

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1157 Local Government Prompt Payment Act
SPONSOR(S): Economic Development & Community Affairs Policy Council, Eisnaugle and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1056

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Military & Local Affairs Policy Committee	13 Y, 1 N	Noriega	Hoagland
2)	Economic Development & Community Affairs Policy Council	15 Y, 0 N, As CS	Noriega	Tinker
3)				
4)				
5)				

SUMMARY ANALYSIS

Current law states that it is the policy of this state that “payment for all purchases by local governmental entities be made in a timely manner.” The purpose of this policy is to provide for:

- prompt payments by local governmental entities and their institutions and agencies;
- interest payments on late payments made by local governmental entities and their institutions and agencies; and
- a dispute resolution process for payment of obligations.

This bill revises provisions relating to the timely payment for purchases of construction services and prohibits the assessment of damages against contractors if the list of items remaining to be completed (generally known as a “punch list”) is not provided to the contractor by the agreed upon date for delivery.

The bill requires that disputes be resolved according to procedures in the contract for the project, and revises provisions relating to the resolution of disputes concerning an improper payment request or invoice.

This bill provides that, in cases of payment disputes, a local governmental entity must notify the vendor in writing within 10 days after the improper payment request is received. Also, the bill provides that if the local governmental entity does not begin the dispute resolution procedure within 45 days, the contractor may give written notice to the local governmental entity of the failure to begin its dispute resolution procedure in a timely manner. If the dispute resolution procedure is not initiated within 2 business days after the notice, the objection to the payment request or invoice is deemed waived.

The bill removes language related to court proceedings, which broadens the ability of the prevailing party to be awarded court costs and attorney’s fees.

The bill also revises definitions and makes several minor, stylistic changes to chapter 218, F.S.

Staff estimates that local governments, including school districts, may incur some costs as a result of this bill. These expenses may include additional staffing costs to meet the conditions and deadlines provided in the bill, payment for construction services that may not meet the contract requirements if the deadlines are not met, and payment of court costs and attorney’s fees if, as the losing party, a local government had a reasonable basis in law or fact to dispute such payments, but ultimately did not prevail.

It does not appear that the provisions of this bill will have an impact on state government.

This bill has an effective date of October 1, 2010.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Florida Prompt Payment Act

Part VII of ch. 218, F.S., known as the "Local Government Prompt Payment Act" (Act) was enacted in 1989, and applies to local governments. The Act states that it is the policy of this state that "payment for all purchases by local governmental entities be made in a timely manner." The purpose of the act is to provide for:

- prompt payments by local governmental entities and their institutions and agencies;
- interest payments on late payments made by local governmental entities and their institutions and agencies; and
- a dispute resolution process for payment of obligations.

"Local governmental entity" is defined by the Act to mean a county or municipal government, school board, school district, authority, special taxing district, other political subdivisions, or any office, board, bureau, commission, department, branch, division or institution thereof.

The Act provides for timely payment for purchases of construction services and non-construction services, procedures for calculation of payment due dates, payment of interest at the rate of one percent per month (or the rate specified by contract, whichever is greater), and resolution of disputes. Local governmental entities must provide payment for construction services no later than 20 business days after the date on which the invoice is received, or within 25 business days if the invoice is subject to agent approval. Current law allots 15 days for both contractors and subcontractors to pay downstream to their subcontractors and suppliers once they have received payment from local governments.

Retainage

Retainage is a common construction contracting practice whereby a certain percentage of payment is withheld by the project owner from the general contractor and, in turn, by the general contractor from the subcontractors, to ensure satisfactory completion of a project. Payments for construction services usually are made incrementally, with a certain percentage withheld. Retainage is established by contract between the contractor and the entity contracting for the project.

Current law does not provide a limit on the amount of retainage state or local governments may withhold from payments for construction services.¹

Definitions

Section 218.72, F.S., provides the following definitions:

- “Proper invoice” refers to an invoice which conforms with all statutory requirements and with all requirements that have been specified by the local governmental entity to which the invoice is submitted;
- “Payment request” refers to a request for payment for construction services which conforms with all statutory requirements and with all requirements specified by the local governmental entity to which the payment request is submitted; and
- “Agent” refers to a project architect, project engineer, or any other agency or person acting on behalf of the local governmental entity.

