

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: CS/SB 378

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Bradley

SUBJECT: Payment for Construction Services

DATE: February 17, 2021      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Paglialonga</u>	<u>Ryon</u>	<u>CA</u>	<b>Favorable</b>
2.	<u>Ponder</u>	<u>McVaney</u>	<u>GO</u>	<b>Fav/CS</b>
3.	_____	_____	<u>RC</u>	_____

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

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/SB 378 enhances the statutory interest rate for public and private parties that fail to make required payments for certain construction labor, services, and material.

The bill increases, by one percent per month, the remedial interest rate applied to payments wrongfully withheld for construction services for public and private construction projects. For public sector construction projects, the bill increases the interest rate from one percent to two percent per month. Public entities that wrongfully withhold payment to contractors and, likewise, contractors who wrongfully withhold payment to subcontractors and sub-subcontractors on public projects will be liable for interest at a rate of two percent per month on the unpaid amounts. For private sector construction projects, current law specifies that late payments bear interest at the rate specified in s. 55.03, F.S., which provides the general rate of interest on judgments.<sup>1</sup> The bill increases the late payment interest for the private sector to the rate specified in s. 55.03, F.S., *plus* twelve percent per annum.

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<sup>1</sup> Under s. 55.03, F.S., the Chief Financial Officer sets rates of interest that apply to judgments or decrees for the calendar quarter beginning January 1 and adjusted quarterly on April 1, July 1, and October 1 by averaging the discount rate of the Federal Reserve Bank of New York for the preceding 12 months, then adding 400 basis points to the averaged federal discount rate. As of January 1, 2021, the current judgment interest rate per annum is 4.81%. Jimmy Patronis Florida's Chief Financial Officer Website, *Current Judgement Interest Rates*, available at: <https://www.myfloridacfo.com/division/aa/localgovernments/current.htm> (last visited Jan. 25, 2021).

Furthermore, the bill clarifies that parties who contract with a public or private entity for construction services and knowingly and intentionally fail to pay the undisputed contract obligations for construction labor, services, or materials, commit misapplication of construction funds, as provided in s. 713.345, F.S. The Construction Industry Licensing Board must take disciplinary against a construction industry licensee found guilty of committing misapplication of construction funds and suspend the licensee's license for a minimum of one year.

The state and local governments and contractors may incur additional costs associated with the increased interest rates applied to the late payment of constructions services.

The provisions of the bill apply only to contracts executed on or after July 1, 2021.

## II. Present Situation:

Florida law has several Prompt Payment Acts regulating various aspects of payments connected to construction projects and services. Part VII of ch. 218, F.S., addresses payment for local government construction projects. Chapter 255, F.S., governs payments connected to state agency construction projects, and payments for private construction projects are regulated in chs. 713 and 715, F.S.

### **Prompt Payment Act for Local Governments**

Part VII of ch. 218, F.S., is known as the "Local Government Prompt Payment Act" and requires "payment for all purchases by local governmental entities be made in a timely manner."<sup>2</sup> Moreover, the stated purpose of this act is to provide for prompt payments by local governments to parties for construction services, apply interest on late payments made by local governments, and establish a dispute resolution process for contested payments.<sup>3</sup>

The act applies to 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.<sup>4</sup> The act defines construction services as all labor, services, and materials provided in connection with the construction, alteration, repair, demolition, reconstruction, or other improvements to real property.<sup>5</sup>

### ***Payment Deadlines for Prime Contractors***

According to s. 218.735, F.S., when a local governmental entity enters into a contract for construction services with a contractor,<sup>6</sup> the local government must identify the representative who is to receive contractor invoices. The payment process begins when a contractor submits an invoice. This action starts the local government entity's timeframe to remit payment or reject the invoice.

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

<sup>3</sup> *Id.*

<sup>4</sup> Section 218.72(5), F.S.

<sup>5</sup> Section 218.72(2), F.S.

