors

Under both acts, the bill requires a contractor who receives payment from a governmental entity for labor, services, or materials furnished by subcontractors and suppliers hired by the contractor, to remit payment due to those subcontractors and suppliers within 10 days. However, the subcontractors have 7 days to pay their subcontractors and suppliers. The bill provides that when the state government makes a payment to a contractor for the benefit of subcontractors, interest accrues on late payments to the subcontractors at a rate of at least 1 percent per month.

Punch List

Under both acts, the bill provides that each contract for construction services between a government entity and a contractor to provide for the development and review of a “punch list,” or list of items required to “render complete, satisfactory, and acceptable the construction services purchased” For construction projects costing less than \$10 million, the list must be completed: (a) within 30 calendar days after reaching substantial completion as defined in the contract, or if not defined in the contract, upon reaching beneficial occupancy or use; or (b) within 30 calendar days, unless extended up to 60 days by contract, after reaching substantial completion as defined in the contract, or if not defined in the contract, upon reaching beneficial occupancy or use.

Payment of Retainage to Contractors

Notwithstanding omissions on a punch list, a contractor must fully complete the contract. Upon completion of all items specified in the punch list, a contractor may submit a request for the retainage. If a governmental entity fails to timely develop the required punch list, the contractor may submit a payment request for the appropriate amount of retainage. The governmental entity is not required to pay the requested retainage if the contractor has, in whole or part, failed to

cooperate with the governmental entity in development of the list; failed to perform its contractual responsibilities, if any, with regard to the development of the list. In a good faith dispute relating to the list, a governmental entity is authorized to withhold up to 150 percent of the total costs to complete any incomplete items on the list.

Retainage Amounts

From the beginning of a construction project until 50 percent of the project has been completed, a governmental entity may not withhold as retainage more than 10 percent of each progress payment to the contractor. After reaching 50-percent completion, the governmental entity may withhold as retainage no more than 5 percent of future progress payments to the contractor. The term “50-percent completion” means as defined in the contract, or, if not defined in the contract, the point at which the governmental entity has expended 50 percent of the total cost of the construction services purchased as identified in the contract, plus all change orders and other additions or modifications as provided in the contract.

After reaching 50-percent completion, the contractor may submit a payment request for up to one-half of the retainage amount held by the governmental entity. The governmental entity must promptly pay the contractor, unless there is a “good-faith” dispute between the contractor and the governmental entity. If the governmental entity pays retainage to the contractor, the contractor must timely remit payment of such retainage to the appropriate subcontractors and suppliers. However, under specified conditions and with proper notice, the contractor may withhold more than 5 percent retainage from payments to its subcontractors.

Subcontractor Claims Against Payment Bond

Claims against a payment bond by a subcontractor to a sub-subcontractor must specify the portion of the claim for retainage. Additionally, claims may not be initiated in an action for the sole purpose of recovery of retainage against the contractor or against the surety providing a payment or performance bond until:

- The public entity has paid out that retainage to the contractor, and the time provided in s. 255.073(3), F.S., for payment of that retainage has expired;⁵
- The claimant has completed all contracted work and 70 days have passed since the public entity received the contractor’s final payment request; or
- The claimant has made a written request to the contractor for the retainage, and the contractor has not responded, in writing, 10 days after receipt of the request.

If none of these conditions can be satisfied and, consequently, an action for recovery of retainage cannot be instituted within the 1-year limitation period, the limitation period is extended until 120 days after one of the conditions is satisfied.

⁵ See section 7 of this bill. Proposed s. 255.073(3), F.S., requires that when a contractor receives payment from a public entity for labor, services, or materials furnished by subcontractors and suppliers hired by the contractor, the contractor must remit payment due to those subcontractors and suppliers within 10 days after the contractor's receipt of payment. Similarly, when a subcontractor receives payment from a contractor for labor, services, or materials furnished by subcontractors and suppliers hired by the subcontractor, the subcontractor must remit payment due to those subcontractors and suppliers within 7 days after the subcontractor's receipt of payment.

Prohibited Contractual Provisions

The bill prohibits an entity from entering into a contract for the purchase of construction materials or services which conditions payment for such materials or services on the receipt of payment from any other entity. Furthermore, any such conditional payment provision is void as a violation of the public policy of this state.

Effective Date

The bill provides an effective date of October 1, 2004.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

This bill may result in more timely payments to contractors and subcontractors who provide services or supplies in the construction of public projects.

C. Government Sector Impact:

This bill may require state and local governments to provide more timely payments to contractors and subcontractors who provide services or supplies in the construction of public projects.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Judiciary:

Eliminates the following entities from the definition of local governmental entity: district and separate unit of local government created or established pursuant to law. As a result, these entities are not governed by the Local Government Prompt Pay Act.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
