

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/CS/SB 1724

SPONSOR: Governmental Oversight and Productivity Committee, Comprehensive Planning Committee, and Senator Bennett

SUBJECT: Prompt Payment for Construction Services

DATE: April 22, 2003 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cooper</u>	<u>Yeatman</u>	<u>CP</u>	<u>Fav/CS</u>
2.	<u>White</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	<u>RI</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute for committee substitute revises provisions relating to prompt payment for construction services; redesignates part VII of ch. 218.17 F.S., as the "Local Government Prompt Payment Act," rather than the "Florida Prompt Payment Act"; creates the "Florida Prompt Payment Act" to apply to state projects; and provides procedures for payment of retainage and for settling disputes relating thereto.

This bill amends the following sections of the Florida Statutes: 218.70, 218.72, 218.735, 255.071, and 255.05.

This bill creates the following sections of the Florida Statutes: ss. 255.0705, 255.072, 255.073, 255.074, 255.075, 255.076, 255.077, and 255.078.

II. Present Situation:

Prompt Payment of Vendors by State Agencies

Section 215.422, F.S., addresses prompt payment of vendors by state agencies and the judicial branch. Vouchers authorizing payment of an invoice must be filed with the Comptroller not later than 20 days after receipt of the invoice. The Comptroller is required to issue a warrant in payment of the invoice, not later than 10 days after filing the voucher. Partial payments to contractors are authorized.

Section 215.422(2)(b), F.S., specifies that disputes over payments between the state agency and vendors are to be resolved in accordance with rules developed and adopted by the Chief Justice for the judicial branch, and rules adopted by the Department of Banking and Finance or in a

formal administrative proceeding before an administrative law judge of the Division of Administrative Hearings for state agencies.

Section 255.071, F.S., addresses disputes between contractors and subcontractors and suppliers for public works projects. When the contractor receives payments from the state or “any county, city, or political subdivision of the state, or other public authority...” for the construction of a public building, they are required to pay, in accordance with the contract terms, the undisputed contract obligations for labor, services, or materials provided for the project. If the contractor fails to pay these undisputed obligations to the subcontractor or supplier within 30 days of the required payment date, the subcontractor or supplier is entitled to the procedures and remedies provided in subsections (3) and (4).

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 218.72.(2), F.S., defines the term local governmental entity to mean, “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 or any project supported by county or municipal funds.” The act does not apply to community colleges.

Section 218.73, F.S., provides that payments for non-construction services by a local governmental entity must be calculated from 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 latter date of:

- 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 provides dates relative to payment periods.

Section 218.735, F.S., specifies the due-dates for payment of construction services.

Subsection (5) requires that if a local governmental entity disputes a portion of a payment request or an invoice, the undisputed portion must be paid timely, in accordance with the requirements of subsection (1). Subsection (6) requires that when a contractor receives payment from a local governmental entity for labor, services, or materials furnished by subcontractors and suppliers hired by the contractor, the contractor must remit payment due to those subcontractors and suppliers within 15 days after the contractor's receipt of payment. Similarly, when a subcontractor receives payment from a contractor for labor, services, or materials furnished by subcontractors and suppliers hired by the subcontractor, the subcontractor must remit payment due to those subcontractors and suppliers within 15 days after the subcontractor's receipt of payment.

Subsection (7) specifies that all payments due under this section and not made within the specified time shall bear interest at the rate of 1 percent per month, or the rate specified by contract, whichever is greater.

Section 218.74, F.S., requires each local governmental entity to establish procedures to mark each payment request or invoice as received on the date on which it is delivered to the local government.

Section 218.75, F.S., provides that no contract between a local government entity and a vendor¹ 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 payment request or invoice is submitted by a vendor, the local governmental entity has 10 days after the improper payment request or invoice is received to notify the vendor that the payment request or invoice is improper and indicate what corrective action on the part of the vendor is needed to make the payment request or invoice proper.

Subsection (2) governs disputes between a vendor and a local governmental entity over payment of a payment request or invoice. 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 payment request or invoice was received by the local governmental entity and be concluded by final decision of the local governmental entity not later than 60 days after the date on which the proper payment request or invoice was received. 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 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.

Subsection (3) provides that the prevailing party in a collection action under the prompt payment act is entitled to recover court costs and reasonable attorney's fees under certain circumstances.

