

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/CS/HB 585 Payment for Construction Services  
**SPONSOR(S):** Commerce Committee, Regulatory Reform Subcommittee, DiCeglie  
**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 378

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**FINAL HOUSE FLOOR ACTION:** 114 Y's 0 N's **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/CS/HB 585 passed the House on April 26, 2021, as CS/SB 378.

Current law requires prompt payments to parties for construction services, and requires interest to accrue on amounts owed for construction services if the state, a local government, or a private party fails to timely make payments for such services. The calculation of interest is set by statute or determined by the contract. Interest also accrues on amounts owed if a contractor receives payment for labor, services, or materials and fails to make timely payments under the contract obligations for such labor, services, or materials.

If a person receives payment for labor, services, or materials for construction work on private real property and knowingly and intentionally fails to make undisputed payments under the contract obligations for labor, services, or materials, the person commits misapplication of construction funds. Misapplication of construction funds is a felony, the degree of which is determined by the amount of unpaid funds.

Construction contractors are certified by or registered with the Construction Industry Licensing Board (CILB) housed within the Department of Business and Professional Regulation. Certified contractors can practice statewide and are licensed and regulated by the CILB. Registered contractors are licensed and regulated by a local jurisdiction and may practice within that locality.

The bill:

- Increases the interest rate from **1 percent** per month to **2 percent** per month for untimely payments for construction services by the state or local governments;
- Increases the interest rate for untimely payments for private construction services from the interest rate payable on judgments to the interest rate payable on judgments **plus 12 percent per annum**;
- Provides that a party who receives payment from the state, any local government, or public authority for a public works construction project that knowingly and intentionally fails to pay the undisputed contract obligations to another party commits misapplication of construction funds;
- Clarifies that the CILB may discipline a contractor for committing misapplication of construction funds; and
- Requires the CILB to suspend a contractor's licenses for a minimum of one year if the contractor is convicted of misapplication of construction funds.

The bill applies to contracts executed on or after July 1, 2021.

The bill may have an indeterminate negative fiscal impact on state and local governments. See Fiscal Comments.

The bill was approved by the Governor on June 21, 2021, ch. 2021-124, L.O.F., and will become effective on July 1, 2021.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### **Prompt Payment Act for Local Governments – Current Situation**

Chapter 218, part VII, F.S., is known as the “Local Government Prompt Payment Act” (“Act”). The purpose of the Act is to provide for prompt payments by local governments, apply interest on late payments made by local governments, and establish a dispute resolution process for contested payments.<sup>1</sup> The Act defines “local government 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.<sup>2</sup>

Current law provides that when a local government entity enters into a contract for construction services<sup>3</sup> with a contractor,<sup>4</sup> the local government entity must identify the agent,<sup>5</sup> employee, facility, or office who is to receive the contractor’s payment request or invoices.<sup>6</sup> Every local government entity must establish procedures so that every payment request or invoice received by the local government entity is marked as received on the date on which it is delivered to an agent or employee of the local government entity, or a facility or office of the local governmental entity.<sup>7</sup>

When a contractor submits a payment request or invoice, the local government entity must make the payment within:<sup>8</sup>

- 25 business days after the date on which the payment request or invoice is stamped, if an agent must approve the invoice before it is submitted to the entity for payment;
- 20 business days after the date the payment request or invoice is stamped, if an agent is not required to approve the invoice.

If payment is not received by the due date, the contractor may send an overdue notice to the local government entity. Four business days after overdue notice delivery, if the invoice is not rejected, the invoice will be considered undisputed, except for any amounts that are fraudulent or misleading.<sup>9</sup>

If the payment request or invoice does not meet the contract requirements, the local government entity must provide the contractor with a written rejection specifying the deficiency and any action needed to rectify it, within 20 business days of receipt of the payment request or invoice.<sup>10</sup>

If a contractor submits a corrected payment request or invoice, the local government entity must pay or dispute the request within:<sup>11</sup>

- Ten business days after the date the corrected payment request or invoice is stamped as received; or

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<sup>1</sup> S. 218.71, F.S.

<sup>2</sup> S. 218.72(5), F.S.

<sup>3</sup> “Construction services” is defined as all labor, services, and materials provided in connection with the construction, alteration, repair, demolition, reconstruction, or other improvements to real property. S. 218.72(2), F.S.

<sup>4</sup> “Contractor” means the person who contracts directly with a local governmental entity to provide construction services.” S. 218.72(3), F.S.

