

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/CS/SB 1056

INTRODUCER: Judiciary Committee, Community Affairs Committee, and Senator Baker

SUBJECT: Local Government Prompt Payment Act

DATE: April 21, 2010 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harrington	Imhof	RI	<b>Favorable</b>
2.	Gizzi	Yeatman	CA	<b>Fav/CS</b>
3.	Treadwell	Maclure	JU	<b>Fav/CS</b>
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

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|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill revises the Local Government Prompt Payment Act under ch. 218, F.S., to require additional information to be included in contracts for public construction projects. The bill also provides for the development of a single list of items that are required to complete construction services in local governmental entity contracts.

The bill further provides prompt payment procedures for subcontractors to submit invoices for the remainder of unpaid services and requires local governmental entities to provide vendors with written notice of improper payment requests or invoices.

This bill substantially amends the following sections of the Florida Statutes: 218.72, 218.735, and 218.76.

## II. Present Situation:

### Local Government Prompt Payment Act

Part VII of ch. 218, F.S., known as the “Local Government Prompt Payment Act,” was enacted in 1989 to ensure that all local governmental entity purchases are paid in a timely manner.<sup>1</sup> The Act specifically provides 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.<sup>2</sup>

The statutory provisions within the Local Government Prompt Payment Act (Act) govern local governmental entity payments both for the purchase of goods, services, personal property or lease of real property, and for labor services and materials that are provided in construction projects. Section 218.72(2), F.S., defines a local governmental entity to mean any “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.”<sup>3</sup>

The Act provides for the timely payment of local government purchases for both construction services and non-construction services.

#### *Non-Construction Purchases*

Section 218.74(2), F.S., requires local governmental entities to pay for non-construction services within 45 days after one of the following dates:

- The date on which the chief disbursement officer receives a proper invoice and the invoice is approved by the local government, if required; or
- If a proper invoice is not received by the local governmental entity, the date that:
  - The personal property is delivered and accepted by the local governmental entity;
  - The services are completed;
  - The rental period begins; or
  - The local governmental entity and vendor agree in a contract that provides dates relative to payment periods; whichever date is latest.<sup>4</sup>

An invoice is considered to be a “proper invoice” so long as it conforms to statutory and local governmental entity requirements.<sup>5</sup>

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<sup>1</sup> Section 218.70, F.S.

<sup>2</sup> Section 218.71, F.S.

<sup>3</sup> Section 218.72(2), F.S.

<sup>4</sup> Section 218.73, F.S.

<sup>5</sup> Section 218.72(1), F.S.

### ***Construction Purchases***

The payment due date for construction purchases is dependent on whether the payment request is subject to agent approval.<sup>6</sup> Payment requests that must be approved by an agent are due within 25 business days from the date the payment request is stamped as received.<sup>7</sup> If the payment request does not need to be approved by an agent, then the payment is due within 20 business days from the date the request is stamped as received.<sup>8</sup>

However, s. 218.74, F.S., requires local governmental entities to establish procedures for all payment requests or invoices to be marked as received on the date it is delivered to an agent or employee of the local governmental agency.<sup>9</sup> Upon an improper payment request, the local governmental entity must notify the vendor within 10 calendar days of receiving the request, indicating the corrective action that is required to make the payment request or invoice proper.<sup>10</sup>

A local governmental entity is permitted to reject a payment request in writing within 20 business days after it is stamped or marked as received.<sup>11</sup> Any corrected payment request that has been resubmitted must be either paid or rejected within 10 business days of receipt. If the local governing body is required to approve the request pursuant to local ordinance, charter, or other law, then the payment becomes due on the first business day following the next regularly scheduled meeting of the governing body.<sup>12</sup>

Prompt payment obligations also extend to contractors and subcontractors.<sup>13</sup> Section 218.735(6), F.S., requires a contractor to pay his or her subcontractors and suppliers within 10 days of receiving payment from the local governmental entity, and requires a subcontractor to pay his or her subcontractors and suppliers within seven business days of receipt of funds.<sup>14</sup>

### **Retainage**

Pursuant to subsection (8) of s. 218.735, F.S., local governments may “retain” not more than 10 percent of progress payments made to contractors until 50 percent of the construction services are completed.<sup>15</sup> After 50 percent of the construction services under the contract are completed, the local government must reduce the amount of retainage to 5 percent for each subsequent payment made to the contractor.<sup>16</sup> However, certain small local governments<sup>17</sup> may withhold

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<sup>6</sup> See s. 218.72(9), F.S., defining “agent” to mean “project architect, project engineer, or any other agency or person acting on behalf of the local governmental entity.”

<sup>7</sup> Section 218.735(1)(a), F.S.

<sup>8</sup> Section 218.735(1)(b), F.S.