Proposed Changes

The bill revises the definition of “agent” to provide that the agent who is required to review invoices or payment requests must be identified in accordance to the provisions of s. 218.735(1), F.S.² This provision would result in having one receiving agent that would be identified in advance.

The bill revises the definitions of “payment request” and “proper invoice” to provide that these requirements must be included in the contract for the project for which the payment is requested or for which the invoice is submitted, respectively.

Timely Payment for Purchases of Construction Services

Due Date

Present Situation

Section 218.735, F.S., provides guidelines for the timely payment for construction services purchases. Under s. 218.735(1), F.S., if an agent must approve the payment request or invoice prior to the payment request or invoice being submitted to the local governmental entity, payment is due 25 business days after the date on which the payment request or invoice is stamped as received.

Proposed Changes

The bill provides that a contractor may send the local government an overdue notice. If the payment request or invoice is not rejected within 2 business days after delivery of the overdue notice, the payment request or invoice will be deemed accepted, except for any portion of the payment request or invoice that is fraudulent or misleading.

The bill also provides that a local governmental entity must identify the agent or employee of the local governmental entity, or the facility or office, to which the contractor may submit its payment request or invoice. This requirement must be included in the contract between the local governmental entity and contractor, or must be provided by the local governmental entity through a separate written notice, as required under the contract, no later than 10 days after the contract award. A contractor’s submission of a payment request or invoice to the identified agent, employee, facility, or office of the local

¹ In an e-mail dated March 15, 2010, the Department of Management Services (DMS) indicated that the standard amount of retainage throughout the construction industry for a project starts at 10 percent, but that there is an allowance for a reduction to 5 percent when 50 percent of the project has been completed.

² Section 218.735(1), F.S., addresses guidelines for the determination of the payment due date for the purchase of construction services by a local governmental entity.

governmental entity must be stamped as received as provided in s. 218.74(1), F.S.,³ and will begin the time periods for payment or rejection of a payment request or invoice as provided in s. 218.735(1) and (2), F.S.⁴

Payment Rejection

Present Situation

Section 218.735(2), F.S., states that the local governmental entity may reject the payment request or invoice within 20 business days after the date on which the payment request or invoice is stamped as received as provided in s. 218.74(1), F.S. The rejection must be written and must specify the deficiency in the payment request or invoice and the action necessary to make the payment request or invoice proper.

Proposed Changes

The bill provides that if the payment request or invoice does not meet the contract requirements, the local entity must reject the payment request or invoice within 20 business days after the date on which the payment request or invoice is stamped as received as provided in s. 218.74(1), F.S.

Dispute Resolution

Present Situation

Section 218.735(4), F.S., provides that if a dispute between the local governmental entity and the contractor cannot be resolved by the procedure in s. 218.735(3), F.S., the dispute must be resolved in accordance with the dispute resolution procedure prescribed in the construction contract or in any applicable ordinance. In the absence of a prescribed procedure, the dispute must be resolved by the procedure specified in s. 218.76(2), F.S.⁵

Proposed Changes

The bill provides that the applicable dispute resolution procedure prescribed in the construction contract or in any applicable ordinance must be referenced in the contract.

List of Items (Punch List)

Present Situation

Section 218.735, F.S., provides that each contract for construction services between a local governmental entity and a contractor must provide for the development of a list of items (generally known as a "punch list") required to render complete, satisfactory, and acceptable the construction services purchased by the local governmental entity.

Section 218.735(a), F.S., provides for a 30-day timeline for construction projects having an estimated cost of less than \$10 million. Section 218.735(7)(b), F.S., provides for a 30-day timeline for construction projects having an estimated cost of \$10 million or more, unless otherwise extended by contract not to exceed 60 calendar days, after reaching substantial completion of the construction services purchased as defined in the contract, or, if not defined in the contract, upon reaching beneficial occupancy or use.

