The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL:	CS/SB 246
INTRODUCER:	Governmental Oversight and Accountability Committee and Senator Hooper
SUBJECT:	Public Construction
DATE:	October 14, 2019 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Ponder	McVaney	GO	**Fav/CS**
2.			CA	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 246 reduces the amount (referred to as retainage[1]) a state or local governmental entity may withhold from payment to a contractor for any contract for construction services from 10 percent to 5 percent throughout the term of the contract. This change will have a positive fiscal impact on the private sector contractors who will receive a higher percentage of payment as work is completed for construction services.

The bill also removes the discretion of a contractor to present to the public entity a payment request for up to one-half of the retainage held by that entity after 50 percent of the project is completed.

The bill revises the requirements for the Department of Management Services' rules governing certain contracts to align with the reduced retainage cap.

The bill provides that the act does not apply to any contract for construction services entered into or pending approval by a public entity or local government, or to any construction services project advertised for bid by the public entity or local government, on or before October 1, 2020. Additionally, the provisions of the bill do not apply to Florida Department of Transportation construction projects authorized under ch. 337, F.S.

[1] The term "retainage" means a "percentage of what a landowner pays a contractor, withheld until the construction has been satisfactorily completed and all mechanic's liens are released or have expired." BLACK'S LAW DICTIONARY (10th ed. 2014).

The state may incur additional costs as a result of the reduced retainage cap if a contractor or subcontractor fails to adequately perform construction services as contracted.

The bill takes effect October 1, 2020.

II. Present Situation:

Public Construction Project Bonds

Section 255.05, F.S., requires that any person contracting with the state or local government or other public authority for construction or repair of a public building must provide a payment and performance bond. The bond is conditioned upon the contractor's timely performance and prompt payment to all subcontractors or materialmen.[2] The section was created to afford protection to the laborers and materialmen who cannot perfect a mechanic's lien on public property.[3] The public, who is, in effect, the owner of the public works project, is also protected by the payment and performance bond requirements. The payment portion of the bond provides the surety insurer's undertaking to guarantee prompt payment to all subcontractors and materialmen, and the performance bond ensures full performance.[4]

Contracts for construction services with the state in the amount of $100,000 or less are specifically exempted from the requirement of a payment and performance bond.[5] Additionally, the Secretary of Management Services may delegate authority to state agencies to exempt payment and performance bond for projects more than $100,000 but not more than $200,000.[6] When the construction services are for a county, city, political subdivision, or public authority, the official or board awarding the contract for $200,000 or less has the discretion to exempt such project from the execution of the payment and performance bond.[7]

The Department of Management Services is charged with adopting rules with respect to all contracts in the amount of $200,000 or less, to provide procedures for retainage of each request for payment submitted by a contractor for the first half of the contract and procedures for determining disbursements from the retainage for claims made by subcontractors or materialmen.[8]

Section 337.18, F.S., requires a successful bidder for a Department of Transportation construction or maintenance contract to obtain a surety. This section also provides for department project bonds. Section 337.18(1)(f), F.S., specifies that s. 255.05, F.S., is not applicable to the statutory bonds issued pursuant to this section.

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[2] Section 255.05(1)(c), F.S.
[3] *American Home Assurance Co. v. Plaza Materials Corp.,* 908 So. 2d 360, 363 (Fla. 2005) (citation omitted).
[4] *Id.*
[5] Section 255.05(1)(d), F.S.
[6] *Id.*; *See* Rule 60D-50041, F.A.C.
[7] Section 255.05(1)(d), F.S.
[8] Section 255.05(1)(f), F.S.

The Florida Prompt Payment Act and the Local Government Prompt Payment Act

Sections 255.0705 through 255.078, F.S., known as the Florida Prompt Payment Act, govern the timely payment for construction services by the state.[9] Local governmental entities as defined under s. 218.72, F.S., are specifically excluded from the application of those sections. Additionally, contracts or work performed for the Department of Transportation are specifically excluded from the definition of "construction services" under the Florida Prompt Payment Act.[10]

Part VII of ch. 218, F.S., is known as the Local Government Prompt Payment Act and governs local governmental entities[11] in contracting for public construction projects. The stated purpose of the Local Government Prompt Payment Act is to provide for the prompt payments by local governmental entities, interest on late payments, and a dispute resolution process.[12] The Local Government Prompt Payment Act states that it is the policy of this state that "payment for all purchases by local governmental entities be made in a timely manner."[13]