<sup>5</sup> “Agent” means the project architect, project engineer, or other agency or person acting on behalf of the local governmental entity. S. 218.72(1), F.S.

<sup>6</sup> S. 218.735(1), F.S.

<sup>7</sup> S. 218.74(1), F.S.

<sup>8</sup> S. 218.72(1), F.S.

<sup>9</sup> S. 218.735(1), F.S.

<sup>10</sup> S. 218.735(2), F.S.

<sup>11</sup> S. 218.735(3), F.S.

- The first business day after the local government entity's next regularly scheduled meeting, if the local governmental entity is required by ordinance, charter, or other law to approve or reject the corrected payment request or invoice.

If a local government entity cannot resolve a dispute with the contractor, the dispute must be resolved by the dispute resolution procedure established in the contract or by the local government entity.<sup>12</sup>

When payment is received by a contractor from a local government entity for labor, services, or materials furnished by subcontractors or suppliers, the payment is due to those subcontractors and suppliers within 10 days of the contractor receiving the payment from the local government entity.<sup>13</sup>

If a subcontractor utilizes sub-subcontractors or suppliers, payment to those parties is due within 7 days of the subcontractor receiving payment.<sup>14</sup> Contractors and subcontractors may dispute a party's invoice as long as the contractor or subcontractor notifies the party in writing of the amount in dispute and the actions required to resolve the dispute. However, any undisputed amounts must be paid within the required time periods.<sup>15</sup>

Any payment for construction services that is not made within the required time period accrues interest at a rate of **1 percent per month**, or the rate specified by contract, whichever is greater. A local government entity may not prohibit late interest charges in a contract with a vendor or provider of construction services.<sup>16</sup> In an action to recover amounts due for construction services purchased by a local government entity, a court must award court costs and reasonable attorney fees to the prevailing party.<sup>17</sup>

### **Prompt Payment Act for Local Governments – Effect of the Bill**

The bill increases the interest rate for untimely payments for local government construction services to **2 percent per month**, or the rate specified by contract, whichever is greater.

### **Prompt Payment Act for State Construction Projects – Current Situation**

Sections 255.0705 - 255.078, F.S., are known as the Florida Prompt Payment Act. The act governs the timely payment for construction services<sup>18</sup> by a public entity, except construction services for the Department of Transportation.<sup>19</sup> Public entity means the state, or any office, board, bureau, commission, department, branch, division, or institution thereof.<sup>20</sup>

Every public entity must establish procedures so that every payment request or invoice from a contractor,<sup>21</sup> which is received by the public entity, is marked as received on the date on which it is delivered to an agent,<sup>22</sup> employee, facility, or office of the public entity.<sup>23</sup>

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<sup>12</sup> S. 218.735(4), F.S.

<sup>13</sup> S. 218.735(6), F.S.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Ss. 218.735(9), and 218.75, F.S.

<sup>17</sup> S. 218.76(3), F.S.

<sup>18</sup> "Construction Services" means all labor, services, and materials provided in connection with the construction, alteration, repair, demolition, reconstruction, or any other improvements to real property. The term "construction services" does not include contracts or work performed for the Department of Transportation. S. 255.072(2), F.S.

<sup>19</sup> S. 255.072(2), F.S.

<sup>20</sup> S. 255.072(5), F.S.

<sup>21</sup> "Contractor" means any person who contracts directly with a public entity to provide construction services. S. 255.072(3), F.S.

<sup>22</sup> "Agent" means project architect, project engineer, or any other agency or person acting on behalf of a public entity. S. 255.072(1), F.S.

<sup>23</sup> S. 255.074(1), F.S.

Upon receipt of a contractor's invoice or payment, a public entity must maintain the date of:<sup>24</sup>

- Receipt of the invoice or payment;
- Receipt of the provided goods and services; and
- Inspection and approval of the goods and services.

Approval and inspection of goods or services may take no longer than 5 working days unless the bid specifications, purchase order, or contract specifies otherwise. The latter of these days is the "prompt pay start date."<sup>25</sup>

The public entity must submit the contractor's invoice or payment request to the Chief Financial Officer (CFO). The CFO is a member of the Cabinet and serves as the chief fiscal officer of the state and agency head of the Department of Financial Services (DFS).<sup>26</sup> The public entity must submit this information within 20 days of the prompt pay start date.<sup>27</sup>

Upon receipt of the contractor's invoice or payment, DFS must approve or deny the payment application within 10 days, unless exceptional circumstances require a longer period. If the 10-day period contains fewer than 6 business days, DFS may approve or deny the payment within 6 business days.<sup>28</sup> If payment is not issued within 40 days of the prompt pay start date, interest begins to accrue.<sup>29</sup>