<sup>6</sup> Section 218.72(3), F.S.: "Contractor or provider of construction services means the person who contracts directly with a local governmental entity to provide construction services."

The payment due date depends on whether an agent must approve the invoice. If a local government representative must approve the invoice before it is submitted to the entity for payment, the payment is due 25 business days after the date on which the invoice is stamped as received. If the invoice does not require approval by an entity representative, payment is due 20 days after the date on which the invoice is stamped as received.<sup>7</sup>

If payment is not received by the due date, the contractor can send an overdue notice to the local government entity. After four business days of delivering the overdue notice, if the invoice is not rejected, the invoice will be considered undisputed, except for any amounts that are fraudulent or misleading.<sup>8</sup>

If the invoice does not meet contract requirements, the local government entity must provide the contractor with a written rejection specifying the deficiency and action needed to rectify within 20 business days of receipt. Once the invoice is corrected, payment or notice of rejection of the invoice is due within ten business days of receipt or the first business day after the local government entity's next held meeting.<sup>9</sup>

#### ***Payment Deadlines for Subcontractors, Sub-Subcontractors, & Suppliers***

When payment is received by a contractor for labor, services, or materials furnished by subcontractors and suppliers, payment is due to those subcontractors and suppliers within 10 days of receipt of payment from the local government entity.<sup>10</sup>

If a subcontractor utilizes sub-subcontractors and suppliers, payment to those parties is due within 7 days of the subcontractor receiving payment.<sup>11</sup> Under s. 218.735(6), F.S., contractors and subcontractors are entitled to dispute invoices so long as the payment rejection is in writing. The actions required to rectify the dispute must be included in the rejection. However, any undisputed amounts are required to be paid within the outlined time limits.

#### ***Penalties for Late Payment***

Under the Local Government Prompt Payment Act, if payment for construction services is late or wrongfully withheld, statutorily imposed interest will accrue at a rate of 1 percent per month, or a greater rate specified by contract, until the debt is paid. Attorney fees and court costs are only available to disputes between contractors, subcontractors, and suppliers. They will only be awarded if payments were withheld without any reasonable basis in law or fact.<sup>12</sup>

#### **Prompt Payment Act for State Construction Projects**

Sections 255.0705 - 255.078, F.S., are known as the Florida Prompt Payment Act. This act governs the timely payment for construction services by the state or any agency thereof (public

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<sup>7</sup> Section 218.72(1), F.S.

<sup>8</sup> *Id.*

<sup>9</sup> Section 218.735(3), F.S.

<sup>10</sup> Section 218.735(6), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> Section 218.735(6), F.S.

entity).<sup>13</sup> This act also governs payments made by contractors to subcontractors and suppliers when the construction services are in connection with a public entity construction project.

#### ***Payment Deadline for Public Entity to Contractor***

For public entities contracting with a prime contractor, the payment process starts when a contractor submits a pay application to the public entity. The public entity must submit the contractor's request to the Chief Financial Officer within 20 days of receiving the payment application. Upon receipt, the payment officer performs an inspection of the construction services claimed by the payment application. The payment officer must approve or deny the payment application within 10 days. Under these provisions, payment to a contractor who properly performs construction services is due within 30 days after the payment application is submitted.<sup>14</sup>

#### ***Payment Deadline for Contractor to Subcontractors and Suppliers***

Prime contractors typically do not have to pay other parties involved in a public construction project until the public entity has paid the prime contractor.<sup>15</sup> Subcontractors and suppliers are entitled to receive payment from a prime contractor once all the necessary lien waivers and payment applications have been submitted to the prime contractor. After these prerequisites are fulfilled, the prime contractor must release undisputed payments within 30 days after the labor or materials were provided, or 10 days from receipt of payment from the public entity, whichever is later.<sup>16</sup>

