

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 383 Public Construction

SPONSOR(S): State Affairs Committee and Local Administration, Federal Affairs & Special Districts Subcommittee, Griffiths and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 346

FINAL HOUSE FLOOR ACTION: 83 Y's

29 N's

GOVERNOR'S ACTION: Approved

SUMMARY ANALYSIS

CS/CS/HB 383 passed the House on May 3, 2023, as CS/CS/SB 346.

Contracts for construction services between local government entities and contractors are subject to requirements for prompt payment. Public construction contracts may provide for withholding payment of certain sums pending final completion, called retainage, as well as the posting of a surety bond by the contractor. When the work under a contract for construction of public improvements nears completion, the government entity must provide a list of items required to finish the contract before final payment is made. For purposes of certain statutory limitations, "public works projects" are defined to mean an activity exceeding \$1 million in value that is paid for with any state-appropriated funds. When required, a state government entity must submit a payment request to the Chief Financial Officer (CFO) within 20 days of receiving the request.

The bill revises procedures for construction contracts between governmental entities and contractors by requiring:

- The "punch list" to contain the estimated cost to complete each item on the list and the process for determining the estimated cost;
- Payment of the contract balance, subject to certain exceptions, be made within 20 business days after providing such a list;
- Local governments to only withhold payment on the basis of a good faith dispute under the contract made in writing or for claims against public surety bonds;
- State entities to submit a payment request to the CFO within 14 days of receipt;
- State entities to make payment for undisputed portions of an invoice or payment request at the sooner of the date specified in the contract or 20 business days after receiving the request; and
- Local governments to commence proceedings to resolve a disputed invoice or payment request within 30 days after receipt and render a final decision within 45 days of receipt.

The bill amends the definition of "public works projects" to include construction activities paid for with any state-appropriated funds, instead of limiting the definition to those activities paid for with state-appropriated funds exceeding \$1 million.

The bill may have a financial impact to the extent local governments are required to act under shorter deadlines. The bill may have a positive financial impact on private sector building contractors to the extent payments of undisputed amounts under contracts are paid more promptly.

The bill was approved by the Governor on May 25, 2023, ch. 2023-134, L.O.F., and will become effective on July 1, 2023.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

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 Once an agent, employee, facility, or office of the local government receives a contractor's payment request, it must stamp the request as received. This begins the 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 contractor corrects the deficiency, the local government must pay the corrected payment request or invoice by the latter of 10 business days after it received the corrected invoice or, if the local governmental entity is required by ordinance, charter, or other law to approve the corrected payment request or 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 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 receiving payment from the local government. A subcontractor must remit payment due to its subcontractors and suppliers within seven days after receiving payment.¹³

¹ S. 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. S. 218.72(5), F.S.

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

⁴ S. 218.735(1)(b), F.S.

⁵ S. 218.735(1)(a), F.S.

⁶ S. 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 S. 218.735(1)(b), F.S.

⁸ S. 218.735(2), F.S.

⁹ S. 218.735(3), F.S.

¹⁰ S. 218.735(4), F.S.

¹¹ S. 218.76(2), F.S.

¹² S. 218.735(5), F.S.

¹³ S. 218.735(6), F.S. This subsection does not prohibit a contractor or subcontractor from disputing all or any portion of a payment allegedly due to another party if the contractor or subcontractor notifies the party whose payment is disputed, in writing, of the amount in dispute and the actions required to cure the dispute.

Each local government contract for construction services must provide for the development of a single list of items, commonly referred to as a “punch list,”¹⁴ required to render complete, satisfactory, and acceptable the construction services purchased by the local governmental entity.¹⁵ 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.¹⁶ 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.¹⁷ However, for projects with an estimated cost of \$10 million or more, the deadline may be extended by contract, up to 60 calendar days after reaching substantial completion of the construction as defined in the contract or, if not so defined, upon reaching beneficial occupancy or use.¹⁸

The contract must specify a date for the delivery of the list of items, not to exceed five 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.¹⁹

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.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

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.²² 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.²³ 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.²⁴ 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.²⁵

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

¹⁴ Kacie Goff, *What is a Punch List?*, Bankrate, <https://www.bankrate.com/real-estate/what-is-a-punch-list/> (last visited Apr. 17, 2023).