Public Construction Retainage

Retainage is a common construction contracting practice whereby a certain percentage of payment is withheld by the project owner from the general contractor and, in turn, by the general contractor from the subcontractors, to ensure satisfactory completion of the project.[14] Both the Florida Prompt Payment Act and Local Government Prompt Payment Act (collectively, the "Prompt Payment Acts") provide caps on the amount of retainage that may be withheld by a state and local governmental entity. Under the Prompt Payment Acts, up to 10 percent may be withheld by the state or local governmental entity from each progress payment made to the contractor until 50-percent completion of the services.[15] After 50-percent completion, the amount of retainage withheld by the state or local governmental entity may not exceed 5 percent.[16] The term "50-percent completion" has the meaning provided by contract between the state and the contractor, or, if not defined by contract, the point at which the state has expended 50 percent of the total cost of the construction services purchased.[17]

The Prompt Payment Acts specifically provide that state and local governmental entities are not prohibited from contracting with a contractor to withhold a retainage of less than 10 percent of each progress payment, from incrementally reducing the retainage amount, or from releasing, at

[9] Section 255.073, F.S., defines public entity to mean "the state, or any office, board, bureau, commission, department, branch, division, or institution thereof."
[10] Section 255.072(2), F.S.
[11] Section 218.72, F.S., for purposes of the Local Prompt Payment Act, defines "local governmental entity" as 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."
[12] Section 218.71, F.S.
[13] *Id.*
[14] *See* OPPAGA *Special Review: Inflexibility in Contracting and Retainage Practices Could Hurt Construction Industry*, Report No. 00-26, December 2000. Available online at http://www.oppaga.state.fl.us/reports/pdf/0026rpt.pdf. (Last visited September 24, 2019.)
[15] Sections 278.078(1) and 218.735(8)(a), F.S.
[16] Sections 255.078(2) and 218.735(8)(b), F.S.
[17] *Id.*

any point, any portion of retainage held that is attributable to labor, services, or materials supplied for the project.[18]

In accordance with bond requirements found in s. 255.05(1)(f), F.S., Department of Management Services Rule 60D-50041(2), FAC., provides for procedures in instances where a payment and performance bond are not required for a public construction project and requires, in a case where the contractor defaults, the claims made for unpaid bills by laborers, materialmen, and subcontractors of the project be paid from the ten percent (10%) retainage on a pro rata basis.

III. Effect of Proposed Changes:

The bill modifies the retainage cap for public construction projects.

Section 1 amends s. 218.735, F.S., to reduce the retainage cap a local governmental entity may withhold from payment for construction services from 10 percent to 5 percent throughout the entire term of contract for construction services and makes conforming changes. Additionally, this bill eliminates provisions governing retainage after 50 percent completion of the services and removes the discretion of a contractor to present to the public entity a payment request for up to one-half of the retainage held by that entity after 50 percent completion of the services.

Section 2 amends s. 255.05, F.S., to align with the new lower retainage amounts provided in section 4 of the bill. The change in the retainage cap revises requirements for the Department of Management Services' rules for contracts less than $200,000.

Section 3 amends s. 255.077, F.S., to update a cross-reference consistent with the changes included in section 4.

Section 4 amends s. 255.078, F.S., to reduce the retainage cap the state may withhold from payment for construction services from 10 percent to 5 percent throughout the entire term of the contract.

Section 5 specifies that the act does not apply to any contract which is entered into or pending approval by a public entity or local government, or to any construction services project advertised for bid by the public entity or local government, on or before October 1, 2020. This section also provides that the changes made in ss. 255.05 and 255.078, F.S., by this act do not apply to contracts executed under ch. 337, F.S.

Section 6 provides that the bill takes effect October 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. This bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities

[18] Sections 255.078(5) and 218.735(8)(e), F.S.

have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

The bill does not impose, authorize, or raise a state tax or fee.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

This bill does not impact state or local taxes or fees.

B. Private Sector Impact:

The reduction in the retainage cap will likely provide a positive fiscal impact for contractors and subcontractors because it provides a more timely payment of a larger percentage of work performed and invoiced.

C. Government Sector Impact:

The state or local governmental entity may incur additional costs as a result of the reduced retainage cap if a contractor or subcontractor fails to adequately perform construction services as contracted. The state or local governmental entity is not required to withhold retainage for construction services; rather, retainage, in most instances, functions as a secondary security device, supplementing the payment and performance bond. For construction services contracts where a payment or performance bond is not required, the lowered retainage cap potentially may not provide adequate leverage to protect the investment by the state or local governmental entity.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 218.735, 255.05, 255.077, and 255.078.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on October 14, 2019:
The CS corrects a scrivener's error on line 68.

B. Amendments:

None.