

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 870

SPONSOR: Governmental Oversight and Productivity Committee and Senator Webster

SUBJECT: Prompt Payment Act

DATE: March 14, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Favorable/CS
2.	_____	_____	CA	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute (CS) for SB 870 revises the “Prompt Payment Act” to:

- Define the term “payment request” as a request for payment of construction services that may suffice in lieu of an invoice.
- Specify that school boards, school districts, local authorities, special taxing districts, other political subdivisions, and community colleges are subject to the act.
- Change the time period in which a local government entity must pay a payment request or invoice for construction services that requires agent approval.
- Require contractors and subcontractors, who receive payment from a local government entity, to pay their subcontractors and suppliers within 15 days after receipt of the payment.
- Require undisputed portions of a payment request or invoice to be paid within specified time frames.
- Delete existing law’s 12-month cap for interest fees on overdue payments.
- Provide prevailing party court costs and attorney’s fees for recovery actions pursuant to the act.

The CS amends the following sections of the Florida Statutes: 218.72, 218.73, 218.735, 218.74, 218.75, and 218.76.

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.¹ The term “local governmental entity” is defined to mean, “a county or municipal government or any office, board, bureau, commission, department, branch, division, or institution thereof or any project supported by county or municipal funds.”² The act does not appear to apply to school districts, nor community colleges.

For purchases, other than purchases of construction services, local governmental entities must pay within 45 days after the latest of the following dates:

- The date on which a proper invoice³ is received by the chief disbursement officer (CDO) 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 that:
 - delivery of personal property is accepted by the local governmental entity;
 - services are completed;
 - the rental period begins; or
 - the local governmental entity and vendor agree in a contract that specifies dates relative to payment periods.⁴

For purchases of construction services, local governmental entities must pay within 20 business days after the invoice:

- is stamped as received by the government entity⁵, if the project architect or engineer is not required to approve the invoice prior to it being submitted to the entity; or
- has been approved by the project architect or engineer and stamped as received, where architect or engineer approval is required.⁶

If the local governmental entity fails to make timely payments, interest at a rate of one percent a month on the unpaid balance begins accruing 30 days after the payment due date.⁷ 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 one month shall be considered as one 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.

¹Section 215.422, F.S., addresses prompt payment of vendors by state agencies.

²Section 218.72(2), F.S.

³Section 218.72(1), F.S., defines a “proper invoice” as an invoice that conforms with all: (a) statutory requirements; and (b) requirements formally adopted by the local governmental entity and made available to the vendors.

⁴Sections 218.73 and 218.74, F.S.

⁵Section 218.74, F.S., provides that local governmental entities must establish procedures to mark each invoice as received on the date it is delivered to an agent or employee of the entity or of a facility or office of the entity.

⁶Section 218.735(1), F.S.

⁷Section 218.74(4), F.S.

Section 218.75, F.S., provides that no contract between a local government entity and a vendor⁸ may prohibit the vendor from invoicing the local government entity for interest allowable under ch. 218, Part VII, F.S.

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.

If a dispute occurs between a vendor and a local governmental entity over payment of an invoice, such disagreement shall be finally determined by the local governmental entity.⁹ 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 ch. 120, F.S. 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, interest begins to accrue as of the original date the payment became due.

Currently, there is concern that the timely payment requirements provided for construction services by existing statute do not work because the majority of local government entities require an architect or engineer to approve an invoice. Existing law does not specify any time frame for when the architect or engineer must approve the invoice. As a result, it is possible for substantial delay to occur in the payment process.

Payments to Subcontractors for Construction Contracts

Delays in payments to contractors can also affect subcontractors. Section 255.071, F.S., applies to contracts for construction or repair of public buildings and works. It requires persons, firms, or corporations who receive payment as a result of such contracts from the state or any county, city, or political subdivision of the state to pay, in accordance with contract terms, the undisputed contract obligations for labor, services, or materials. These payments must be made by the later of the following dates:

- within 30 days after the date the labor, services or materials were furnished and payment became due; or
- within 30 days after the payment for the labor, services, or materials is received.