#### ***Penalties for Late Payment***

All payments due for the purchase of construction services under the Florida Prompt Payment Act and wrongfully withheld by a public entity or prime contractor bear statutorily imposed interest at the rate of 1 percent per month.<sup>17</sup>

#### **Prompt Payment Law for Private Construction Projects**

The payment procedures for private construction projects in Florida are described in chs. 713 and 715, F.S. Section 713.346, F.S., describes how persons are required to pay contract obligations for labor, services, or materials provided on account for constructing or altering permanent improvements to real property. Section 715.12, F.S., titled "Construction Contract Prompt Payment Law," specifically applies to written contracts to improve a real property for which a construction lien is authorized under Part I of ch. 713, F.S.

#### ***Payment Deadlines and Remedies***

Under s. 713.346, F.S., failure to pay any undisputed obligations for labor, services, or materials used in a private construction project within 30 days after payment became due or is received,

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<sup>13</sup> Section 255.073, F.S., defines "public entity" to mean the state, or any office, board, bureau, commission, department, branch, division, or institution thereof.

<sup>14</sup> Section 255.073-74, F.S.

<sup>15</sup> See *International Engineering Services Inc. v. Scherer Const. & Engineering of Cent. Florida, LLC*, 74 So.3d 531 (Fla. 5th DCA 2011); see also *Everett Painting Co., Inc. v. Padula & Wadsworth Const., Inc.*, 856 So.2d 1059 (Fla. DCA 4th 2003).

<sup>16</sup> Section 255.073(3), F.S.

<sup>17</sup> Section 255.073(4), F.S.

whichever last occurs, entitles the person providing such construction services to bring a verified complaint. Based on this complaint and an evidentiary hearing, the court may award either party an accounting of the payment, an injunction, prejudgment attachment, and any other appropriate legal and equitable remedy.

Under s. 715.12, F.S., an obligee<sup>18</sup> is entitled to payment for construction services as described by the terms of a contract, and when all the following events have occurred:

- The obligee has furnished the obligor<sup>19</sup> with a written request for payment.
- The obligor, except the owner of the real property, immediately above the obligee in the chain of contracts has been paid for the obligee's labor, services, or materials.
- The obligee has furnished the obligor with all affidavits or waivers required for the owner to make proper payments under s. 713.06, F.S.<sup>20</sup>

### ***Penalties for Late Payment***

Any payment due under the provisions of s. 715.12, F.S., excluding any amounts withheld pursuant to a good faith dispute, bears interest at the rate specified in s. 55.03 F.S., computed beginning on the fourteenth day after payment is due.

A party can withhold payment for reasons specified in s. 713.346 and s. 715.12, F.S. If none of the exceptions apply, any late or wrongfully withheld payments will be subject to interest accruing at the current judgment rate or a rate specified in the contract, whichever is greater.<sup>21</sup> If the dispute goes to court, the prevailing party will be awarded attorney fees.<sup>22</sup>

### **Construction Industry Licensing Board**

Florida regulates construction contracting under Part I of ch. 489, F.S. Florida establishes the Construction Industry Licensing Board ("CILB") under s. 489.107, F.S., to oversee the licensing and various regulations for the Florida construction industry. When applying for a construction license, the CILB will meet to consider the application. The CILB also reviews disciplinary cases and conducts informal hearings regarding licensure.<sup>23</sup>

### ***Disciplinary Action***

The CILB is authorized to take disciplinary actions upon finding that a licensee has violated Florida construction industry regulations. The CILB may suspend the license holder from all operations as a contractor, revoke a license, or place the license holder on probation. Furthermore, the CILB may attach conditions to any disciplinary action taken, which in the sound discretion of the CILB are deemed appropriate disciplinary measures based on the factual circumstances.<sup>24</sup>

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<sup>18</sup> Section 715.12(3)(b), F.S., defines "obligee" to mean a contractor, subcontractor, sub-subcontractor, or materialman who is entitled to receive payments under a contract that is subject to the Prompt Payment Law.

