

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/CS/SB 346

INTRODUCER: Governmental Oversight and Accountability Committee; Community Affairs Committee; and Senator DiCeglie

SUBJECT: Public Construction

DATE: March 30, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hunter</u>	<u>Ryon</u>	<u>CA</u>	<u>Fav/CS</u>
2.	<u>Harmsen</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 346 requires each contract for construction services between a local government entity and a contractor to include a list of items required to render complete, satisfactory, and acceptable the construction services contracted for which outlines the estimated cost of each item necessary to complete the work. The local government must pay all portions of the contract balance, except for 150 percent of the portion attributed to those projects on the list, within 20 days after the list is created, subject to certain exceptions. A local government must pay the contractor for the remaining list projects upon their total completion, subject to certain exceptions.

The bill limits local governments' ability to withhold certain amounts under the contract to only those subject to a written good faith dispute or claims against public surety bonds.

The bill shortens timeframes in which a disputed construction services contract must be resolved, and clarifies that a local government must pay the undisputed portions of a contract within 20 days.

The bill makes similar conforming changes to construction services contracts with public entities.

The bill revises the definition of “public works project” to include any construction, maintenance, repair, renovation, remodeling, improvement, or portion thereof that uses any amount of state-appropriated funds. This will prohibit the political subdivision that undertakes the public works project that uses state-appropriated funds from imposing specified requirements on contractors.

The bill may have a negative fiscal impact on local governments; however, the impact is indeterminate.

The bill takes effect July 1, 2023.

II. Present Situation:

Prompt 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 an agent of the local government is not required to approve payment, then payment is due 20 business days after receipt of the payment request or invoice.⁴

If local government 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 Once an agent, employee, facility, or office receives a contractor’s payment request, it must stamp the request as received; this 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 its receipt. The rejection must specify both the deficiency and its resolution.⁸ If the contractor corrects the deficiency, the local government must pay the corrected payment request or invoice on the later of 10 business days after it received the corrected invoice, or, if the local government must approve the invoice, the first business day after its next regularly scheduled meeting.⁹

If a dispute between the local government and the contractor cannot be resolved by a local government’s requirement for cure letter, the dispute must be resolved using the dispute

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. Proper receipt occurs when the payment request or invoice is stamped as received on the day that it is delivered to an agent or employee of the local government entity or of a facility or office of the local governmental entity, as provided in s. 218.74(1), F.S.

⁶ Section 218.735(1)(b), 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.

resolution procedure or applicable ordinance provided in the contract.¹⁰ Absent a prescribed procedure, the dispute must be resolved 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, it must still timely pay the undisputed portion.¹² A contractor who receives a local government's payment for labor, services, or materials must remit payments due to its subcontractors and suppliers within 10 days after it receives payment from the local government. A subcontractor must remit payments due to its subcontractors and suppliers within 7 days after it receives payment.¹³

Punch List

Each local government contract for construction services must provide for the development of a single list of items required to render complete, satisfactory, and acceptable construction services purchased by the local governmental entity (also called a "punch list").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 Generally, the punch list is required to be created after substantial completion of the construction project and must include those projects necessary to repair or complete the project in its entirety.¹⁶

For construction projects of 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 defined, upon reaching beneficial occupancy or use.¹⁷ The general deadline for completion of the list for construction projects that cost \$10 million or more is the same (30 days after reaching substantial completion), but the deadline may be extended by contract to 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.¹⁸ The local government's contract must specify the date that the deliverables list must be given to the contractor. This date cannot be later than 5 days after the deliverables list completion and review.

If the project relates to construction services on more than one building or structure, or involves a multi-phased project, the same general timeframes apply for creation of a deliverables list, but a list must be created for each building, structure, or phase of the project.¹⁹

¹⁰ Section 218.735(4), F.S.

¹¹ Section 218.76(2), F.S.

¹² Section 218.735(5), F.S. Payment must be made within 25 days after the payment request or invoice is properly received, or within 20 days of the submission of an invoice by a contractor (if an agent does not need to approve the payment).

¹³ Section 218.735(6), F.S.

¹⁴ Section 218.735(7), F.S.

¹⁵ Section 218.735(7)(a), F.S.

¹⁶ See, e.g., Town of Jupiter Island, *Construction General Conditions*, s. 9.4, <https://townofjupiterisland.com/wp-content/uploads/2019/01/Construction-General-Conditions.pdf> (last visited Mar. 29, 2023); and Monroe County, Florida, *General Conditions of the Contract for Construction*, s. 9.8.2, https://www.monroecounty-fl.gov/DocumentCenter/View/28603/General-Requirements-from-RFP_22021---DO-NOT-DELETE?bidId= (last visited Mar. 29, 2023).

