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2020 Legislature

1
2 An act relating to public construction; amending s.
3 218.735, F.S.; revising the amount of retainage that
4 certain local government entities and contractors may
5 withhold from progress payments for any construction
6 services contract; conforming a provision to changes
7 made by the act; amending s. 255.05, F.S.; revising
8 requirements for Department of Management Services
9 rules governing certain contracts; amending s.
10 255.077, F.S.; conforming a cross-reference; amending
11 s. 255.078, F.S.; revising the amounts of retainage
12 that certain public entities and contractors may
13 withhold from progress payments for any construction
14 services contract; conforming a provision to changes
15 made by the act; providing applicability; providing an
16 effective date.

17
18 Be It Enacted by the Legislature of the State of Florida:

19
20 Section 1. Paragraph (i) of subsection (7) and subsection
21 (8) of section 218.735, Florida Statutes, are amended to read:
22 218.735 Timely payment for purchases of construction
23 services.—

24 (7) Each contract for construction services between a
25 local governmental entity and a contractor must provide for the

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26 development of a single list of items required to render
27 complete, satisfactory, and acceptable the construction services
28 purchased by the local governmental entity.

29 (i) If a local governmental entity fails to comply with
30 its responsibilities to develop the list required under
31 paragraph (a) or paragraph (b) within the time limitations
32 provided in paragraph (a), the contractor may submit a payment
33 request for all remaining retainage withheld by the local
34 governmental entity pursuant to this section; and payment of any
35 remaining undisputed contract amount, less any amount withheld
36 pursuant to the contract for incomplete or uncorrected work,
37 must be paid within 20 business days after receipt of a proper
38 invoice or payment request. If the local governmental entity has
39 provided written notice to the contractor specifying the failure
40 of the contractor to meet contract requirements in the
41 development of the list of items to be completed, the local
42 governmental entity need not pay or process any payment request
43 for retainage if the contractor has, in whole or in part, failed
44 to cooperate with the local governmental entity in the
45 development of the list or to perform its contractual
46 responsibilities, if any, with regard to the development of the
47 list or if paragraph (8)(c) ~~(8)(f)~~ applies.

48 (8)(a) With regard to any contract for construction
49 services, a local governmental entity may withhold from each
50 progress payment made to the contractor an amount not exceeding

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51 5 ~~10~~ percent of the payment as retainage until ~~50~~-percent
52 completion of such services.

53 ~~(b) After 50-percent completion of the construction~~
54 ~~services purchased pursuant to the contract, the local~~
55 ~~governmental entity must reduce to 5 percent the amount of~~
56 ~~retainage withheld from each subsequent progress payment made to~~
57 ~~the contractor. For purposes of this subsection, the term "50-~~
58 ~~percent completion" has the meaning set forth in the contract~~
59 ~~between the local governmental entity and the contractor or, if~~
60 ~~not defined in the contract, the point at which the local~~
61 ~~governmental entity has expended 50 percent of the total cost of~~
62 ~~the construction services purchased as identified in the~~
63 ~~contract together with all costs associated with existing change~~
64 ~~orders and other additions or modifications to the construction~~
65 ~~services provided for in the contract. However, notwithstanding~~
66 ~~this subsection, a municipality having a population of 25,000 or~~
67 ~~fewer, or a county having a population of 100,000 or fewer, may~~
68 ~~withhold retainage in an amount not exceeding 10 percent of each~~
69 ~~progress payment made to the contractor until final completion~~
70 ~~and acceptance of the project by the local governmental entity.~~

71 ~~(c) After 50-percent completion of the construction~~
72 ~~services purchased pursuant to the contract, the contractor may~~
73 ~~elect to withhold retainage from payments to its subcontractors~~
74 ~~at a rate higher than 5 percent. The specific amount to be~~
75 ~~withheld must be determined on a case-by-case basis and must be~~

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76 | ~~based on the contractor's assessment of the subcontractor's past~~
77 | ~~performance, the likelihood that such performance will continue,~~
78 | ~~and the contractor's ability to rely on other safeguards. The~~
79 | ~~contractor shall notify the subcontractor, in writing, of its~~
80 | ~~determination to withhold more than 5 percent of the progress~~
81 | ~~payment and the reasons for making that determination, and the~~
82 | ~~contractor may not request the release of such retained funds~~
83 | ~~from the local governmental entity.~~

84 | ~~(d) After 50-percent completion of the construction~~
85 | ~~services purchased pursuant to the contract, the contractor may~~
86 | ~~present to the local governmental entity a payment request for~~
87 | ~~up to one-half of the retainage held by the local governmental~~
88 | ~~entity. The local governmental entity shall promptly make~~
89 | ~~payment to the contractor, unless the local governmental entity~~
90 | ~~has grounds, pursuant to paragraph (f), for withholding the~~
91 | ~~payment of retainage. If the local governmental entity makes~~
92 | ~~payment of retainage to the contractor under this paragraph~~
93 | ~~which is attributable to the labor, services, or materials~~
94 | ~~supplied by one or more subcontractors or suppliers, the~~
95 | ~~contractor shall timely remit payment of such retainage to those~~
96 | ~~subcontractors and suppliers.~~