A public entity may dispute any payment but must pay any undisputed amounts. Disputes must 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.<sup>30</sup>

When payment is received by a contractor from a public entity for labor, services, or materials furnished by subcontractors or suppliers, the payment is due to those subcontractors and suppliers within 10 days of the contractor receiving the payment from the local government entity.<sup>31</sup> If a subcontractor utilizes sub-subcontractors or suppliers, payment to those parties is due within 7 days of the subcontractor receiving payment.<sup>32</sup> Contractors and subcontractors may dispute a party's invoice as long as the contractor or subcontractor notifies the party in writing of the amount in dispute and the actions required to resolve the dispute. The actions required to rectify the dispute must be included in the rejection. However, any undisputed amounts are required to be paid within the outlined time limits.<sup>33</sup>

In an action to recover amounts due for construction services purchased by a public entity, a court must award court costs and reasonable attorney fees, if the court finds that the nonprevailing party withheld any portion of the payment that is the subject of the action without any reasonable basis in law or fact to dispute the prevailing party's claim to those amounts.<sup>34</sup>

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<sup>24</sup> S. 215.422(1) and (3), F.S.; Chief Financial Officer, Payment Processing October 2013, <https://www.myfloridacfo.com/Division/aa/documents/2013-PaymentProcessOverviewFinal.pdf> (last visited Mar. 23, 2021).

<sup>25</sup> *Id.*

<sup>26</sup> Art. IV, s. 4, Fla. Const.; Ch. 17, F.S.

<sup>27</sup> S. 215.422(1), F.S.

<sup>28</sup> S. 215.422(1) and (2), F.S.

<sup>29</sup> S. 215.422(3), F.S.

<sup>30</sup> Ss. 215.422(3), and 255.073(2), F.S.

<sup>31</sup> S. 255.073(3), F.S.

<sup>32</sup> *Id.*

<sup>33</sup> S. 255.073(3), F.S.

<sup>34</sup> S. 255.076, F.S.

Any payment for construction services that is not made within the required time period accrues interest at a rate of **1 percent per month**.<sup>35</sup> A public entity may not prohibit late interest charges in a contract with a vendor or provider of construction services.<sup>36</sup>

### **Prompt Payment Act for State Construction Projects – Effect of the Bill**

The bill increases the interest rate for untimely payments for state construction services to **2 percent per month**.

### **Prompt Payment Law for Private Construction Projects – Current Situation**

Section 715.12, F.S., is the Construction Contract Prompt Payment Law. It defines an “obligor” as an owner, contractor, subcontractor, or sub-subcontractor who has an obligation to make payments under a written construction contract. It defines an “obligee” as a contractor, subcontractor, sub-subcontractor, or materialman who is entitled to receive payments under a written construction contract.<sup>37</sup>

An obligee is entitled to payment for his or her construction services, labor, or materials when all of the following have occurred:<sup>38</sup>

- The obligee is entitled to payment at the time and under the terms specified in the contract between the obligor and the obligee;
- The obligee has furnished the obligor with a written request for payment;
- The obligor, except an owner, has been paid for the obligee’s labor, services, or materials described in the obligee’s request for payment by the person immediately above the obligor in the chain of contracts; and
- The obligee has furnished the obligor with all affidavits or waivers required for the owner to make proper payments under the construction lien law.<sup>39</sup>

Beginning 14 days after a payment is due, any payment, except payments withheld pursuant to a good faith dispute or retained in accordance with the contract, bears interest at the rate of interest payable on judgments or the rate specified in the contract, whichever is greater.<sup>40</sup> An obligee may not waive the right to receive interest on a payment before a payment is due under a contract. However, an obligee may waive the right to receive interest due on any late payment on or after the date the payment is due.<sup>41</sup>

The CFO sets the rate of interest on judgments. The CFO adjusts the rate quarterly beginning January 1 and on April 1, July 1, and October 1, by averaging the discount rate of the Federal Reserve Bank of New York for the preceding 12 months, then adding 400 basis points to the averaged federal discount rate.<sup>42</sup> The current interest rate is 4.81 percent per annum or .0131781 percent per day.<sup>43</sup>

### **Prompt Payment Law for Private Construction Projects – Effect of the Bill**

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<sup>35</sup> S. 255.073(4), F.S.

<sup>36</sup> S. 255.075, F.S.