Retainage on Construction Projects²

“Retainage” is a common construction contracting practice whereby a certain percentage of compensation is withheld by the project owner from the general contractor and, in turn, by the general contractor from subcontractors until the project is completed satisfactorily. Retainage is established by contract between the prime-builder and the entity contracting for the project. Proponents of this practice claim it is necessary as leverage to assure timely completion of construction projects. Opponents of retainage claim that payment procedures on large public projects can be lengthy and complex, and that final payment to the subcontractors can be delayed for months when problems with one aspect of the project remain unresolved.

¹ “Vendor” is defined as a person who sells goods or services, sells or leases personal property, or leases real property to a local government entity. See s. 218.71(6), F.S.

² This information is taken from OPPAGA *Special Review: Inflexibility in Contracting and Retainage Practices Could Hurt Construction Industry*, Report No. 00-26, December 2000.

Florida's subcontractors, who claim that retainage often creates undue financial hardships, asked the 2000 Legislature to consider limiting the allowable percentage of compensation that could be retained. In response, the Legislature requested the Office of Program Policy Analysis and Government Accountability (OPPAGA) to evaluate retainage and other construction practices identified by subcontractors.

OPPAGA determined that limiting retainage may have the harmful unintended side effect of thwarting the development of new business or retarding the growth of existing businesses. In addition, owners and prime contractors may use other means to minimize risk, which may be less favorable than retainage.

OPPAGA found that the fiscal impact of retainage on subcontractors can be lessened through the payment of interest on their percentage of compensation that has been retained. Although the Legislature could require payment of interest by law, ideally, this would be negotiated as part of the contracting process. OPPAGA suggested that consideration of such legislation should take into account the fiscal impact to the state of Florida and other units of government.

OPPAGA also recommended the Department of Management Services identify and disseminate best construction practices that, if implemented, would facilitate final project completion and release of retainage.

Industry representatives report that Florida is one of only seven states that have no laws regulating retainage. Payment procedures on large public projects can be lengthy and complex, and in particular, final payment can be delayed for months for even one small problem that remains unresolved.

Bonds of Contractors on Public Buildings

In Florida, "surety insurance" is defined to include payment and performance bonds.³ Such bonds are contracts in which a surety company, which is paid a premium by a principal, e.g., a general contractor, agrees to stand in the place of the principal in the event the principal defaults either as to performance of the contract or as to payment of its subcontractors/suppliers.⁴

Chapter 255, F.S., deals with public property and publicly owned buildings. Section 255.05, F.S., requires a payment and performance bond from any person who enters into a formal contract with the state or any local government, or other public authority, for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work.

Section 255.05(2), F.S., provides procedures for subcontractors and suppliers to make claims against a payment bond. This section also provides an outline for a notice form, deadlines for action, and consequences for improper notice or failure to act within specified guidelines.

³ Section 624.606(1), F.S.

⁴ *Surety Bonds: A Basic User's Guide for Payment Bond Claimants and Obligees*, Construction Lawyer, Daniel Toomey and Tamara McNulty, Winter, 2002.

III. Effect of Proposed Changes:

This CS revises and redesignates the "Florida Prompt Payment Act" as the "Local Government Prompt Payment Act," and creates the "Florida Prompt Payment Act" to apply to the state and state universities. In addition, it provides procedures for payment of retainage and for settling disputes relating to these acts.

Section 1 re-designates part VII of ch. 218, F.S., as the "Local Government Prompt Payment Act," rather than the "Florida Prompt Payment Act." The Florida Prompt Payment Act is reestablished in sections 4-12 of this bill, and applies primarily to state government.

Section 2 amends s. 218.72, F.S., to include "community college" in the definition of "local governmental entity," thereby making community colleges subject to the Local Government Prompt Payment Act. In addition, the definition of "construction services" is amended to make the prompt payment provisions in this act available to any contractors performing services on local government projects.

Section 3 amends s. 218.735(6), F.S., to require that when a contractor receives payment from a local governmental entity for labor, services, or materials furnished by subcontractors and suppliers hired by the contractor, the contractor must remit payment due to those subcontractors and suppliers within 10 days, rather than 15 days as provided in current law, after the contractor's receipt of payment. Likewise, the subcontractors have 10 days, rather than 15 days as provided in current law, to pay their subcontractors and suppliers.