97 | (b) ~~(e)~~ This section does not prohibit a local governmental
98 | entity from withholding retainage at a rate less than 5 ~~10~~
99 | percent of each progress payment, from incrementally reducing
100 | the rate of retainage pursuant to a schedule provided for in the

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101 contract, or from releasing at any point all or a portion of any
 102 retainage withheld by the local governmental entity which is
 103 attributable to the labor, services, or materials supplied by
 104 the contractor or by one or more subcontractors or suppliers. If
 105 a local governmental entity makes any payment of retainage to
 106 the contractor which is attributable to the labor, services, or
 107 materials supplied by one or more subcontractors or suppliers,
 108 the contractor must ~~shall~~ timely remit payment of such retainage
 109 to those subcontractors and suppliers.

110 (c) ~~(f)~~ This section does not require the local
 111 governmental entity to pay or release any amounts that are the
 112 subject of a good faith dispute, the subject of a claim brought
 113 pursuant to s. 255.05, or otherwise the subject of a claim or
 114 demand by the local governmental entity or contractor.

115 (d) ~~(g)~~ The time limitations set forth in this section for
 116 payment of payment requests apply to any payment request for
 117 retainage made pursuant to this section.

118 (e) ~~(h)~~ Paragraph (a) does ~~Paragraphs (a) (d) do~~ not apply
 119 to construction services purchased by a local governmental
 120 entity which are paid for, in whole or in part, with federal
 121 funds and are subject to federal grantor laws and regulations or
 122 requirements that are contrary to any provision of the Local
 123 Government Prompt Payment Act.

124 (f) ~~(i)~~ This subsection does not apply to any construction
 125 services purchased by a local governmental entity if the total

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126 | cost of the construction services purchased as identified in the
 127 | contract is \$200,000 or less.

128 | Section 2. Paragraph (f) of subsection (1) of section
 129 | 255.05, Florida Statutes, is amended to read:

130 | 255.05 Bond of contractor constructing public buildings;
 131 | form; action by claimants.—

132 | (1) A person entering into a formal contract with the
 133 | state or any county, city, or political subdivision thereof, or
 134 | other public authority or private entity, for the construction
 135 | of a public building, for the prosecution and completion of a
 136 | public work, or for repairs upon a public building or public
 137 | work shall be required, before commencing the work or before
 138 | recommencing the work after a default or abandonment, to execute
 139 | and record in the public records of the county where the
 140 | improvement is located, a payment and performance bond with a
 141 | surety insurer authorized to do business in this state as
 142 | surety. A public entity may not require a contractor to secure a
 143 | surety bond under this section from a specific agent or bonding
 144 | company.

145 | (f) The Department of Management Services shall adopt
 146 | rules with respect to all contracts for \$200,000 or less, to
 147 | provide:

148 | 1. Procedures for retaining up to 5 ~~10~~ percent of each
 149 | request for payment submitted by a contractor and procedures for
 150 | determining disbursements from the amount retained on a pro rata

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151 basis to laborers, materialmen, and subcontractors, as defined
 152 in s. 713.01.

153 2. Procedures for requiring certification from laborers,
 154 materialmen, and subcontractors, as defined in s. 713.01, before
 155 final payment to the contractor that such laborers, materialmen,
 156 and subcontractors have no claims against the contractor
 157 resulting from the completion of the work provided for in the
 158 contract.

159

160 The state is not liable to any laborer, materialman, or
 161 subcontractor for any amounts greater than the pro rata share as
 162 determined under this section.

163 Section 3. Subsection (8) of section 255.077, Florida
 164 Statutes, is amended to read:

165 255.077 Project closeout and payment of retainage.—

166 (8) If a public entity fails to comply with its
 167 responsibilities to develop the list required under subsection
 168 (1) or subsection (2), as defined in the contract, within the
 169 time limitations provided in subsection (1), the contractor may
 170 submit a payment request for all remaining retainage withheld by
 171 the public entity pursuant to s. 255.078. The public entity need
 172 not pay or process any payment request for retainage if the
 173 contractor has, in whole or in part, failed to cooperate with
 174 the public entity in the development of the list or failed to
 175 perform its contractual responsibilities, if any, with regard to

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176 the development of the list or if s. 255.078(3) ~~s. 255.078(6)~~
 177 applies.

178 Section 4. Section 255.078, Florida Statutes, is amended,
 179 to read:

180 255.078 Public construction retainage.—

181 (1) With regard to any contract for construction services,
 182 a public entity may withhold from each progress payment made to
 183 the contractor an amount not exceeding 5 ~~10~~ percent of the
 184 payment as retainage until ~~50-percent completion of such~~
 185 services.