¹⁷ Section 218.735(7)(a)1., F.S.

¹⁸ Section 218.735(7)(a)2., F.S.

¹⁹ Section 218.735(7)(b), F.S.

The final contract completion date must be at least 30 days after the deliverables list is given to the contractor. If the list is not provided to the contractor by the agreed upon delivery date, the contract's completion date 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 its failure to complete a project within the time required, unless the contractor failed to complete the project within the contract period as extended.²⁰ 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.²¹

Retainage

A local government can withhold up to 5 percent of each progress payment as retainage.²² Once a contractor has completed all items on the deliverables list, it can submit a payment request for all remaining retainage withheld by the local government.²³ If a good faith dispute exists as to whether one or more items on the deliverables list have been properly completed, the local government may continue to withhold up to 150 percent of the total costs to complete such items.²⁴ All items requiring correction to complete the contract and that are identified after preparation and delivery of the list remain the contractor's obligation as defined by the contract.²⁵ Warranty items or items not included in the list may not affect the final payment of retainage nor payment as provided in contracts between the contractor and its subcontractors and suppliers.²⁶ A local government or contractor cannot withhold retainage 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.²⁷

If a local government fails to develop the deliverables 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 gives the contractor written notice that it failed to meet contract requirements in developing the deliverables list, then the local government need not pay or process any payment request for retainage.²⁸

Improper Payment Requests and Resolution of Disputes

If a vendor submits an improper payment request, the local government must notify the vendor that its request is improper within 10 days of its receipt. The local government's notice must indicate what corrective action is required.²⁹

²⁰ Section 218.735(7)(c), F.S.

²¹ Section 218.735(7)(d), F.S.

²² Section 218.735(8), F.S.

²³ Section 218.735(7)(e), F.S.

²⁴ *Id.*

²⁵ Section 218.735(7)(f), F.S.

²⁶ Section 218.735(7)(g), F.S.

²⁷ Section 218.735(7)(h), F.S.

²⁸ Section 218.735(7)(i), F.S.

²⁹ Section 218.76(1), F.S.

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; 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.³⁰

Public Entity Construction Contracts

State government public construction contracts are subject to the Florida Prompt Payment Act.³¹ If a public entity³² disputes a portion of a payment request, the undisputed portion must be timely paid.³³

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.³⁴

Prohibited Governmental Actions Related to Public Works Projects

Except as required by federal or state law, the state or any political subdivision³⁵ that contracts for a public works project³⁶ 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

³⁰ Section 218.76(2)(a), F.S.

³¹ 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.

³² The state, or any office, board, bureau, commission, department, branch, division, or institution thereof. Section 255.072(5), F.S.

³³ Section 255.073(2), F.S.

³⁴ Section 255.074, F.S.

³⁵ “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.

³⁶ “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.

- 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.³⁷

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.³⁸

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 governments and contractors and public entities and contractors for public construction projects.

Punch List

Under **section 1** of the bill, a local government must include in its contract for construction services, a process by which the contractor will develop a punch list and determine the cost for each item on that list. The punch list enumerates the projects required to complete the contract.

The punch list is created within a contractually-specified timeframe after the contractor reaches substantial completion of the construction services as defined in the contract, or if that is not defined, then after the project reaches beneficial occupancy or use. If the contract is valued at less than \$10 million, then the punch list must be developed within 30 calendar days; if the contract is valued at \$10 million or more, then it must be developed within 45 calendar days.

If a local government fails to develop a punch list within either 30 or 45 days of the project's substantial completion, depending on the contract value, then the contractor may submit a payment request for the contract balance, including the remaining retainage, and the local government must pay it within 20 business days. Conversely, if a contractor fails to coordinate with the local government to create a punch list in the required timeframe and the local government has given written notice of the failure, then the local government may keep back 150 percent of the estimated costs required to complete the items it intended to include on the punch list. The local government must still pay the contractor the remaining contract balance, which includes the retainage.

³⁷ Section 255.0992, F.S.

³⁸ Section 255.0992(1)(b), F.S.

Prompt Payment

The bill adds a new requirement that the local government must pay the remaining contract balance within 20 business days after the punch list has been developed. This payment must include the remaining retainage withheld, minus 150 percent of the cost to complete the punch list projects. Once the contractor completes all of the deliverables on the punch list, it may submit a payment request for this amount. The local government must pay, unless a good faith dispute exists regarding whether one or more items on the punch list has been completed pursuant to the contract. If a good faith dispute exists, then the local government can continue to withhold up to 150 percent of the total cost to complete those items.