⁸“Vendor” is defined as a person who sells good or services, sells or leases personal property, or leases real property to a local government entity. Section 218.71(6), F.S.

⁹Section 218.76(2), F.S.

If timely payment is not made, the labor, services, or materials provider may file a complaint against the contractor. The complaint must allege: (a) the existence of the contract; (b) description of labor, services, or materials provided in accordance with the contract; (c) the contract price; (d) any amounts paid pursuant to the contract; (e) the undisputed amount that remains unpaid; (f) that the undisputed amount has been due pursuant to the contract for more than 30 days after the labor, services, or materials were accepted; and (g) that the person against whom the complaint is filed has been paid for the labor, services or materials described in the complaint at least 30 days prior to the complaint being filed.

After the complaint is filed, the court must conduct an evidentiary hearing. The person providing the labor, services, or materials is entitled to the following remedies to the extent of the undisputed amount due for labor or services performed or materials supplied, and upon proof of each allegation in the complaint:

- 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 the bond requirements specified in the Florida Rules of Civil Procedure.
- Prejudgment attachment against the person who received the payment, in accordance with each of the requirements of ch. 76, F.S.
- Such other legal or equitable remedies as may be appropriate in accordance with the requirements of the law.

These remedies do not apply to the extent of a bona fide dispute regarding any portion of the contract price, or if the plaintiff has committed a material breach of contract that relieves the defendant from the obligations under the contract.

The prevailing party in any proceeding under s. 255.071, F.S., is entitled to recover costs, including a reasonable attorney's fee, at trial and on appeal. The provisions of this section shall also apply to any contract between a subcontractor and a sub-subcontractor or supplier and any contract between a sub-subcontractor and supplier on any project for the construction or repair of public buildings and works.

III. Effect of Proposed Changes:

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

- “Proper invoice” is changed to provide that a local governmental entity need not take formal action to approve its requirements for invoices and payment requests.
- “Local governmental entity” is changed to include school board, school district, authority, special taxing district, other political subdivision, and community college, in addition to a county or municipal government or any office, board, bureau, commission, department, branch, division, or institution thereof or any project supported by county or municipal funds.

- “Purchase” is changed to include the purchase of construction services, in addition to the purchase of goods or services, the purchase or lease of personal property, or the lease of real property by a local governmental entity.
- “Construction services” is changed to include labor and materials provided, in addition to the purchase of services provided in connection with the construction, alteration, repair, demolition, reconstruction or other improvements to real property.
- “Payment request”¹⁰ is added to mean a request for payment of construction services that conforms with all statutory requirements and with all requirements specified by the local government entity.
- “Agent” is added to mean a project architect, engineer, or any other agency or person acting on behalf of the local government entity.

Section 2. The CS amends s. 218.73, F.S., to clarify that the section applies to nonconstruction services.

Section 3. The CS amends s. 218.735, F.S., to revise the prompt payment process for construction services, labor, and materials. The bill allows a “payment request” to be submitted as an alternative to an “invoice.” It also substitutes the term “agent” for the phrase “project architect or engineer” throughout the section.

Subsection (1)(a) is amended to require payment of construction services within 25 days after a payment request or invoice is stamped received, where agent approval is required. Thus, under the bill, the start of the payment time frame no longer includes waiting for the architect or engineer to approve the invoice, as allowed under existing law; instead, it begins once the request or invoice is stamped as received. Existing law’s payment deadline in subsection (1)(b) of 20 days after the receipt of an invoice (and now also after the receipt of a payment request), where agent approval is not required, is retained.

Subsection (5) is amended to provide that when a local government disputes a portion of a payment request or invoice, the undisputed portion must be timely paid in accordance with subsection (1).

