

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 Regulated Industries Committee

BILL: SB 1056
 INTRODUCER: Senator Baker
 SUBJECT: Local Government Payment Act
 DATE: March 17, 2010 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|------------|----------------|-----------|------------------|
| 1. | Harrington | Imhof | RI | Favorable |
| 2. | _____ | _____ | CA | _____ |
| 3. | _____ | _____ | JU | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

I. Summary:

The bill revises provisions relating to the timely payment for purchases of construction services for public construction projects. The bill requires that the requirements for a proper invoice, the dispute resolution procedure, and the agent acting on behalf of the local governmental entity be included and identified in the invitation to bid or request for proposal for projects. The bill provides that the local governmental entity must reject a payment request or invoice that does not meet the contract requirements. The bill provides that each contract for construction services between a local governmental entity and a contractor must provide for the development of a single list of items required to be completed. The bill provides that the final contract completion date must be at least 30 days after the delivery of the list of items. Items not included in the list may not affect the final payment of retainage. The bill further provides that if the local governmental entity fails to comply with its responsibilities to develop the list, the contractor may request payment of any remaining contract amount and that amount must be paid within 20 business days.

The bill requires that the local governmental entity notify vendors in writing that the request or invoice for payment is improper. If the local governmental entity does not timely commence the dispute resolution procedure, the objection to payment shall be deemed to have been waived. The bill also expands the attorney fee provision to permit courts to award attorney fees to the prevailing party, regardless of whether the nonprevailing party had reasonable basis for withholding payment.

The bill provides an effective date of July 1, 2010.

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

II. Present Situation:

Overview

Part VII of ch. 218, F.S., the Local Government Prompt Payment Act (act) was enacted in 1989. The act provides for prompt payments for services by local governmental entities, for interest payments on late payments made by local governmental entities, and for a dispute resolution process for payment.¹ It is the policy of the state that all local governmental entity purchases be paid for in a timely manner.² “Local governmental entity” is defined as 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.³ The act governs the payment of local governmental entities for both the purchase of goods, services, personal property or the lease of real property, and for labor services and materials provided for construction projects.

Nonconstruction Purchases

For purchases, other than the purchases of construction services, local governmental entities must pay within 45 days after the latest of the following dates:⁴

- The date on which the chief disbursement officer receives a proper invoice⁵ 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.

Any payment for the purchase of goods or services not made within the times set forth above, shall bear interest from thirty days after the due date at the rate of one percent per month on the unpaid balance.⁶ However, in order to receive the interest payment, vendors must invoice the local governmental entities for any interest accrued.⁷

Construction Purchases

The time that payment for construction services is due depends on whether the payment requests must be approved by an agent.⁸ If payment requests must be approved by an agent, then payments are due within 25 business days after the date the payment request is stamped as

¹ Section 218.71(1), F.S.

² Section 218.71(2), F.S.

³ Section 218.72(2), F.S.

⁴ Sections 218.73 and 218.74, F.S.

⁵ A proper invoice is defined by s. 218.72(1), F.S., as an invoice that conforms to all requirements, both statutory and as provided by the local governmental entity.

⁶ Section 218.74(4), F.S.

⁷ *Id.*

⁸ The act defines “agent” as an architect, project engineer, or any other agency or person acting on behalf of the local governmental entity. Section 218.72(9), F.S.

received.⁹ If payment requests need not be approved by an agent, then payments are due within 20 business days after the date the payment request is stamped or marked as received.¹⁰ Pursuant to the act, all payment requests and invoices are required to be stamped or marked on the date on which it is delivered to an agent or employee of the local government entity.¹¹

The local governmental entity may reject a payment request. Such rejection must be in writing and within 20 business days after the payment request is stamped or marked as received.¹² If a payment request is rejected and is re-submitted, then the corrected payment request must be paid or rejected within 10 business days after receipt unless the governing body is required by ordinance, charter, or other law, to approve the payment request.¹³ If approval is required by ordinance, charter, or other law, then the payment is due on the first business day after the next regularly scheduled meeting of the governing body after the corrected payment request is received.¹⁴

If an improper payment request is submitted, the local governmental entity must, within 10 calendar days after the improper request is received, notify the vendor and indicate what corrective action must be done on the part of the vendor to make the payment request proper.¹⁵ The statute does not require the local governmental entity to notify the contractor in writing that the payment request is improper.

“Punch Lists”

Each contract between a local governmental entity and contractor must provide for the creation of a list of items required to render the contracted construction services complete and satisfactory.¹⁶ Upon completion of all items on the list, the contractor can submit a payment request for all remaining retainage withheld from the local governmental entity.¹⁷ All items required to be completed under the contract, that are identified after the creation of the list, remain the responsibility of the contractor to complete.¹⁸ If the local governmental entity fails to comply with its requirement to help develop the list, the contractor can request payment for all remaining retainage.¹⁹

Interest Charges

If the time periods for prompt payments specified above are not met, any late payment shall accrue interest. The amount of interest that accrues under the act is the higher of one percent per month or the rate specified in the contract.²⁰ Contracts with local governmental entities may not

⁹ Section 218.735(1)(a), F.S.

¹⁰ Section 218.735(1)(b), F.S.

¹¹ Section 218.74(1), F.S.

¹² Section 218.735(2), F.S.

¹³ Section 218.735(3), F.S.

¹⁴ Section 218.735(3)(b), F.S.