Proposed Changes

The bill provides that the contract must provide for the development of a single punch list for the construction services purchased by the local governmental entity.

³ Section 218.74, F.S., refers to "procedures for calculation of payment due dates."

⁴ Section 218.735(2), F.S., addresses guidelines related to the rejection for a payment request or invoice.

⁵ Section 218.76, F.S., refers to "improper payment request or invoice; resolution of disputes."

The bill provides that the contract must specify a date for the delivery of the punch list, not to exceed 5 days after the punch list has been developed and reviewed.

This bill also provides that the final contract completion date must be at least 30 days after the delivery of the punch list. If the punch 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 governmental entity exceeded the delivery date. In addition, 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 pursuant to the guidelines listed above.

Retainage

Present Situation

Section 218.735, F.S., provides that warranty items may not affect the final payment of retainage as provided in this section or as provided in the contract between the contractor and its subcontractors and suppliers.

In addition, if a local governmental entity fails to comply with its responsibilities to develop the punch list for the construction services purchased by the local governmental entity, as defined in the contract or statute, the contractor may submit a payment request for all remaining retainage withheld by the local governmental entity pursuant to this section. The local governmental entity need not pay or process any payment request for retainage if the contractor has, in whole or in part, failed to cooperate with the local governmental entity in the development of the punch list or failed to perform its contractual responsibilities, if any, with regard to the development of the punch list or if s. 218.735(8)(f), F.S.,⁶ applies.

Proposed Changes

The bill provides that items not included in the punch list as required by statute may not be used to withhold final payment of retainage. In addition, the bill requires submittal of the final, undisputed retainage payment within 20 business days after receipt of a proper invoice or payment request, less any amount withheld pursuant to the contract for incomplete or uncorrected work, unless the local governmental entity has provided a written notice to the contractor specifying the failure of the contractor to meet contract requirement in the development of the punch list.

Improper Payment Request or Invoice; Resolution of Disputes

Dispute Resolution Process

Present Situation

Section 218.76, F.S., provides for a dispute resolution process if a government entity files an objection to a request for payment. In addition, s. 218.76, F.S., provides that, in an action to recover amounts due under the Act, “the court shall award court costs and reasonable attorney’s fees, including fees incurred through any appeal, to the prevailing party, if the court finds that the nonprevailing party withheld any portion of the payment that is the subject of the action without any reasonable basis in law or fact to dispute the prevailing party’s claim to those amounts.”

Proposed Changes

The bill provides that if an improper payment request or invoice is submitted by a vendor, the local governmental entity must notify the vendor in writing within 10 days after the improper payment request is received.

The bill also provides that if the local governmental entity does not begin the dispute resolution procedure within 45 days, a contractor may give written notice to the local governmental entity of the

⁶ Section 218.735(8)(f), F.S., does not require the local governmental entity to pay or release any amounts that are the subject of a good faith dispute, the subject of a claim brought pursuant to s. 255.05, F.S., or otherwise the subject of a claim or demand by the local governmental entity or contractor refers to “improper payment request or invoice; resolution of disputes.”

failure to begin its dispute resolution procedure in a timely manner. If the local governmental entity fails to begin the dispute resolution procedure within 2 business days after such notice, any amounts resolved in the contractor's favor must bear mandatory interest, as set forth in s. 218.735(9), F.S.,⁷ from the date the payment request or invoice containing the disputed amounts was submitted to the local governmental entity. If the dispute resolution procedure is not initiated within 2 business days after the notice, the objection to the payment request or invoice is deemed waived. The waiver of an objection pursuant to this subsection does not relieve a contractor of its contractual obligations.

This bill removes language related to court proceedings. Under this bill, prevailing parties in legal disputes related to the Act would be awarded court and legal fees, even in cases when the losing party claimed to have a reasonable basis in law or fact to dispute such payments. This provision does not apply to any litigation that begins prior to October 1, 2010.

