

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 Community Affairs

BILL: CS/SB 346

INTRODUCER: Community Affairs Committee and Senator DiCeglie

SUBJECT: Public Construction

DATE: March 17, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hunter	Ryon	CA	Fav/CS
2.			GO	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 346 requires each contract for construction services between a local government entity and a contractor to include the estimated cost of each item necessary to complete the work. Payment of the contract balance, subject to certain exceptions, must be made within 20 days after providing such a list.

The bill limits the ability of local governments to withhold certain amounts under the contract only to those subject to good faith disputes in writing or claims against public surety bonds. The deadline for a state entity to submit a payment request to the CFO is shortened to 14 days after its receipt. Payment by a local government for undisputed portions of an invoice or payment request must be made according to the terms of the contract or 20 days after receiving the request, whichever is sooner. A local government must commence proceedings to resolve a disputed invoice or payment request within 30 days after receipt and must render its final decision within 45 days from receipt.

The bill revises the definition of “public works project” to prohibit the imposition of certain requirements on contractors for certain public construction projects that exceed \$350,000, in which either state or local funds are used.

The bill takes effect July 1, 2023.

II. Present Situation:

Payments for Public Construction Contracts

Contracts between local governments and private contractors for construction of public projects are subject to prompt payment requirements. The Local Government Prompt Payment Act¹ provides for timely payment by local governmental entities² to construction contractors.³ If payment need not be approved by an agent of the local government, payment is due 20 business days after the payment request or invoice is submitted.⁴ If agent approval is required, payment is due 25 business days after proper receipt.⁵ A local government must identify its agent, employee, facility, or office, to which the contractor may submit a payment request.⁶ A contractor's submitting a payment request to the identified agent, employee, facility, or office of the local government shall be stamped as received and begins the time period for payment or rejection of a payment request.⁷ If a payment request does not meet the contract requirements, the local government must reject the request in writing within 20 business days after the date on which the payment request is stamped as received. The rejection must specify the deficiency and the action necessary to make the proper request.⁸

If a payment request is rejected and the contractor submits a request correcting the deficiency, the corrected payment request or invoice must be paid or rejected on the later of 10 business days after the date of receipt, or if the local governmental entity is required by ordinance, charter, or other law to approve or reject the corrected payment request or invoice, the first business day after the next regularly scheduled meeting of the local government held after the corrected payment request or invoice is received.⁹

If a dispute between the local government and the contractor cannot be resolved by the above procedure, the dispute must be resolved using the dispute resolution procedure or applicable ordinance provided in the contract.¹⁰ Absent a prescribed procedure, the dispute must be determined pursuant to a dispute resolution procedure established by the local government.¹¹

If a local government disputes a portion of a payment request or an invoice, the undisputed portion must be paid timely.¹² A contractor receiving payment from a local government for labor, services, or materials furnished by subcontractors and suppliers hired by the contractor must remit payment due to those subcontractors and suppliers within 10 days after the receiving payment. A subcontractor receiving payment from a contractor for amounts due to

¹ Section 218.70, F.S.

² 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. Section 218.72(5), F.S.

³ Section 218.71, F.S. A contractor is one who contracts directly with a local government to provide construction services. Section 218.72(3), F.S.

⁴ Section 218.735(1)(b), F.S.

⁵ Section 218.735(1)(a), F.S.

⁶ Section 218.735, F.S. This requirement must be included in the contract or provided by the local governmental in a separate written notice, as required under the contract, no later than 10 days after the contract award or notice to proceed.

⁷ Section 218.735(1)(b), F.S.

⁸ Section 218.735(2), F.S.

⁹ Section 218.735(3), F.S.

¹⁰ Section 218.735(4), F.S.

¹¹ Section 218.76(2), F.S.