¹⁵ Section 218.76(1), F.S.

¹⁶ Section 218.735(7)(a), F.S.

¹⁷ Section 218.735(7)(d), F.S.

¹⁸ Section 218.735(7)(e), F.S.

¹⁹ Section 218.735(7)(h), F.S.

²⁰ Section 218.735(9), F.S.

prohibit the collection of late payment interest charges.²¹ Additionally, local governmental entities that pay more than \$250 within a fiscal year must report in December of that year the total number of interest payments made during the preceding fiscal year to either the board or county commissioners or the municipal governing body.²²

Dispute Resolution Procedure

Disputed sums are also required to be paid in a timely manner. The dispute resolution procedure must be commenced within 45 days after receipt of the payment request and concluded within 60 days after receipt of the payment request.²³ The dispute resolution procedures are not administrative hearings subject to ch. 120, F.S.²⁴ If the dispute is resolved in favor of the vendor, then interest accrues from the original date that the payment came due. However, if the dispute is resolved in favor of the local governmental entity, then interest begins to accrue 15 days after the local governmental entity's final decision.²⁵ The undisputed portion of the payment request shall be paid timely.²⁶

Subcontractor Payment

In addition to the requirement of prompt payment by local governmental entities, contractors share the prompt payment obligation and are required to pay subcontractors and suppliers in a timely manner. When a contractor receives payment, the contractor is required to pay subcontractors and suppliers within 10 days of receipt of the funds.²⁷ When a subcontractor receives payment, the subcontractor must pay his or her subcontractor and suppliers within 7 days of receipt of the funds.²⁸

Attorney Fees

The act also provides that in any action to recover amounts due under the act, the court shall award court costs and reasonable attorney's fees if the court finds that the non-prevailing party withheld any payment without any reasonable basis in law or fact.²⁹

III. Effect of Proposed Changes:

The bill amends and renumbers the definitions in s. 218.72, F.S. The bill amends the definition for "proper invoice" to require the invitation to bid or request for proposal to include the statutory requirements and local governmental entity requirements for the invoice. The bill amends the definition for "payment request" to require the invitation to bid or request for proposal to include all statutory requirements and requirements specified by the local

²¹ Section 218.75, F.S.

²² Section 218.78, F.S.

²³ Section 218.76(2), F.S.

²⁴ *Id.* Such procedures do not constitute an administrative proceeding and prohibit a court from deciding the matter de novo.

²⁵ *Id.*

²⁶ Section 218.735(5), F.S.

²⁷ Section 218.735(6), F.S.

²⁸ *Id.*

²⁹ Section 218.76(3), F.S.

governmental entity for the request. The bill also amends the definition for “agent” to require the agent to be identified in the invitation to bid or request for proposal for the project.

If an agent is required to approve the payment request prior to submitting the invoice to the local governmental entity, then payment is due 25 days after the payment request is received. Section 218.735, F.S., is amended to provide that if the payment request is not rejected before the due date, it shall be deemed accepted. The bill provides that the local governmental entity must reject a payment request or invoice that does not meet the contract requirements. The bill also provides that the dispute resolution procedure must be prescribed in the invitation to bid or request for proposal for the project.

The bill provides that each contract for construction services between a local governmental entity and a contractor must provide for the development of a single list of items required to be completed for construction services. The bill provides that the final contract completion date must be at least 30 days after the delivery of the list of items. If the list is not provided to the contractor in a timely manner, the contract time for completion must be extended by at least 30 days after the contractor receives the list. If the list has not been timely provided, damages for failing to complete a project on time may not be assessed. There is not definition of what is considered to be timely.

Items not included in the list may not affect the final payment of retainage.³⁰ The bill further provides that if the local governmental entity fails to comply with its responsibilities to develop the list, the contractor may request payment of any remaining contract amount and that amount must be paid within 20 business days.

If the local governmental entity has provided the contractor a written notice specifying its failure to meet the contract requirements for a development of the list, then the local government need not pay any request for retainage. The non-payment must be based upon the contractor failing to cooperate in developing the list, performing to perform on the contract, or if the amount is subject to a claim under s. 255.05, F.S.

The bill requires that the local governmental entity notify vendors in writing that the request or invoice for payment is improper. If the local governmental entity does not timely commence the dispute resolution procedure within 45 days of the receipt of the invoice or request, the objection to payment shall be deemed to have been waived. The time for dispute resolution may be extended upon the written agreement of the affected parties. The bill also expands the attorney fee provision to permit courts to award attorney fees to the prevailing party, regardless of whether the nonprevailing party had reasonable basis for withholding payment.

The bill provides an effective date of July 1, 2010.

³⁰ Retainage is a portion of the amount due to the contractor for work the contractor has completed. The retainage is held until the project is complete. *See*, s. 337.175, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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:

According to the Associated Builders and Contractors, the bill will streamline the payment process and result in contractors receiving payment more quickly.

C. Government Sector Impact:

The Florida League of Cities and the Florida Association of Counties have expressed concern with the bill. In particular, the two organizations suggested that the requirement to include more information in the request for proposal will lengthen the request for proposal and provide information at an earlier stage of the process that is already available to the contractors. In addition, the organizations stated that the local governmental entity and contractors negotiate and contract for these terms. The Florida League of Cities and Association of Counties have also indicated a concern over the single punch-list.

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.)

None.

B. Amendments:

None.

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