186 ~~(2) After 50-percent completion of the construction~~
 187 ~~services purchased pursuant to the contract, the public entity~~
 188 ~~must reduce to 5 percent the amount of retainage withheld from~~
 189 ~~each subsequent progress payment made to the contractor. For~~
 190 ~~purposes of this section, the term "50-percent completion" has~~
 191 ~~the meaning set forth in the contract between the public entity~~
 192 ~~and the contractor or, if not defined in the contract, the point~~
 193 ~~at which the public entity has expended 50 percent of the total~~
 194 ~~cost of the construction services purchased as identified in the~~
 195 ~~contract together with all costs associated with existing change~~
 196 ~~orders and other additions or modifications to the construction~~
 197 ~~services provided for in the contract.~~

198 ~~(3) After 50-percent completion of the construction~~
 199 ~~services purchased pursuant to the contract, the contractor may~~
 200 ~~elect to withhold retainage from payments to its subcontractors~~

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201 ~~at a rate higher than 5 percent. The specific amount to be~~
202 ~~withheld must be determined on a case-by-case basis and must be~~
203 ~~based on the contractor's assessment of the subcontractor's past~~
204 ~~performance, the likelihood that such performance will continue,~~
205 ~~and the contractor's ability to rely on other safeguards. The~~
206 ~~contractor shall notify the subcontractor, in writing, of its~~
207 ~~determination to withhold more than 5 percent of the progress~~
208 ~~payment and the reasons for making that determination, and the~~
209 ~~contractor may not request the release of such retained funds~~
210 ~~from the public entity.~~

211 ~~(4) After 50 percent completion of the construction~~
212 ~~services purchased pursuant to the contract, the contractor may~~
213 ~~present to the public entity a payment request for up to one-~~
214 ~~half of the retainage held by the public entity. The public~~
215 ~~entity shall promptly make payment to the contractor, unless the~~
216 ~~public entity has grounds, pursuant to subsection (6), for~~
217 ~~withholding the payment of retainage. If the public entity makes~~
218 ~~payment of retainage to the contractor under this subsection~~
219 ~~which is attributable to the labor, services, or materials~~
220 ~~supplied by one or more subcontractors or suppliers, the~~
221 ~~contractor shall timely remit payment of such retainage to those~~
222 ~~subcontractors and suppliers.~~

223 ~~(2)(5) Neither~~ This section and ~~nor~~ s. 255.077 do not
224 prohibit ~~prohibits~~ a public entity from withholding retainage at
225 a rate less than 5 ~~10~~ percent of each progress payment, from

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226 incrementally reducing the rate of retainage pursuant to a
 227 schedule provided for in the contract, or from releasing at any
 228 point all or a portion of any retainage withheld by the public
 229 entity which is attributable to the labor, services, or
 230 materials supplied by the contractor or by one or more
 231 subcontractors or suppliers. If a public entity makes any
 232 payment of retainage to the contractor which is attributable to
 233 the labor, services, or materials supplied by one or more
 234 subcontractors or suppliers, the contractor must ~~shall~~ timely
 235 remit payment of such retainage to those subcontractors and
 236 suppliers.

237 (3) ~~(6)~~ ~~Neither~~ This section and ~~nor~~ s. 255.077 do not
 238 require ~~requires~~ the public entity to pay or release any amounts
 239 that are the subject of a good faith dispute, the subject of a
 240 claim brought pursuant to s. 255.05, or otherwise the subject of
 241 a claim or demand by the public entity or contractor.

242 (4) ~~(7)~~ The same time limits for payment of a payment
 243 request apply regardless of whether the payment request is for,
 244 or includes, retainage.

245 (5) ~~(8)~~ Subsection (1) does ~~Subsections (1) (4) do not~~
 246 apply to construction services purchased by a public entity
 247 which are paid for, in whole or in part, with federal funds and
 248 are subject to federal grantor laws and regulations or
 249 requirements that are contrary to any provision of the Florida
 250 Prompt Payment Act.

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251 ~~(6)-(9)~~ This section does not apply to any construction
252 services purchased by a public entity if the total cost of the
253 construction services purchased as identified in the contract is
254 \$200,000 or less.

255 Section 5. (1) This act does not apply to any contract
256 for construction services which is entered into or is pending
257 approval by a public entity, as defined in s. 255.072, Florida
258 Statutes, or by a local governmental entity, as defined in s.
259 218.72, Florida Statutes, or to any construction services
260 project advertised for bid by the public entity or local
261 governmental entity, on or before October 1, 2020.

262 (2) The amendments made to ss. 255.05 and 255.078, Florida
263 Statutes, by this act do not apply to contracts executed under
264 chapter 337, Florida Statutes.

265 Section 6. This act shall take effect October 1, 2020.