¹² Section 218.735(5), F.S.

subcontractors and suppliers hired by the subcontractor must remit payment due to those subcontractors and suppliers within 7 days after receiving payment.¹³

Each contract for construction services between a local government and a contractor must provide for the development of a single list of items required to render complete, satisfactory, and acceptable the construction services purchased by the local governmental entity.¹⁴ The contract must specify the process and a reasonable time for developing the list, including the responsibilities of the local government and the contractor in developing and reviewing the list.¹⁵ For construction projects with an estimated cost less than \$10 million, the list must be developed within 30 calendar days after reaching substantial completion of construction as defined in the contract or, if not so defined, upon reaching beneficial occupancy or use.¹⁶ For projects with an estimated cost of \$10 million or more, the list must be developed within 30 calendar days, or, if extended by contract, up to 60 calendar days after reaching substantial completion of construction as defined in the contract or, if not so defined, upon reaching beneficial occupancy or use.¹⁷

The contract must also specify a date for the delivery of the list of items, not to exceed 5 days after the list is developed and reviewed. If the project relates to more than one building or structure, or involves a multi-phased project, the contract must provide for the development of the list of items pertaining to all the construction services purchased under the contract for each building, structure, or phase of the project within the time limitations.¹⁸

The final contract completion date must be at least 30 days after the delivery of the list of items. If the list is not provided to the contractor by the agreed upon date for delivery, the contract time for completion must be extended by the number of days the local government exceeded the list delivery date. Damages may not be assessed against a contractor for failing to complete a project within the time required by the contract unless the contractor failed to complete the project within the contract period as extended.¹⁹ The failure to include any corrective work or pending items not yet completed on the list does not alter the responsibility of the contractor to complete all the construction services purchased pursuant to the contract.²⁰

Upon completing all items on the list, the contractor may submit a payment request for all remaining retainage withheld by the local government. If a good faith dispute exists as to whether one or more items identified on the list have been properly completed, the local government may continue to withhold up to 150 percent of the total costs to complete such items.²¹ All items requiring correction to complete the contract and that are identified after preparation and delivery of the list remain the obligation of the contractor as defined by the contract.²² Warranty items or items not included in the list may not affect the final payment of

¹³ Section 218.735(6), F.S.

¹⁴ Section 218.735(7), F.S.

¹⁵ Section 218.735(7)(a), F.S.

¹⁶ Section 218.735(7)(a)1., F.S.

¹⁷ Section 218.735(7)(a)2., F.S.

¹⁸ Section 218.735(7)(b), F.S.

¹⁹ Section 218.735(7)(c), F.S.

²⁰ Section 218.735(7)(d), F.S.

²¹ Section 218.735(7)(e), F.S.

²² Section 218.735(7)(f), F.S.

retainage nor payment as provided in contracts between the contractor and its subcontractors and suppliers.²³ Retainage may not be held by a local government or a contractor to secure payment of insurance premiums and the final payment of retainage may not be delayed pending a final audit by the local government's or contractor's insurance provider.²⁴

If a local government fails to develop the list in a timely manner, the contractor may submit a payment request for all remaining retainage withheld by the local government and payment of any remaining undisputed contract amounts, less any amount withheld under the contract for incomplete or uncorrected work, which must be paid within 20 business days after receipt of a request. If the local government provides the contractor written notice specifying the failure to meet contract requirements in developing the list of items, the local government need not pay or process any payment request for retainage if the contractor failed to cooperate in developing the list or performing its contractual responsibilities.²⁵

If an improper payment request is submitted by a vendor, within 10 days after receiving the request the local government must notify the vendor, in writing, that the payment request is improper and indicate what corrective action is required.²⁶

If a dispute arises between a vendor and a local government concerning a payment request, the dispute is adjudicated under the dispute resolution procedure established the local governmental entity. Proceedings to resolve the dispute must begin within 45 days after the date the payment request was received and the local government must render its final decision within 60 days after the date the payment request was received. If the dispute is resolved in favor of the local government, interest begins to accrue 15 days after the final decision. If the dispute is resolved in favor of the vendor, interest accrual relates back to the original date the payment became due.²⁷