<sup>9</sup> Section 218.74(1), F.S.

<sup>10</sup> Section 218.76(1), F.S.

<sup>11</sup> Section 218.735(2), F.S.

<sup>12</sup> Section 218.735(3)(b), F.S.

<sup>13</sup> Section 218.735(6), F.S.

<sup>14</sup> *Id.*

<sup>15</sup> Section 218.735(8)(a), F.S.

<sup>16</sup> See s. 218.735(8)(b), F.S. This subsection defines 50 percent completion as “the meaning set forth in the contract between the local governmental entity and the contractor or, if not defined in the contract, the point at which the local governmental entity has expended 50 percent of the total cost of the construction services purchased as identified in the contract together with all costs associated with existing change orders and other additions or modifications to the construction services

retainage in the amount of 10 percent of each progress payment throughout the entire length of the contract.<sup>18</sup>

When 50 percent of the construction services are completed, the contractor may bill the local government for half of the retainage withheld. The local governmental entity must promptly make the payment unless there are grounds for a good faith dispute.<sup>19</sup>

### **List of Items (“Punch List”)**

Section 218.735(7), F.S., requires each construction contract between a contractor and a local governmental entity to provide a list of items that are required in order to render complete, satisfactory, and acceptable construction services, as purchased by the local governmental entity. This list of items is generally known as a “punch list.”<sup>20</sup>

The local governmental entity and the contractor must develop the punch list within 30 calendar days of substantial completion of the construction project. However, this time limit may be extended in the contract for up to 60 calendar days for projects that are more than ten million dollars.<sup>21</sup> If the local governmental entity fails to comply with the statutory requirement to develop a punch list, then the contractor is entitled to request payment for all remaining retainage.<sup>22</sup>

When all of the work provided in the punch list is completed, the contractor can submit a payment request for all remaining retainage withheld from the local governmental entity.<sup>23</sup> If there is a good faith dispute as to the completion of one or more items identified on the punch list, then the local governmental entity may continue to withhold an amount up to 150 percent of the total costs to complete such items.<sup>24</sup> Under current law, warranty items may not affect the final payment of retainage, nor may retainage be withheld to secure insurance premium payments under a consolidated insurance program.<sup>25</sup>

### **Mandatory Interest Charges**

All late payments under the Local Government Prompt Payment Act must accrue a mandatory interest rate that is equal to the greater of 1 percent per month or the rate specified in the

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provided for in the contract.” (Note: Section 218.735(8)(c), F.S., states that contractors may withhold retainage payments from their subcontractors at a rate higher than 5 percent, based on certain factors of the subcontractor’s past performance.)

<sup>17</sup> A municipality having a population of 25,000 or less; or a county having a population of 100,000 or less.

<sup>18</sup> Section 218.735(8)(b), F.S. See also Leiby, Larry R., CONSTRUCTION LAW MANUAL s. 4:3 PROMPT PAYMENT LAWS, 8 Fla. Prac., Constr. Law Manual s. 4:3 (2009-10 ed.).

<sup>19</sup> Section 218.735(8)(d) and (f), F.S.

<sup>20</sup> Bruner, Philip L. and Patrick J. O’Conner, Jr., PAYMENT PROCESS: FINANCING, SECURING AND MAKING PAYMENT s. 8:37 PUNCH LIST WORK, 3 Bruner & O’Conner Construction Law s. 8:37 (Jan. 2010).

<sup>21</sup> Section 218.735(7)(a) 1.-2., F.S.

<sup>22</sup> Section 218.735(7)(h), F.S.

<sup>23</sup> Section 218.735(7)(d), F.S.

<sup>24</sup> *Id.*

<sup>25</sup> Sections 218.735(7)(f) and (g), F.S.

contract.<sup>26</sup> Contracts with local governmental entities may not prohibit the collection of late payment interest charges.<sup>27</sup> If the total number of interest payments exceeds \$250, then the local governmental entity must report the total number of interest payments to the local governing authority in December of that year.<sup>28</sup>

### **Dispute Resolution Procedures**

Section 218.76, F.S., requires payment disputes between a local governmental entity and a vendor to be determined under local government dispute resolution procedures. The local government dispute resolution procedures must commence no later than 45 days after the receipt of the payment request, and a final decision must be rendered no later than 60 days after receipt of the payment request.<sup>29</sup> If the dispute is resolved in favor of the local governmental entity, then the interest charges shall begin to accrue 15 days after the final decision. However, if the dispute is resolved in favor of the vendor, then the interest accrues from the original date that the payment became due.<sup>30</sup>

In any action to recover amounts due under the Act, the court shall award court fees and reasonable attorney's fees to the prevailing party if it determines that the non-prevailing party withheld any payment without a reasonable basis in law or fact.<sup>31</sup>

### **III. Effect of Proposed Changes:**

**Section 1** amends the definition of "proper invoice" in s. 218.72, F.S., to provide that all statutory and government requirements of invoices must be included in the contract for the project for which the invoice is submitted. The bill also revises the definition of "payment request" to require the contract to include both statutory and local governmental entity requirements. This section also amends the definition of the term "agent" to require the invitation to bid or request for proposal to identify the agent in accordance with s. 218.735(2), F.S., as amended by the bill.