This section also creates a new subsection (7) to require each contract for construction services between a local government entity and a vendor to provide for the development of a list of items required to "render complete, satisfactory, and acceptable the construction services purchased . . ." The contract must specify the process for development and review of the list. The time for development of the list must be as follows:

- For construction projects that cost less than \$10 million, the list must be developed within 30 days after reaching substantial completion of the construction services as defined in the contract, or, if not defined in the contract, upon reaching beneficial occupancy or use; or
- For construction projects that cost more than \$10 million, the list must be developed within 30 days, unless otherwise extended by contract up to 90 days, after reaching substantial completion of the construction services as defined in the contract, or, if not defined in the contract, upon reaching beneficial occupancy or use;

The aforementioned list and time frame requirements also apply to construction contracts relating to construction services on more than one building or structure, or involving a multiphased project.

Failure to include any corrective work or pending items not yet completed on the list developed pursuant to subsection (7) does not alter the responsibility of a vendor to complete all of the purchased construction services as defined in the contract.

The vendor may submit a payment request for the appropriate amount of retainage upon completion of all items on the list, or such other time defined in the contract. The local government may withhold up to 150 percent of the total costs to complete any incomplete items on the list.

All items that require correction under the contract and that are identified after the preparation and delivery of the list shall remain the obligation of the vendor as defined in the contract.

Warranty items may not affect the final payment of retainage as provided in this section or as may be provided in the contract between the vendor and its subcontractors and suppliers.

If a local government fails to develop the required list, the vendor may submit a payment request for the appropriate amount of retainage. The local government is not required to pay the requested retainage if the vendor has, in whole or part, failed to cooperate with the local government in development of the list; failed to perform its contractual responsibilities, if any, with regard to the development of the list; or if paragraph (8)(d) applies.

Subsection (8) is created to provide for interim release of retainage. At the start of a construction project until 50 percent of the project has been completed, a local governmental entity may not withhold as retainage more than 10 percent of each progress payment to the vendor. After reaching 50-percent completion, the local government may withhold as retainage no more than 5 percent of future progress payments to the vendor. However, a municipality with a population of 25,000 or fewer, or a county with a population of 100,000 or fewer, may withhold as retainage up to 10 percent of each progress payment until final completion and acceptance of the project by the local government. The term "50-percent completion" means as defined in the contract, or, if not defined in the contract, the point at which: (a) the local government has expended 50 percent of the total project costs identified in the contract, plus all change orders and other additions issued subsequent to the approval of the contract by the local government; and (b) the level of actual project construction is equivalent to such expenditure of funds.

After reaching 50-percent completion, the vendor may submit a payment request for up to one-half of the retainage amount held by the local government. The local governmental entity shall promptly pay the vendor, unless the local government has grounds, pursuant to the contract or paragraph (d), for withholding the retainage. If the local government pays retainage to the vendor, the vendor must timely remit payment of such retainage to the appropriate subcontractors and suppliers. However, the vendor may withhold more than 5 percent retainage from payments to its subcontractors. The specific amount to be withheld is to be determined on a case-by-case basis and is conditioned upon notice to the subcontractor of the vendor's decision to withhold more than 5 percent, including reasons for that decision.

Finally, paragraphs (8)(d) and (e) specify that this section does not require the payment or release of amounts that are the subject of a good-faith dispute, of an action brought pursuant to s. 255.05, F.S., or of another claim or demand, and reiterates that this act applies to the payment of any payment request for retainage pursuant to subsection (8).

Section 4 creates s. 255.0705, F.S., to establish the new "Florida Prompt Payment Act." This new provision of law pertains primarily to state government or projects supported by state funds.

Provisions in this act correspond to the current Florida Prompt Payment Act in ss. 218.70-218.76, F.S., which is renamed in section 1 as the Local Government Prompt Payment Act, and provisions added in this act relating to retainage.

Section 5 amends s. 255.071(2) and (3), F.S., to address payment of subcontractors, sub-subcontractors, materialmen, and suppliers on construction contracts for public projects. Subsection (2) currently provides that failure to pay any undisputed obligations for labor, services, or materials within 30 days such labor, services, or materials were furnished and payment became due, or within 30 days after the date payment is received, whichever last occurs, entitles the person providing such labor, services, or materials to the procedures for settling disputes and remedies specified in subsections (3) and (4). The second deadline is changed from 30 days to 10 days.

Subsection (3) provides procedures for settling disputes between contractors and subcontractors and suppliers. Any person providing labor, services, or materials for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work improvements to real property, may file a verified complaint alleging, among other things, that the person against whom the complaint was filed has received payment on account of the labor, services, or materials described in the complaint more than 30 days prior to the date the complaint was filed. This deadline is changed from 30 to 10 days.