<sup>19</sup> Section 715.12(3)(a), F.S., defines "obligor" to mean an owner, contractor, subcontractor, or sub-subcontractor who has an obligation to make payments under a contract that is subject to the Prompt Payment Law.

<sup>20</sup> Section 715.12(4), F.S.

<sup>21</sup> Section 715.12(5)(a), F.S.

<sup>22</sup> Section 713.346(7), F.S.

<sup>23</sup> Section 489.129, F.S.

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

During Fiscal Year 2019-2020, the CILB received 8,128 complaints of which 1,950 received a finding of probable cause by the CILB or the Department of Business and Professional Regulation (Department) in instances delegated by the CILB).<sup>25</sup> Also, during this time frame, the CILB received \$139,512 in unlicensed activity fees, \$111,520 in administrative fines, and \$17,163 in citations.<sup>26</sup>

### **Misapplication of Construction Funds**

Section 713.345, F.S., provides that the misapplication of construction funds is a crime in Florida. This statute only imposes criminal liability on those who misuse construction project funds and does not impose any fiduciary relationship between parties in contractual relationships for construction, and is not a civil cause of action.

The statute provides that “any person who receives payments for the improvement of real property must apply such portion of any payments to the payment of all amounts then due and owing for services and labor performed.” However, this provision “does not prevent any person from withholding any payment, or any part of a payment, in accordance with the terms of a contract for services, labor, or materials, or pursuant to a bona fide dispute regarding the amount due, if any, for such services, labor, or materials.”

Section 713.345, F.S., continues to state that “any person who knowingly and intentionally fails to comply with paragraph (a) [the proper payment of accounts due and owing] is guilty of misapplication of construction funds[.]” Thus, to be criminally convicted for misapplication of construction funds, there are two relevant elements:

- The party must complete a “wrongful application of funds” in violation of a contract and not regarding a bona fide dispute about the amount due; and
- The party must act “knowingly and intentionally.”<sup>27</sup>

Acting “knowingly and intentionally” will be presumed when there is a valid lien recorded against the property, the defendant who contracted with the claimant (injured party) received enough funds to pay the claimant, and the defendant failed to pay the claimant for at least 45 days from receipt of the funds. Notwithstanding, a party may still be found guilty if there is sufficient evidence to prove that the misapplication of funds was intentional.

Section 713.345(1)(d), F.S., requires a state attorney or the statewide prosecutor, upon filing an indictment or information against a contractor, subcontractor, or sub-subcontractor which charges such person with misapplication of construction funds to provide a copy of the indictment or information to the Department. The Department must promptly open an investigation to the matter and, if probable cause is found, shall furnish a copy of any investigative report to the state attorney or statewide prosecutor who furnished a copy of the indictment or information and to the owner of the property which is the subject of the investigation.

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<sup>25</sup> Florida Department of Business and Professional Regulation 2019-2020 Annual Report, p. 89, available at: <http://www.myfloridalicense.com/dbpr/reg/documents/ULA%20Report%20FY19-20.pdf> (last visited February 8, 2021).

<sup>26</sup> *Id.* at p. 55.

<sup>27</sup> See *Weber v. State*, 649 So.2d 253 (Fla. 2nd DCA 1994).

### *Criminal Penalties*

Persons convicted for misapplication of construction funds may be subject to different criminal penalties depending on the amount of money that was misapplied. If the amount of payments misapplied total \$100,000 or more, the individual is guilty of a first-degree felony, which is punishable by up to 30 years in state prison, and could be fined as much as \$10,000. If the total amount of misapplied payments are less than \$100,000, but greater than \$1,000, the crime is a second-degree felony, which is punishable by up to 15 years in prison and \$10,000 in fines. Lastly, if the amount of payments misapplied are less than \$1,000, it is a third-degree felony, which is punishable by up to 5 years in prison and a maximum fine of \$5,000.