Pursuant to the bill, a local government can no longer 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 made in writing pursuant to the contract or for certain bond claims disputed pursuant to s. 255.05, F.S.

Payment Disputes

Section 2 of the bill reduces the time afforded for a contract dispute regarding improper payment. A local government must begin its dispute proceeding within 30 days after it received a contractor's payment request. The local agency must render a final decision in the dispute within 45 days of its receipt of the payment request, versus 60 days.

Public Entity Provisions

Section 5 of the bill requires construction contracts with public entities to specify the process for the creation of a punch list and for the determination of the costs associated with those projects required to complete the contract, consistent with changes to local government construction contracts. Likewise, the parties have 30 days from substantial completion of construction services, as defined in a contract of less than \$10 million, or if not defined, then from beneficial occupancy or use, to develop and review the punch list and associated costs. If the contract is valued at \$10 million or more, then the parties have 45 days.

If the public entity fails to coordinate to create the punch list, then it must pay the contractor all remaining retainage withheld within 20 business days of receipt of the contractor's payment request. However, a public entity is not required to pay or process a payment request for retainage if the contractor did not cooperate or failed to perform its contractual duties in the development of the punch list.

Like its local government counterpart, a public entity must, pay the remaining contract balance, including the remaining retainage, within 20 business days after the punch list is developed, and after its receipt of a proper invoice or payment request. The contract balance does not include 150 percent of the estimated cost to complete the items on the punch list.

Section 3 of the bill requires a public entity to pay the undisputed portions of a construction contractor's payment request, as required under the contract or within 20 days of the request, whichever is earlier.

Section 4 reduces the time in which a public entity must submit a payment request to the Chief Financial Officer for payment from 20 to 14 days after its receipt of the payment request.

Section 6 of the bill clarifies that the public entity is always permitted to withhold a retainage payment that is the subject of a good faith dispute made in writing pursuant to the contract, or the subject of a claims against public surety bonds, but can no longer withhold amounts that are subject to a claim or demand by the public entity or the contractor.

Public Works Projects

Section 7 of the bill amends the definition of “public works project” in s. 255.0992, F.S., to include any construction, maintenance, repair, renovation, remodeling, or improvement activity that is paid for with state-appropriated funds. Therefore, political subdivisions³⁹ that pay for public works projects with any amount of state-appropriated funds cannot, for example:⁴⁰

- Exclude contractors from bidding on a public works project based on their geographic location;
- Impose certain wage and employment conditions on contractors and their employees;
- Require that a contractor recruit, train, or hire employees from a designated, restricted, or single source; and
- Prohibit any contractor, subcontractor, materials supplier, or carrier from submitting a bid if the entity is qualified, licensed, or certified.

Section 8 provides that the bill takes effect on July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties’ or municipalities’ ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

³⁹ “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.

⁴⁰ Section 255.0992(2)(b)-(c), F.S.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

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.

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.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

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

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

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

CS/CS by Governmental Oversight and Accountability on March 29, 2023:

The committee substitute:

- Requires a local government’s or public entity’s contract for construction services to include a prescribed process that the contractor must use to determine the estimated cost to complete the projects that remain after substantial completion of the overall construction project.
- Distinguishes the reasonable time in which the parties to both local government and public entity construct contracts have to develop the punch list—allowing up to 30 days for contracts under \$10 million, and up to 45 days for contracts of \$10 million or more.
- Allows a local government to retain up to 150% of the estimated cost to complete items on the punch list after it receives a contractor’s request that it pay the contract balance, and clarifies that the local government must pay the withheld cost upon completion of those punch list projects—barring a good faith dispute.
- Requires a local government and public entity to present its good faith dispute in writing before it may refuse to pay on the basis thereof.
- Clarifies that a public entity must pay the remaining contract balance (excluding costs associated with the punch list) only after the punch list has been developed, and within 20 days of its receipt of a proper invoice or payment request.
- Removes language included in the bill that defined a public works project as any that uses any local funds that exceeds \$350,000.
- Defines a public works project as any activity that is paid for with any state-appropriated funds, deleting any dollar threshold entirely. This will prevent state and local governments from using the following provisions in their public works contract procurements:
 - geographic location restrictions for the sourcing of a contractor, supplier, or carrier;
 - wage rate and employee benefit prescriptions; and
 - limits on the source of employee recruitment, training, or hiring.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