Section 6 creates s. 255.072, F.S., to provide definitions for the “Florida Prompt Payment Act.” Except for subsections (2) and (4), these definitions are adapted from the definitions in s. 218.735, F.S., the current Florida Prompt Payment Act. Subsection (2) specifies that the definition of “construction services” does not include contracts or work performed for the Department of Transportation. Subsection (4) defines “public entity” as the state, a state university, or any office, board, bureau, commission, department, branch, division, or institution thereof, or any project supported by state funds.

Section 7 creates s. 255.073, F.S., to address timely payment for purchases of construction services. This section is, with minor changes, adapted from s. 218.735, F.S., a provision in the current Florida Prompt Payment Act. In this section, the term “public entity” is substituted for “local government entity” and the term “vendor” is substituted for “contractor.” In addition, the deadline for remitting payments to subcontractors is 10 days, rather than 15 days as specified in the current Florida Prompt Payment Act.

Subsection (1) states this version of the Florida Prompt Payment Act governs the timely payment for construction services by a public entity, except as otherwise provided in s. 215.422, F.S., which addresses prompt payment of vendors by state agencies or the judicial branch.

Subsection (2) provides that if a public entity disputes a portion of a payment request, the undisputed portion must be timely paid, in accordance with either s. 215.422, F.S., which addresses prompt payment of vendors by state agencies or the judicial branch, or under the provisions of this Florida Prompt Payment Act.

Subsection (3) requires that when a contractor receives payment from a public entity for labor, services, or materials furnished by subcontractors and suppliers hired by the contractor, the

contractor must remit payment due to those subcontractors and suppliers within 10 days after the contractor's receipt of payment. Similarly, when a subcontractor receives payment from a contractor for labor, services, or materials furnished by subcontractors and suppliers hired by the subcontractor, the subcontractor must remit payment due to those subcontractors and suppliers within 10 days after the subcontractor's receipt of payment.

Subsection (4) specifies that all payments due under this section and not made within the time periods specified by this section shall bear interest at the rate of 1 percent per month, or the rate specified by contract, whichever is greater.

Section 8 creates s. 255.074, F.S., to address procedures for calculation of payment due dates. This section is, with minor changes, adapted from s. 218.74, F.S., a provision in the current Florida Prompt Payment Act. In this section, the term “public entity” is substituted for “local government entity.”

Subsection (1) requires each public entity to establish procedures to mark each payment request or invoice as received on the date on which it is delivered to the local government.

Subsection (2) specifies that if the terms under which a purchase is made allow for partial deliveries, and a payment request or proper invoice is submitted for a partial delivery, the time for payment for the partial delivery must be calculated from the time of the partial delivery and the submission of the payment request or invoice in the same manner as provided in s. 255.073, F.S. Subsection (3) differs from the current Florida Prompt Payment Act in that the public entity must submit a payment request to the Chief Financial Officer for payment no more than 25 days after receipt of the payment request.

Section 9 creates s. 255.075, F.S., to specify that a contract between a public entity and a vendor or a provider of construction services may not prohibit the collection of late payment interest charges allowable under ss. 255.072-255.078 F.S. This section is, with minor changes, adapted from s. 218.75, F.S., a provision in the current Florida Prompt Payment Act.

Section 10 creates s. 255.076, F.S., to address improper payment requests and resolution of disputes. This section is, with minor changes, adapted from s. 218.76, F.S., a provision in the current Florida Prompt Payment Act. In this section, the term “public entity” is substituted for “local government entity.”

Subsection (1) provides that in any case in which an improper payment request or invoice is submitted by a vendor, the public entity has 10 days after the improper payment request or invoice is received to notify the vendor that the payment request or invoice is improper and indicate what corrective action on the part of the vendor is needed to make the payment request or invoice proper.

Subsection (2) governs disputes between a vendor and a public entity over payment of a payment request or invoice. Each public 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 payment request or invoice was received by the public entity and be concluded by final decision of the public entity not later than 60 days after the date on which the proper payment request or invoice was

received. Such procedures are not subject to ch. 120, F.S. If the dispute is resolved in favor of the public entity, then interest charges shall begin to accrue 15 days after the public 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.

Subsection (3) provides that the prevailing party in a collection action under the prompt payment act is entitled to recover court costs and reasonable attorney's fees under certain circumstances.

Section 11 creates s. 255.077, F.S., to require public entities to provide to vendors a final "punch list" to of all items required to "render complete, satisfactory, and acceptable the construction services purchased..." This punch list must be presented to the vendor within 30 days after the earliest of the following:

- Issuance of a temporary or final certificate of occupancy, if applicable;
- Substantial completion of the construction services purchased, as defined in the contract;
or
- Beneficial occupancy or use of the structure, building, or facility that is the subject of the construction services purchased, as defined in the contract.