**Section 2** amends s. 218.735, F.S., to provide that a contractor may send the local government an overdue notice. If the payment request or invoice is not rejected within two business days after delivery of the overdue notice, the payment request or invoice is deemed accepted, unless any portion of the payment request or invoice is deemed fraudulent or misleading.

A local governmental entity is required to identify the agent or employee, or the facility or office, to which the contractor may submit its payment request or invoice. This requirement must be included in the contract, or, as required by the contract, must be provided by the local government through written notice within 10 days after the contract is awarded. Any request or invoice to the agent, employee, facility, or local governmental entity must be stamped as

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<sup>26</sup> Section 218.735(9), F.S. *See also* Leiby, Larry R., CONSTRUCTION LAW MANUAL s. 4:3 PROMPT PAYMENT LAWS, 8 Fla. Prac., Constr. Law Manual s. 4:3 (2009-10 ed.)

<sup>27</sup> Section 218.75, F.S.

<sup>28</sup> Section 218.78, F.S.

<sup>29</sup> Section 218.76(2), F.S.

<sup>30</sup> *Id.*

<sup>31</sup> Section 218.76(3), F.S.

received as provided in s. 218.74(1), F.S. The time periods begin to run upon the submission of the payment request or invoice. This section also *requires* the local governmental entity to reject a payment request or invoice that does not meet contract requirements.

Subsection (4) (redesignated as subsection (5) under the bill) of s. 218.735, F.S., is amended to require any disputes between the local governmental entity and the contractor to be resolved in accordance to the dispute resolution procedures prescribed in the contract or by the applicable ordinance that is stated in the contract.

This section amends subsection (7) (redesignated as subsection (8) under the bill) of s. 218.735, F.S., to require each contract for construction services between a local governmental entity and a contractor to provide for a *single* list of items (“punch list”). The date for the delivery of the list of items must be specified in the contract, which shall not be more than 5 days after the list has been developed and reviewed.

The bill also requires the final completion date in the contract to be at least 30 days after the delivery of the list of items or receipt of an untimely list. This new paragraph also allows the contract time to be extended by the number of days that the local governmental entity exceeds the delivery date and does not allow the entity to assess damages against the contractor for incompleteness of the contract unless he or she failed to complete the project within the extended time period.

Contractors are permitted to make a payment request for the remaining contract amounts if the local governmental entity fails to develop the list of items, which must be paid within 20 business days after the receipt of a proper invoice or payment request. If the local government has provided written notice to the contractor specifying the failure of the contractor to meet contract requirements in developing the list of items to be completed, the local government is not required to pay or process any payment request for retainage.

**Section 3** amends s. 218.76, F.S., to require the local government to provide vendors with *written* notice of improper payment requests or invoices. This section also amends subsection (2) to provide that, if the local governmental entity does not commence the dispute resolution procedure within the time required, the contractor may give written notice to the local governmental entity of this failure. Under the bill, if the local governmental entity fails to commence the dispute resolution procedure within two business days after the notice:

- Any amounts resolved in the contractor’s favor bear mandatory interest, as set forth in s. 218.735(9), F.S., from the date the payment request or invoice containing the disputed amounts was submitted to the local governmental entity.
- The objection to the payment request or invoice is deemed waived. The waiver of the obligation does not relieve a contractor of its other contractual obligations.

This section also expands the eligibility for attorney’s fees by allowing the court to grant the prevailing party attorney’s fees and court costs regardless of whether the non-prevailing party had a reasonable basis for withholding payment. However, the bill provides that the attorney fee provision does not apply to any litigation initiated before October 1, 2010.

