SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 1464

SPONSOR: Senator Webster

SUBJECT: Prompt payment and retainage reform

DATE: March 10, 2000 REVISED: 4/4/00

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bowman	Yeatman	CA	Fav/1 Amendment
2.			RI	
3.			CM	
4.				
5.				

I. Summary:

This bill revises the Florida Prompt Payment Act to:

- Change the time period within which payment to a contractor must be made by a local government subsequent to a payment.
- Limit the amount of retainage that can be required for bonded public or bonded private projects to no more than 5% of the progress payment.
- Require governmental entities to release retainage based on the completion of individual subcontracts, rather than the general contract alone.
- Require that public and private entities pay interest on retainage payments that are late.
- Provide that in disputes over prompt payment and retainage under the act, that the prevailing party is entitled to recover attorney's fees and costs.

This bill amends the following sections of the Florida Statutes: 218.72, 218.73, 218.735, 218.74, 218.75, 218.76, and 715.12; and creates the following section of the Florida Statutes: 255.049.

II. Present Situation:

Florida Prompt Payment Act

Part VII of chapter 218, F.S., known as the "Florida Prompt Payment Act," was enacted in 1989 to provide for prompt payments by local governmental entities to private vendors. (Section 215.422, F.S., addresses prompt payment of vendors by state agencies.)

Section 218.73, F.S., establishes timely payment standards for nonconstruction services. Payment deadlines are calculated from the latest of:

- The date on which a proper invoice is received by the chief disbursement officer of the local governmental entity after approval by the governing body, if required; or
- If a proper invoice is not received by the local governmental entity, the date:

- On which delivery of personal property is accepted by the local governmental entity;
- On which services are completed;
- On which the rental period begins; or
- On which the local governmental entity and vendor agree in a contract that may provide dates relative to payment periods.

Section 218.735, F.S. establishes timely payment standards for construction services. The due date for payment is either 20 business days after:

- The invoice is stamped as received by the government entity, if the project architect or engineer does not need to approve the invoice prior to the invoice being submitted to the entity.
- The invoice has been approved by the project architect or engineer and the invoice has been stamped as received by the government entity, in the case of projects requiring architect or engineer approval.

Each local governmental entity is required to establish procedures whereby each invoice received by the local governmental entity shall be marked as having been received on the date on which it is first delivered into the hands of an agent or employee of the local governmental entity or is first delivered to a facility or office of the local governmental entity. The date so marked shall be the date on which the invoice is received. The time at which payment shall be due from a local governmental entity shall be 45 days from the date on which the proper invoice is received or when one of the above criteria are met for the delivery of services to the local government.

All payments due from a local governmental entity and not made within 45 days shall bear interest from 30 days after the due date at the rate of 1 percent per month on the unpaid balance. The vendor must invoice the local governmental entity for any interest accrued in order to receive the interest payment. Any overdue period of less than 1 month shall be considered as 1 month in computing interest. Unpaid interest compounds monthly. With respect to each past due payment, interest ceases to accrue after interest on that payment has accrued for 12 months.

Section 218.74, F.S., provides that all payments due from a local government entity under the section that are not made in time are subject to interest from 30 days after the due date at the rate of 1 percent per month on the unpaid balance. However, with respect to each past due payment, interest ceases to accrue after interest on that payment has accrued for 12 months.

Section 218.76, F.S., outlines a process for the resolution of disputes between local government entities and vendors over payment. In any case in which an improper invoice is submitted by a vendor, the local governmental entity has 10 days after the improper invoice is received to notify the vendor that the invoice is improper and indicate what corrective action on the part of the vendor is needed to make the invoice proper. In the event a dispute occurs between a vendor and a local governmental entity concerning payment of an invoice, such disagreement shall be finally determined by the local governmental entity. Each local governmental entity is required to establish a dispute resolution procedure to be followed in cases of such disputes. Such procedure must provide that proceedings to resolve the dispute be commenced not later than 45 days after the date on which the proper invoice was received by the local governmental entity and shall be

concluded by final decision of the local governmental entity not later than 60 days after the date on which the proper invoice was received by the local governmental entity. Such procedures are not subject to chapter 120. If the dispute is resolved in favor of the local governmental entity, then interest charges shall begin to accrue 15 days after the local governmental entity's final decision. If the dispute is resolved in favor of the vendor, then interest begins to accrue as of the original date the payment became due.

Currently, there is concern that the process does not work for the payment of construction services because disputes frequently arise concerning when a project is actually complete. Often a project is completed in stages and disputes arise concerning when services should be paid. These disputes can add up to 60 days onto the date a contractor will be paid. The delays of payment to contractors also affect subcontractors. Section 255.071, F.S., requires that subcontractors be paid 30 days after the date the labor, services, or materials were furnished or within 30 days after the date payment for such is received, whichever is later. Delays of up to 60 days in payment of contractors cause fiscal stress on subcontractors, which are usually small businesses.

A 1992 report prepared by the Department of Construction Management at Florida International University, entitled “Alternatives to 10% retainage, found that while a flat 10 percent retainage is the most common method of retainage used for construction projects in Florida, the 10 percent retainage practice hurts the cash flow of contractors, subcontractors and suppliers. The report states that according to industry experts consulted, the timely reimbursement of both progress payments and retained funds would largely solve the cash flow problem. The report recommends:

- Decreasing the rate of retainage as the project progresses.
- Releasing retained money periodically based on satisfactory performance
- Basing retainage on trades or work subdivisions and releasing retained funds as these subdivisions of the project are completed.

The Florida Department of Management Services (DMS) is the state agency that has the primary responsibility for construction and maintenance of state buildings. The DMS has a policy of charging a 10% retainage on the first half of a project, and 5% on the remaining portion. Local governments entities in Florida vary in their practices regarding the amount of retainage.