If the purchase relates to construction services on more than one building or structure, the public entity must prepare a final punch list for each building or structure. In these situations, and unless the contract provides otherwise, the public must pay out retainage to the vendor based upon the value of the construction services rendered with regard to that structure or building as compared to the total value of the purchase.

When all items on the final punch list are completed, or within 30 days after issuance of the punch list, whichever occurs sooner, the vendor must submit a payment request for the appropriate amount of retainage. The local government entity is then responsible to pay the requested retainage. However, the owner may withhold up to 150 percent of the cost to complete any incomplete final punch list items.

If the public entity fails to present to the vendor a final punch list within the specified time periods, the project is considered to be completed and the vendor may submit a payment request for the appropriate amount of retainage. The public entity is then responsible to pay the requested retainage.

All items that require correction and that are identified after the preparation and delivery of the final punch list are considered warranty items or make-good items, and such items have no effect on the final payment of retainage.

Section 12 creates s. 255.078, F.S., to provide for interim release of retainage. At the start of a construction project until 50 percent of the project has been earned, a public entity may not withhold as retainage more than 10 percent of each progress payment to the vendor. At 50 percent, the vendor may submit a payment request to the public entity for up to one-half of the retainage withheld up to that time. The public entity is then responsible to pay the requested retainage.

After 50-percent of the contract value has been earned, the public entity may not withhold as retainage more than 5 percent of each progress payment to the vendor. However, the vendor may withhold more than 5 percent retainage from payments to its subcontractors. The specific amount up to be withheld is discretionary, with limited statutory guidance, and is conditioned upon notice to the subcontractor.

Finally, subsections (3) and (4) specify that this section does not require the payment or release of amounts that are the subject of a good-faith dispute, and reiterates that this act applies to the payment of any payment request for retainage.

Section 13 amends s. 255.05, F.S., to provide additional guidelines or restrictions for a subcontractor or supplier when making claims against a payment bond. Subparagraph (2)(a)2. is amended to require that any notice of nonpayment served by a claimant who is not in privity with the contractor (not in contract, typically a subcontractor or supplier under contract with an entity under contract with the prime contractor) which includes sums for retainage must specify the portion of the amount claimed for retainage.

Subsection (10) is created to prohibit a claimant (a subcontractor or supplier) from initiating an action for the sole purpose of recovery of retainage against the contractor or against the surety providing a payment or performance bond until:

- The public entity has paid out that retainage to the contractor;
- The claimant has completed all contracted work and 90 days have passed since the public entity received the contractor's final payment request; or
- The contractor has made a written request pursuant to subsection (11) and has not timely received the requested information from the owner.

Subsection (11) requires property owners to notify claimants (subcontractors or suppliers) that a final payment has been made to the vendor (prime contractor) upon the request of the claimant.

Section 14 provides that this act will take effect July 1, 2003.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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:

This bill may result in more timely payments to contractors and subcontractors who provide services or supplies in the construction of public projects.

C. Government Sector Impact:

This bill may require state and local governments to provide more timely payments to contractors and subcontractors who provide services or supplies in the construction of public projects.

VI. Technical Deficiencies:

On page 5, lines 5 and 22, the bill twice refers to the “appropriate amount of retainage,” but it’s not clear from the paragraphs what the “appropriate” amount is. It may be desirable to amend the bill to specify, “the amount of retainage permitted in subsection (8).”

On page 5, lines 17 through 21, the bill’s provisions are confusing and lengthy. It may be desirable to amend the bill to state, “If a local government entity fails to comply with paragraph (a) or (b), the vendor may submit”

On page 6, lines 11 through 19, the bill provides that the term “50-percent completion” means as defined in the contract, or, if not defined in the contract, “the point at which the local government has expended 50 percent of the total project costs identified in the contract, plus all change orders and other additions issued subsequent to the approval of the contract by the governing body of the local government and the level of actual project construction is equivalent to such expenditure of funds.” It may be desirable to amend the bill to: (a) provide this definition at the beginning of subsection (8) in a separate paragraph, as it applies to all paragraphs within the subsection; (b) specify, “. . . plus the cost of all change orders . . . ;” and (c) define the meaning of, “the level of actual project construction is equivalent to such expenditure of funds.”

VII. Related Issues:

None.

VIII. Amendments:

None.