<sup>37</sup> S. 715.12(1) and (3), F.S.

<sup>38</sup> S. 715.12(4), F.S.

<sup>39</sup> The construction lien law requires various notices, demands, and requests to be provided in writing to the homeowner, contractor, subcontractor, lender, and building officials. Florida law requires that some notices, demands, and requests be in the statutory form provided in statute, while others do not have to be in the statutory form. The following notices are required by the act: Notice of Commencement, Notice to Owner, Claim of Lien, Notice of Termination, Waiver or Release of Lien, Notice of Contest of Lien, Contractor’s Final Payment Affidavit, and Demands of Written Statement of Account. *See* Ch. 713, part I, F.S.

<sup>40</sup> S. 715.12(5) and (6)(a), F.S.

<sup>41</sup> S. 715.12(6)(d), F.S.

<sup>42</sup> S. 55.03(1), F.S.

<sup>43</sup> Chief Financial Officer, *Current Judgment Interest Rates*, <https://www.myfloridacfo.com/division/aa/localgovernments/current.htm> (last visited Mar. 23, 2021).

The bill increases the interest rate for untimely payments for private construction services to the interest rate payable on judgments **plus 12 percent per annum**, or the rate specified by contract, whichever is greater.

### **Misapplication of Construction Funds – Current Situation**

Current law requires any person who receives payment for performing construction work to pay any amounts for labor, services, or materials provided for such construction work in accordance with the contract for such labor, services, or materials, unless there is a bona fide dispute regarding the amount due or the terms of the contract allow for retention of such funds.<sup>44</sup>

Any person who receives a payment for construction work to private or public real property must pay, in accordance with the contract terms, the undisputed contract obligations for labor, services, or materials provided for such construction work. If a person fails to do so within 30 days, any unpaid person providing labor, services, or materials for improvements to real property under the contract may file a civil complaint. Remedies for such a complaint include:<sup>45</sup>

- An accounting of the use of any such payment from the person who received such payment;
- A temporary injunction against the person who received the payment, subject to certain bond requirements;
- Prejudgment attachment against the person who received the payment; and
- Such other legal or equitable remedies as may be appropriate.

Misapplication of construction funds is a crime committed by a person who receives payment for performing construction work on private property and knowingly and intentionally fails to pay any amounts owed for labor, services, or materials, in accordance with the contract terms, unless there is a bona fide dispute regarding the amount due. Misapplication of construction funds is punishable as a:<sup>46</sup>

- First degree felony if the amount of misapplied payments has an aggregate value of \$100,000 or more;
- Second degree felony if the amount of misapplied payments has an aggregate value of \$1,000 or more; or
- Third degree felony if the amount of misapplied payments has an aggregate value of less than \$1,000.

There is a permissive inference that a person knowingly and intentionally misapplied construction funds when:<sup>47</sup>

- A valid lien has been recorded against the property for labor, services, or materials;
- The person who ordered the labor, services, or materials has received sufficient funds to pay for such labor, services, or materials; and
- The person has failed, for a period of at least 45 days from receipt of the funds, to remit sufficient funds to pay for such labor, services, or materials, except for funds withheld pursuant to a bona fide dispute regarding the amount due or the terms of the contract allow for retention of such funds.

If a state attorney or statewide prosecutor files an indictment or information charging a licensed contractor with misapplication of construction funds, the state attorney or statewide prosecutor must

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<sup>44</sup> Ss. 255.071(1), and 713.346(1), F.S.

<sup>45</sup> Ss. 255.071(4), and 713.346(4), F.S.

<sup>46</sup> S. 713.345(1), F.S.

<sup>47</sup> *Id.*

provide a copy of the indictment or information to the Department of Business and Professional Regulation (DBPR).<sup>48</sup>

DBPR must promptly open an investigation into the matter and, if probable cause is found, furnish a copy of any investigative report to the state attorney or statewide prosecutor who provided the indictment or information and to the owner of the property, which is the subject of the investigation.<sup>49</sup>

### *Contractors*

The Legislature has determined that it is “necessary in the interest of the public health, safety, and welfare” to regulate the construction industry.<sup>50</sup>

Construction contractors are either certified by or registered with the Construction Industry Licensing Board (CILB). The CILB is housed in DBPR, and consists of 18 members who are appointed by the Governor and confirmed by the Senate. The CILB is responsible for licensing, regulating, and disciplining certified construction contractors.<sup>51</sup>

“Certified contractors” are individuals who pass the state competency examination and obtain a certificate of competency issued by DBPR. Certified contractors may practice in any jurisdiction in the state.<sup>52</sup>