¹⁵ S. 218.735(7), F.S.

¹⁶ S. 218.735(7)(a), F.S.

¹⁷ S. 218.735(7)(a)1., F.S.

¹⁸ S. 218.735(7)(a)2., F.S.

¹⁹ S. 218.735(7)(b), F.S.

²⁰ S. 218.735(7)(c), F.S.

²¹ S. 218.735(7)(d), F.S.

²² S. 218.735(7)(e), F.S.

²³ S. 218.735(7)(f), F.S.

²⁴ S. 218.735(7)(g), F.S.

²⁵ S. 218.735(7)(h), F.S.

retainage if the contractor failed to cooperate in developing the list or performing its contractual responsibilities.²⁶

If a vendor submits an improper payment request, the local government must notify the vendor, in writing, that its request is improper within 10 days of its receipt. The local government's notice must indicate what corrective action is required.²⁷

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 by the local government 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.²⁸

Public Entity Construction Contracts

State government public construction contracts are subject to the Florida Prompt Payment Act.²⁹ If a state entity, referred to as a public entity,³⁰ disputes a portion of a payment request, the undisputed portion must be timely paid.³¹

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.³²

Prohibited Governmental Actions Related to Public Works Projects

Except as required by federal or state law, the state or any political subdivision that contracts for a public works project may not:³³

- 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.

²⁶ S. 218.735(7)(i), F.S.

²⁷ S. 218.76(1), F.S.

²⁸ S. 218.76(2)(a), F.S.

²⁹ S. 255.0705, F.S. This act expressly excludes local governments as defined in s. 218.72, F.S. S. 255.072(5), F.S.

³⁰ A "public entity" is the state, or any office, board, bureau, commission, department, branch, division, or institution thereof. S. 255.072(5), F.S.

³¹ S. 255.073(2), F.S.

³² S. 255.074, F.S.

³³ S. 255.0992, F.S.

- 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

These provisions apply to projects that:

- Exceed \$1 million in value;
- Are paid for with any state-appropriated funds; and
- Are to construct, maintenance, 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

Effect of the Bill

The bill amends the requirements for construction service contracts between local governments and contractors for public construction projects. The local government's list of items required to render complete, satisfactory, and acceptable the construction services required under the contract must contain the estimated cost to complete each item and the process for determining the estimated cost. The bill also adds a new requirement specifying the date for delivering the list of items by requiring the local government to pay the contractor the remaining balance of the contract within 20 business days after developing the list, including remaining retainage withheld, less an amount that equals 150 percent of 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.

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 bill requires the local government to 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 to only good faith disputes made in writing pursuant to the contract or certain surety 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 from 45 days 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 from 60 days to 45 days after the date the payment request was received by the local government.

The bill requires state entities to make payment for undisputed portions of construction contracts by the earlier of 20 business days after receipt of the payment request or the date specified in the contract.

The bill amends the time a state 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.

³⁴ This provision does not apply to vendors who have previously been convicted of certain crimes involving business with a public entity and those who have been found by a court to have committed discrimination based on race, gender, national origin, disability, or religion. Ss. 287.133 and 287.134, F.S.

³⁵ S. 255.0992(1)(b), F.S.

The bill amends the definition of “public works projects” to include construction activities paid for with any state-appropriated funds, instead of limiting the definition to those activities paid for with state-appropriated funds exceeding \$1 million.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill may have a negative fiscal impact on local governments to the extent they must settle construction contracts under shorter deadlines. However, the revised definition of “public works project” may increase competition and lower costs for local government public construction projects.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.