State government public construction contracts are subject to the Florida Prompt Payment Act.²⁸ If a public entity²⁹ disputes a portion of a payment request, the undisputed portion must be timely paid.³⁰

Under procedures established by the public entity, each payment request is marked as received on the date it is delivered to the agent, employee, designated facility or office of the public entity. If the terms under which a purchase is made allow for partial deliveries and a payment request is submitted for a partial delivery, the time for such payment must be calculated from the time of the partial delivery and the submission of the payment request. A public entity must submit a payment request to the Chief Financial Officer for payment no more than 20 days after receipt.³¹

²³ Section 218.735(7)(g), F.S.

²⁴ Section 218.735(7)(h), F.S.

²⁵ Section 218.735(7)(i), F.S.

²⁶ Section 218.76(1), F.S.

²⁷ Section 218.76(2)(a), F.S.

²⁸ Section 255.0705, F.S. This act expressly excludes local governments as defined in s. 218.72, F.S. Section 255.072(5), F.S.

²⁹ The state, or any office, board, bureau, commission, department, branch, division, or institution thereof. Section 255.072(5), F.S.

³⁰ Section 255.073(2), F.S.

³¹ Section 255.074, F.S.

Prohibited Governmental Actions Related to Public Works Projects

Except as required by federal or state law, the state or any political subdivision³² that contracts for a public works project³³ may not:

- Prevent a certified, licensed, or registered contractor, subcontractor, or material supplier or carrier, from participating in the bidding process based on the geographic location of the company headquarters or offices of the contractor, subcontractor, or material supplier or carrier submitting a bid on a public works project or the residences of employees of such contractor, subcontractor, or material supplier or carrier;
- Require a contractor, subcontractor, or material supplier or carrier engaged in the project to:
 - Pay employees a predetermined amount of wages or prescribe any wage rate;
 - Provide employees a specified type, amount, or rate of employee benefits;
 - Control, limit, or expand staffing; or
 - Recruit, train, or hire employees from a designated, restricted, or single source.
- Prohibit any contractor, subcontractor, or material supplier or carrier from submitting a bid on the project if such individual is able to perform the work described and is qualified, licensed, or certified as required by state law.³⁴

The foregoing governmental actions are prohibited only for projects that:

- Exceed \$1 million in value;
- Are paid for with any state-appropriated funds; and
- Are to construct, maintain, repair, renovate, remodel, or improve any building, road, street, sewer, storm drain, water system, site development, irrigation system, reclamation project, gas or electrical distribution system, gas or electrical substation, or other facility, project, or portion thereof that is owned in whole or in part by any political subdivision.³⁵

Under current law, a political subdivision, for instance, may impose the otherwise prohibited requirements on contractors for projects that are paid for entirely with local funds or, if state funds are used, for projects up to \$1 million.

III. Effect of Proposed Changes:

Prompt Pay for Public Construction

The bill amends the requirements for construction service contracts between local government and contractors for public construction projects. The local government's list of items required to

³² "Political subdivision" means a separate agency or unit of local government created or established by law or ordinance and the officers thereof. The term includes, but is not limited to, a county; a city, town, or other municipality; or a department, commission, authority, school district, taxing district, water management district, board, public corporation, institution of higher education, or other public agency or body thereof authorized to expend public funds for construction, maintenance, repair, or improvement of public works. *See* s. 255.0992(1)(a), F.S.

³³ "Public works project" means an activity exceeding \$1 million in value that is paid for with any state-appropriated funds and which consists of the construction, maintenance, repair, renovation, remodeling, or improvement of a building, road, street, sewer, storm drain, water system, site development, irrigation system, reclamation project, gas or electrical distribution system, gas or electrical substation, or other facility, project, or portion thereof that is owned in whole or in part by any political subdivision. *See* s. 255.0992(1)(b), F.S.

³⁴ Section 255.0992, F.S.