“Registered contractors” are individuals that have taken and passed a local competency examination and can practice contracting only in the local jurisdiction for which the license is issued.<sup>53</sup> Local jurisdictions may approve or deny applications for licensure as a registered contractor, review disciplinary cases, and conduct informal hearings relating to discipline of registered contractors licensed in their jurisdiction. Registered contractors must register with DBPR after obtaining a local license and comply with local and state statutory obligations.<sup>54</sup>

The CILB may take action<sup>55</sup> against a certified or registered contractor if they find the contractor is guilty of violating the contractor’s practice act. Violations include:<sup>56</sup>

- Abandoning a construction project;
- Committing financial mismanagement that causes financial harm to a customer;
- Failing to perform any statutory or legal obligation placed upon a licensee;
- Falsely indicating that payment has been made for all subcontracted work, labor, and materials which results in a financial loss to the owner, purchaser, or contractor;
- Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of contracting or the ability to practice contracting; or
- Proceeding on a job without obtaining applicable local building department permits and inspections.

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* DBPR has authority, for the professions under its jurisdiction, to investigate any legally sufficient complaint that is in writing. When DBPR completes its investigation, it must prepare and submit an investigative report to the probable cause panel for the appropriate board. If probable cause is found, DBPR must file an administrative complaint against the licensee. *See* 455.225, F.S.

<sup>50</sup> S. 489.101, F.S.

<sup>51</sup> *See generally* Ch. 489, Part I, F.S.

<sup>52</sup> S. 489.105, F.S.

<sup>53</sup> S. 489.103, F.S.

<sup>54</sup> Ss. 489.117, and 489.131, F.S.

<sup>55</sup> The CILB may place a contractor on probation, reprimand him or her, revoke or suspend the contractor’s certificate or registration, or deny the issuance of a renewal certificate or registration. The CILB may also require financial restitution to a consumer for financial harm directly related to a violation, require continuing education, or assess costs associated with investigation and prosecution. S. 489.129(1), F.S.

<sup>56</sup> Ss. 455.227(1)(k), and 489.129(1)(o), F.S.

It is the Legislature's intent that minor violations be distinguished from those which endanger the public health, safety, or welfare. The CILB must adopt disciplinary guidelines for each disciplinary action, which they may impose. The disciplinary guidelines must specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses.<sup>57</sup>

Misapplication of construction funds is not expressly enumerated in the list of practice act violations for construction contractors. However, according to DBPR, misapplication of construction funds may fall under the following violations:<sup>58</sup>

- Committing financial mismanagement that causes financial harm to a customer;
- Failing to perform any statutory or legal obligation placed upon a licensee; or
- Falsely indicating that payment has been made for all subcontracted work, labor, and materials which results in a financial loss to the owner, purchaser, or contractor.

According to DBPR, if a contractor is convicted of misapplication of construction funds, the CILB would most likely be able to take action against them for being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of contracting or the ability to practice contracting.<sup>59</sup>

### **Misapplication of Construction Funds – Effect of the Bill**

The bill provides that a party who receives payment from the state, any county, city, or political subdivision, or other public authority for a public works construction project and who knowingly and intentionally fails to pay the undisputed contract obligations to another party for labor, services, or materials, commits misapplication of construction funds.

The bill clarifies that the CILB may discipline a contractor for committing misapplication of construction funds. The bill also provides that if a contractor is convicted of misapplication of construction funds, the CILB must suspend the contractor's licenses for a minimum of one year from the date of conviction. However, this does not prohibit the CILB from imposing additional penalties.

The bill also specifies that a person subject to a civil action for failing to pay undisputed contract obligations commits misapplication of construction funds.

The bill provides that it applies to contracts executed on or after July 1, 2021.

The bill provides an effective date of July 1, 2021.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

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<sup>57</sup> S. 455.2273(1), F.S.

<sup>58</sup> Email from Vicky Summerhill, Department of Business and Professional Regulation, FW: HB 585 Construction Services, (Feb. 22, 2021).

<sup>59</sup> *Id.*

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may decrease the amount of untimely payments to contractors, subcontractors, sub-subcontractors, and material suppliers.

D. FISCAL COMMENTS:

Increasing the interest amount for late payments from 1 percent to 2 percent may have a negative fiscal impact on the state and local governments. However, the impact will vary depending on the amount that is outstanding and the duration of the outstanding payments. Any fiscal impact will only apply to payments not paid on time, as required by statute.