III. Effect of Proposed Changes:

Section 1 amends s. 218.72, F.S., to add or change the following definitions:

- "construction services," is changed to include labor and materials provided, in addition to the purchase of goods or services provided in connection with the construction, alteration, repair, demolition, reconstruction to real property;
- “payment request” is added and means a contractor’s written request for payment for labor, services, and materials provided through a date certain; and
- “agent” is added and means a project architect, engineer, or any other agency or person acting on behalf of the local government entity.

Section 2 amends s. 218.73, F.S., to clarify how timely payments are recalculated for purchases other than construction services. There is no substantive change to this section.

Section 3 amends s. 218.735, F.S., to revise the prompt payment process for construction services, labor and materials. Currently, local governments are granted 20 business days to pay invoices. The bill reduces it to 10 calendar days. Currently, the payment deadline countdown imposed on local governments does not begin until, if applicable, the project architect or engineer approves the payment. This conditional delay is deleted.

The exceptions being removed allow the local government to delay payment if it has a requirement that its project architect or engineer approve payment, or if the local government has a law that requires the local government body to approve the payment. Also the bill changes the time period within which payment must be made from 20 business days from receipt to 20 calendar days from receipt, and changes the time period from 20 business days to 10 calendar days within which the local government has the opportunity to reject the payment request. The bill provides that if a local government disputes a portion of a payment request, the undisputed portion shall be paid in a timely fashion and provides that payments not made on time shall accrue interest of 1% per month (as under current law) <u>or</u> at the rate specified in the contract, whichever is greater.

Section 4 amends s. 218.74, F.S., allowing a payment request to suffice in lieu of an invoice; clarifies that the section applies to the purchase of goods and services other than construction services.

Section 5 amends s. 218.75, F.S., providing that no contract may prohibit the collection of interest on monies for late payment, at allowable rates.

Section 6 amends s. 218.76, F.S., providing that the prevailing party is entitled to recover attorney's fees at trial and on appeal.

Section 7 amends s. 255.049, F.S., applying its provisions to all bonded local government <u>and</u> state government construction projects (with the exception of Department of Transportation road and bridge construction and maintenance). The bill requires progress payments monthly, unless required more frequently by contract; limits the money that the government entity can temporarily retain from progress payments to 5% or less; requires release of subcontractors' retained funds within 90 days after the date a notice of completion has been received and approved; requires final payment of <u>all</u> retained funds, barring a good faith dispute, within 30 days after final acceptance of the project; prohibits the prime contractor from retaining a greater retainage percentage from subcontractor payments than the governmental entity is retaining from prime contractor payments; and provides that if payment is not made when due, interest accrues starting 10 days after the payment due date, and extending until the date of payment. The interest owed for such a late payment is to be calculated at the highest rate allowed by law. The bill also provides basis for withholding payments due to a "good faith dispute."

This language fundamentally changes the way local governmental entities contractually handle retainage. Under current law and practice, these entities only deal contractually with the prime

contractor. The retainage is paid directly to the contractor and contractor is responsible for paying the subcontractor based on the contractual relationship between the contractor and the subcontractor. The provisions of section 7 require the government entity to release funds based on the completion of individual subcontracts for which the government entity is not a party.

Section 8 applies to private construction projects subject to s. 715.12, F.S.,(Construction Contract Prompt Payment Law), providing that payments are due within 10 days after the date of a written payment request and after meeting several other conditions, and that payments not made on time shall accrue interest of 1% per month or at the rate specified in the contract, whichever is greater; changes the time period an owner has to dispute a payment request from 14 days to 10 days; provides that an owner or prime contractor may not withhold any part of full progress payments for work that is covered under a warranty; provides that an owner must release retainage held against a subcontractor's work within 20 days of completion of the subcontractor's work; requires final payment on all retained funds, barring a good faith dispute, within 20 (up from 14) days after final acceptance of the project; provides basis for withholding payments due to a "good faith dispute;" prohibits the prime contractor from retaining a greater retainage percentage from subcontractor payments than the governmental entity is retaining from prime contractor payments; and strikes language prohibiting a basis for a civil suit to collect unpaid late payment interest.

Section 9 provides that the bill shall take effect July 1, 2000, and that it applies to contracts entered into on, or after, that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill may require counties or municipalities to spend funds or to take and action requiring the expenditure of funds, primarily if the new time lines on prompt payment cannot be met and the local government is required to pay interest. However the extent of this impact is indeterminate.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private construction contractors and subcontractors should receive some economic benefit from receiving payment for work completed faster and from reduced retainage requirements.

C. Government Sector Impact:

The bill may have the effect of increasing the costs of state and local governmental entities to process construction contract payments and increasing the likelihood that the entity will have to pay interest on late payments. In addition, the provisions of the bill may increase litigation costs of these entities because of the increased likelihood that the state or local entity will be sued in disputes between contractors and subcontractors over the payment of retainage.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Comprehensive Planning, Local and Military Affairs:
This is a “strike everything” amendment which:

- provides more detail regarding the requirement that the governmental entity consider each subcontractor a separate division of the prime contract;
- requires a subcontractor to complete Notice of Completion in the form included in the bill;
- requires governmental entities to release retained amounts for each subcontract within 90 days after it receives approved Notice of Completion and accompanying payment request from the contractor;
- deletes provisions that applied to private contractors regarding prompt payment and retainage;
- amends the definition of a local governmental entity to clarify that the term includes a school board, authority, special taxing district, other political subdivision, and community college in addition to county and municipal government; and
- adds back language that was deleted in the original bill regarding when a payment request must be paid or rejected.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.