³⁵ Section 255.0992(1)(b), F.S.

render complete, satisfactory, and acceptable the construction services required under the contract must include a dollar valuation reasonably determined by the contractor as a portion of the contract value to complete the items on the list. The bill amends the deadline for developing the list of items required for construction contracts with an estimated cost of \$10 million or more, removing the option to extend the deadline beyond 30 days. The bill also adds a new requirement specifying the date for delivering the list of items. The local government must pay the contractor the remaining balance of the contract within 20 days after developing the list, including remaining retainage withheld, less an amount that equals the estimated cost to complete the items on the list. For state government entities, similar language for timely payment under construction contracts are incorporated for project closeout and payment of retainage.

The bill requires that if a local government has provided written notice to the contractor specifying the failure to meet contract requirements in the development of the list of items to be completed, the local government must pay the contractor the remaining balance of the contract, less an amount equal to 150 percent of the estimated cost to complete the items that the local governmental entity intended to include on the list.

The bill removes the authority of a local government to withhold any amounts for payment or release that are subject to a claim or demand by the local government or contractor, limiting withholding only for good faith disputes in writing pursuant to the contract or certain bond claims. The bill conforms the language for timely payment for purchases of construction services with public construction retainage.

The bill reduces the time a dispute proceeding must be commenced by a local government to 30 days after the date the payment request was received by the local governmental entity. The time to for the local government to make a final determination on such a dispute is reduced to 45 days after the date the payment request was received by the local government.

The bill amends the requirement for payment of undisputed portions of construction contractor payment requests, requiring payment as required under the contract or 20 days after receipt of the request, whichever is earlier.

The bill amends the time a public entity must submit a payment request to the Chief Financial Officer for payment from 20 days after receipt of the payment request to 14 days.

Public Works Projects

The bill amends the definition of “public works project” in s. 255.0992, F.S., to reduce the project threshold from \$1 million to \$350,000, for which the governmental actions identified in s. 255.0992(2)(b)-(c), F.S., are prohibited. The bill also applies those prohibited governmental actions to public works projects paid for with local funds.

With this change, political subdivisions,³⁶ cannot, for example, exclude certain contractors from bidding on a public works project or impose certain wage and employment conditions on

³⁶ “Political subdivision” means a separate agency or unit of local government created or established by law or ordinance and the officers thereof. The term includes, but is not limited to, a county; a city, town, or other municipality; or a department, commission, authority, school district, taxing district, water management district, board, public corporation, institution of

contractors if the value of the project exceeds \$350,000 and is paid for with any local or state-appropriated funds.

The bill takes effect on July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may have a positive financial impact on building contractors to the extent payments of undisputed amounts under contracts are paid more promptly.

The change to the definition of “public works project” may result in a shift in the award of certain construction contracts among locally-based and out of town contractors. Preventing political subdivisions from imposing certain predetermined wage, benefit, and staffing requirements for certain public works projects may have a positive fiscal impact on contractors and a potential negative fiscal impact on contractor employees.

higher education, or other public agency or body thereof authorized to expend public funds for construction, maintenance, repair, or improvement of public works. *See* s. 255.0992(1)(a), F.S.

C. Government Sector Impact:

The bill may have a negative fiscal impact on local governments to the extent they must settle construction contracts under shorter deadlines.

The change to the definition of “public works project” may increase competition and lower costs for local public construction projects exceeding \$350,000.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 166.033, 218.735, 218.76, 255.073, 255.074, 255.077, 255.078, and 255.0992.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on March 15, 2023:

The CS removes section 1 of the bill relating to issuing development permits and orders.

As it pertains to the prompt pay provisions, the CS requires that the estimated costs to complete all items on a construction list must be “a dollar valuation, reasonably determined by the contractor as a portion of the contract value.” The bill as filed required estimated costs to be calculated “using reasonable market rates.”

The CS restores the ability for political subdivisions to impose the governmental actions identified in s. 255.0992(2)(b)-(c), F.S., for public works projects, but only for those projects that do not exceed \$350,000.

B. Amendments:

None.