Other Comments

The bill makes several minor, stylistic changes to ch. 218, F.S., and provides an effective date of October 1, 2010.

B. SECTION DIRECTORY:

Section 1. Amends s. 218.72, F.S., relating to definitions.

Section 2. Amends s. 218.735, F.S., relating to timely payment for purchases of construction services.

Section 3. Amends s. 218.76, F.S., relating to improper payment request or invoice; resolution of disputes.

Section 4. Provides an effective date.

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:

Staff estimates that local governments, including school districts, may incur some costs as a result of this bill. These expenses may include additional staffing costs to meet the conditions and deadlines provided in the bill, payment for construction services that may not meet the contract

⁷ Section 218.735(9), F.S., provides that all payments due under s. 218.735, F.S., and not made within the time periods specified by s. 218.735, F.S., shall bear interest at the rate of 1 percent per month, or the rate specified by contract, whichever is greater.

requirements if the deadlines are not met, and payment of court costs and attorney's fees if, as the losing party, a local government had a reasonable basis in law or fact to dispute such payments, but ultimately did not prevail.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill may result in more timely payments to contractors, subcontractors and suppliers who provide services or supplies for construction projects. In addition, contractors, subcontractors and suppliers could earn interest payments if local governments are unable to meet the required payment timelines. Also, because the number of instances when local governments may not meet the established payment timelines cannot be predicted, neither can the amount of interest that would accumulate.

Contractors, subcontractors, and suppliers could also incur expenditures when filing suit to enforce the provisions of this bill.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision appears to apply because this bill may require counties or municipalities to spend funds or take an action requiring the expenditure of funds. However, the amount of the expenditures is indeterminate at this time, and therefore it is unclear if an exemption would apply.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments

Associated Builders and Contractors, Inc., Florida, (ABC) is a proponent of this bill. According to ABC, the commercial construction industry has observed that local government is oftentimes anything but "prompt" in their payment for services/goods received, in part because of unnecessary and cumbersome procedures. In addition, ABC has stated that, ironically, the failure of government to abide by the Prompt Pay Act disproportionately hurts Florida small businesses (which have the most difficult "cash flow" challenges). Therefore, ABC is a proponent of streamlining these procedures and increasing efficiencies.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On April 16, 2010, the Economic Development & Community Affairs Policy Council adopted a strike-all amendment and reported the bill favorably as a Committee Substitute.

This strike-all amendment provided that:

- a contractor may send the local government an overdue notice, pursuant to specified guidelines for this purpose;

- a local governmental entity must identify the agent or employee of the local governmental entity, or the facility or office, to which the contractor may submit its payment request or invoice, pursuant to specified guidelines for this purpose;
- the applicable dispute resolution procedure prescribed in the construction contract or in any applicable ordinance must be referenced in the contract;
- each contract for construction services between a local governmental entity and a contractor must specify a date for the delivery of the punch list, not to exceed 5 days after the punch list has been developed and reviewed, pursuant to specified guidelines for this purpose;
- if the punch list is not made available 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 governmental entity exceeded the delivery date;
- damages may be assessed against a contractor for failing to complete the project within the contract period as extended, pursuant to specified guidelines for this purpose;
- submittal of the final, undisputed retainage payment must be made within 20 business days after receipt of a proper invoice or payment request, less any amount withheld pursuant to the contract for incomplete or uncorrected work;
- if the local governmental entity does not begin the dispute resolution procedure within 45 days, the contractor may give written notice to the local governmental entity of the failure to begin its dispute resolution procedure in a timely manner. If the dispute resolution procedure is not initiated within 2 business days after the notice, the objection to the payment request or invoice is deemed waived; and
- the provisions related to court proceedings that broaden the ability of the prevailing party to be awarded court costs and attorney's fees do not apply to any litigation that begins prior to October 1, 2010.

This strike-all amendment also revised several definitions and changed the effective date of the bill from July 1, 2010, to October 1, 2010.

This analysis reflects the strike-all amendment adopted by the Economic Development & Community Affairs Policy Council.