**Section 4** provides that this bill will take effect on October 1, 2010.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

This bill requires additional information in contracts for public construction services. The bill also requires local governments to provide written notice to vendors for improper payment requests or invoices, and limits local governmental entities to one list of items (punch list) for construction services. These provisions fall under subsection (a) of section 18 of Article VII, State Constitution, which prohibits counties and municipalities from being bound by general laws that require them to spend funds or to take actions requiring the expenditure of funds unless certain exemptions or exceptions are met.<sup>32</sup>

Subsection (d) of section 18 of Article VII, State Constitution grants an exemption to subsection (a) if the law is determined to have an insignificant fiscal impact. An insignificant fiscal impact means an amount not greater than the average statewide population for the applicable fiscal year times ten cents (FY 2009-2010 \$1.88 million). A fiscal estimate is currently not available. However, if it is determined that this bill has more than an insignificant fiscal impact, it would require a finding of an important state interest and a two-thirds vote of the membership of each house of the Legislature in order to effectively bind cities and counties.<sup>33</sup>

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

This bill will require more information to be provided in invitations to bid or project proposal requests and contracts for public construction projects. The bill will also make it easier for prevailing parties to receive attorney's fees and court costs under dispute resolution procedures. Parties to litigation initiated after October 1, 2010, may be subject to the greater likelihood of an attorney fee award to the prevailing party.

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<sup>32</sup> FLA. CONST. art. VII, s. 18(a).

<sup>33</sup> FLA. CONST. art. VII, s. 18(d).

**C. Government Sector Impact:**

This bill will require local governmental entities to provide written notice to vendors for improper payment requests or invoices. The bill will also limit local governmental entity contracts to one list of items (punch list) for construction services. Additionally, the provisions of this bill negate any payment objection that is not timely determined through dispute resolution procedures.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Judiciary on April 19, 2010:**

The committee substitute:

- Clarifies the definition of “proper invoice” by providing that all statutory and government requirements of invoices must be included in the contract for the project for which the invoice is submitted;
- Clarifies the definition of “payment request” by providing that requirements related to requests for payment for construction services must be included in the contract for the project, rather than in the invitation to bid or request for proposal as required under the bill;
- Includes a reference to s. 218.735(2), F.S., relating to identification of the agent who is required to review invoices or payments requests, in the definition of “agent”;
- Provides that a contractor may send the local government an overdue notice, and if the payment request is not rejected within two business days after the notice, the payment is deemed accepted, except for any portion that is fraudulent or misleading;
- Reduces from 10 to 5 the maximum number of days for the delivery of the list of items required to render a project complete, satisfactory, and acceptable after the list has been developed and reviewed;
- Clarifies that, if a local governmental entity has provided written notice to the contractor specifying the failure of the contractor to meet contract requirements in developing the list of items to be completed, the local governmental entity is not required to pay or process any payment request for retainage;
- Restores provisions in current law relating to the proper amount of retainage that a local governmental entity may withhold after 50 percent of the construction services are completed;

- Removes the provision establishing prompt-payment procedures that allow subcontractors to submit invoices to the contractors for the remainder of unpaid construction services 45 days after the completion of these services;
- Removes the provision requiring the subcontractor to include a conditional release of lien and all appropriate warranties and closeout documentation with the final payment invoice to the contractor;
- Requires the contractor to provide written notice to local governments of the failure to timely commence any alternate dispute resolution procedure;
- Establishes consequences for the local government if it fails to commence the dispute resolution procedure within two business days after notice;
- Specifies that the attorney fee provision does not apply to any litigation initiated before October 1, 2010; and
- Changes the effective date to October 1, 2010, from July 1, 2010.

**CS by Community Affairs on April 7, 2010:**

The committee substitute (CS) makes amendments to ss. 218.72 and 218.735, F.S., to:

- Require a local governmental entity to identify the agent or employee of the local governmental entity, facility, or office that the contractor must submit its payment request or invoice to in the *contract or through a separate written notice* within 10 days after the contract award.
- State that a contractor's payment request or invoice shall be stamped as received pursuant to s. 218.74(1), F.S., and the time period shall commence for payment or rejection of such request or invoice as provided in subsection (1) or (2).
- Provide that a dispute between a local governmental entity and a contractor shall be resolved by the dispute resolution procedures prescribed in the *contract* or by the applicable ordinance which must be referenced in the contract.
- Require public construction contracts to specify the date for delivery of a list of items which shall not exceed 10 days after the list has been developed and received.
- State that the completion time for the contract may be extended *by the number of days the local governmental entity exceeded the delivery date* and clarify that damages may not be assessed against the contractor for failing to complete the project within the time specified in the contract *unless the contractor failed to complete the project within the contract period as extended herein*.
- Further clarify that the payment of any remaining undisputed contract amount, minus amounts withheld for incomplete or incorrect work, must be paid within 20 business days *after receipt of a proper invoice or payment request*.
- Delete provisions relating to the amount of retainage that may be withheld by a local governmental entity after 50 percent of the construction services are completed.
- Establish prompt payment procedures to allow subcontractors to submit invoices for the remainder of unpaid construction services 45 days after the completion of such services.

- Not require invitations to bid or requests for proposals for public construction contracts to include the statutory requirements that are needed for a proper invoice under s. 218.72 (8), F.S., as provided in the CS.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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