A new subsection (6) is added to provide that contractors must pay subcontractors and suppliers for labor, services, or materials provided within 15 days after receipt of payment for these goods and services from the local government entity. In turn, the bill specifies that the subcontractor, upon receiving payment from the contractor for labor, services or materials provided by other subcontractors and suppliers, must pay those subcontractors and suppliers within 15 days after receiving payment from the contractor. Finally, the bill specifies that contractors and sub-contractors may dispute any payment or portion thereof alleged to be due to another party based on the terms of the relevant contract. If such a dispute occurs, the bill provides that the

¹⁰The standard form of billing in the construction industry is referred to as a payment request. This request is generally made at contractually set intervals, such as every 30-days, for work completed to date.

contractor or subcontractor may withhold the disputed portion of the payment, but must remit the undisputed portion within the specified timelines.

Current subsection (6) is redesignated as subsection (7), and amended to provide that all construction payments due under the section, i.e. those due by local governments and those due by contractors and sub-contractors, which are not timely made will accrue interest at the rate of one percent per month (as under current law) or at the rate specified in the contract, whichever is greater.

Section 4. The CS amends s. 218.74, F.S., to delete existing law's provision that interest on past due payments ceases to accrue after interest has accrued for 12 months.

Section 5. The CS amends s. 218.75, F.S., to include providers of construction services within the section's existing provision that states that no contracts may prohibit the collection of late payment interest charges allowed by ch. 218, Part VII, F.S.

Section 6. The CS amends s. 218.76, F.S., to refer to a payment request, as well as an invoice, and to provide that the prevailing party in a collection action under the prompt payment act is entitled to recover court costs and reasonable attorney's fees at trial and on appeal.

Section 7. The CS provides an effective date of July 1, 2001.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

In the event a municipality or county fails to timely pay as required by the CS, the entity may have to pay interest. Moreover, the CS might require counties or municipalities to spend funds in order to comply with the shortened construction payment deadlines. This fiscal impact is indeterminate.

To date, neither the counties nor the cities have argued or provided any data alleging that the CS will have an adverse financial impact. Without such data it is impossible to determine whether any fiscal impact of the CS would meet the "significant fiscal impact" standard of \$.10 times the population of Florida, or \$1.5 million based on 1999 census estimates.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

If the CS results in increased costs to affected entities with taxing power, those costs may be passed on in the form of higher taxes.

B. Private Sector Impact:

The CS should have the effect of enabling private contractors and subcontractors to receive faster payments from local government entities. It will also require private contractors and subcontractors, who elect to contract with local government entities, to issue timely payments to their subcontractors and suppliers, or be subject to interest penalties.

C. Government Sector Impact:

The CS may have the effect of increasing the costs of local government entities, as defined in the CS, to process construction contract payments and by increasing the likelihood that the entity will have to pay interest on late payments. Additionally, the CS may increase the litigation costs of these entities due to the prevailing party court costs and attorney's fee award provision.

Representatives from the community college system have indicated that it may be necessary for them to hire additional staff in order to insure proper fiscal review of payment requests and invoices within the time frame proposed in the CS.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Public policy reasons militate both for and against provisions, such as that contained in the CS, which award court costs and attorney's fees to the prevailing party. On the one hand, permitting such recovery encourages parties to comply with the law, and discourages frivolous lawsuits. On the other hand, the threat of being assessed costs and fees may discourage plaintiffs with arguable, but which may ultimately prove meritorious, cases from filing an action.

The CS's costs and fees provision is automatic. In other words, the trial court must enter a judgment requiring the losing party to pay the costs and fees. It can be argued that the involuntary nature of the provision is desirable because it will strongly deter local government entities, contractors, and subcontractors from failing to make timely payments as prescribed by the act. Conversely, it can be argued that this provision has the potential of requiring a plaintiff or defendant, who may have acted in good faith, but who still loses in court, to pay costs and fees. For example, there could be a legitimate dispute over the meaning of a contractual

provision that results in payment delay. An alternative to automatic recovery is to vest the trial court with discretion to award costs and fees where the trial court believes such is just.¹¹

VIII. Amendments:

None.

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

¹¹For example, s. 120.69, F.S., provides, "In any final order on a petition for enforcement the court may award to the prevailing party all or part of the costs of litigation and reasonable attorney's fees and expert witness fees, whenever the court determines such an award is appropriate."