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

**Section 1** amends s. 218.735 F.S., to increase the interest rate from one percent per month to two percent per month that applies to all payments due and not made within the specified time periods by a local governmental entity, its agent, or a contractor for construction services on a local government project.

**Section 2** amends s. 255.071 F.S., to specify that a party who receives payment from the state or any agency thereof for a construction project and knowingly and intentionally fails to pay the undisputed contract obligations to another party for labor, services, or material commits misapplication of construction funds as provided in s. 713.345, F.S.

**Section 3** amends s. 255.073 F.S., to increase the interest rate from one percent per month to two percent per month that applies to all payments due and not made within the specified time periods by a public entity, its agent or a contractor for construction services on a state government project

**Section 4** amends s. 489.129 F.S., to provide that the Construction Industry Licensing Board (“CILB”) may take disciplinary actions against a licensee for committing misapplication of construction funds in violation of s. 713.345. Under the bill, the board must also suspend all licenses of persons convicted of misapplication of construction funds for a minimum of 1 year from the date of conviction.

**Section 5** amends s. 713.345 F.S., to provide that persons convicted of misapplication of construction funds are subject to discipline by the Construction Industry Licensing Board.

**Section 6** amends s. 713.346 F.S., to specify that a party who knowingly and intentionally fails to pay the undisputed contract obligations to another party for construction labor, services, or material commits misapplication of construction funds as provided in s. 713.345, F.S.

**Section 7** amends s. 715.12 F.S., to increase the interest rate specified in s. 55.03, F.S., by twelve percent per annum, which will apply to late payment amounts for construction labor, services, or material for private sector construction projects.

**Section 8** reenacts s. 218.76 F.S., to incorporate the amendment made to s. 218.735, F.S.

**Section 9** reenacts s. 255.075 F.S., to incorporate the amendment made to s. 255.073, F.S.

**Section 10** provides that the bill applies to contracts executed on or after July 1, 2021.

**Section 11** provides that the bill takes effect July 1, 2021.

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

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

Article VII, s. 18(a) of the State Constitution provides, in relevant part, that: “No county or municipality shall be bound by any general law requiring such county or municipality to spend funds...unless the legislature has determined that such law fulfills an important state interest and unless: the law requiring such expenditure is approved by two-thirds vote of the membership of each house of the legislature; [or] . . . the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments....”

If the increase in the interest rate due on late payments by counties and municipalities is deemed to be “requiring” an expenditure under the mandates provision, the legislature may want to consider adding a legislative finding that the bill fulfills an important state interest to ensure the increased interest rate on late payments is binding upon counties and municipalities. As drafted, the bill applies to all persons similarly situated (governmental entities contracting for construction services), including state agencies, school boards, community colleges, counties, and municipalities.

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

None.

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

None.

##### **D. State Tax or Fee Increases:**

None.

##### **E. Other Constitutional Issues:**

None identified.

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

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

None.



**B. Private Sector Impact:**

The increased interest rates applied to unpaid contractual obligations for construction labor, services, and materials may have a negative fiscal impact for prime contractors and a positive fiscal impact for subcontractors and parties lower in the chain of contracts.

**C. Government Sector Impact:**

The increased interest rate proposed by the bill may cause state and local governmental entities to incur additional costs associated with unpaid contractual obligations for construction services.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 218.735, 255.071, 255.073, 489.129, 713.345, 713.346, 715.12, 218.76, and 255.075.

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

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

**CS by Governmental Oversight and Accountability on February 17, 2021:**

The CS increases the percentage to be added to the interest rate specified in s. 55.03, F.S., from “plus 1 percent” to “plus 12 percent per annum” under the private construction prompt payment provisions. This change matches the increase in interest in the governmental prompt payment provision in the bill and the per annum basis is consistent with how the interest rate in s. 55.03, F.S., is calculated.

**B. Amendments:**

None.