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DATE: January 22, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
LOCAL GOVERNMENT & VETERANS AFFAIRS
ANALYSIS**

BILL #: HB 113

RELATING TO: Construction (Prompt Payment Act)

SPONSOR(S): Representative Trovillion

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) LOCAL GOVERNMENT & VETERANS AFFAIRS
 - (2) GENERAL EDUCATION
 - (3) COUNCIL FOR SMARTER GOVERNMENT
 - (4)
 - (5)
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I. SUMMARY:

This bill applies the "Florida Prompt Payment Act" to school boards, school districts, authorities, special taxing districts, other political subdivisions, and community colleges, in addition to counties and municipalities, which are currently governed by the act. The bill revises the prompt payment process for construction services, labor, and materials. A definition for "payment request" is provided to allow an alternative to the use of an invoice for construction services. The bill provides a definition of "agent," which includes any agency or person acting on behalf of a local governmental entity, in addition to a project architect or engineer, and provides that if an agent must approve the payment request or invoice prior to either being submitted to the local government entity, payment is due 25 business days after the date the payment request or invoice is stamped as received. The bill requires undisputed portions of a payment request or invoice to be paid within specified timeframes.

The bill requires that a contractor who receives payment from a local government for labor, services, or materials furnished by subcontractors and suppliers hired by the contractor must pay those subcontractors or material suppliers within 15 days after receipt of the payment. Subcontractors are required to provide payment to their subcontractors and material suppliers within the same time frames.

The bill provides for minimum interest payments of 1 percent per month on all past due payments for purchases of construction services, including payments from contractors to subcontractors and to suppliers. The bill deletes a statutory provision limiting interest payments on past due payments to 12 months, and provides that no contract between a local government and vendor or a provider of construction services may prohibit the collection of late payment interest charges. The bill also provides that in an action to recover amounts dues under the Prompt Payment Act, the prevailing party is entitled to recover court costs and attorney's fees at trial and on appeal.

The bill has no fiscal impact on state government. This bill may require local governmental entities to spend funds.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|-----------------------------------------|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

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. The act applies to all counties and municipalities and any office, board, bureau, commission, department, branch, division, or institution thereof and any project supported by county or municipal funds. The act does not appear to apply to school districts or community colleges. The act was substantially modified in 1995, and provisions specifically relating to construction services were placed in s. 218.735, F.S.

Section 218.73, F.S., establishes timely payment standards for nonconstruction services. Payment deadlines are calculated from the latest of:

- 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 date:

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 may provide dates relative to payment periods.

Section 218.735, F.S. establishes timely payment standards for construction services. The due date for payment is determined as follows:

- If the project architect or engineer must approve the invoice prior to the invoice being submitted to the local government, payment is due 20 business days after the invoice has been approved by the project architect or engineer and the invoice has been stamped as received.

- If the project architect or engineer does not need to approve the invoice prior to the invoice being submitted to the local government, payment is due 20 business days after the invoice is stamped as received.

The local government may reject the invoice within 20 days after the date the invoice is stamped as received, but the rejection must be written and must specify the deficiency in the invoice. When the contractor submits a corrected invoice, it must be paid or rejected no later than:

- Ten business days after the date the corrected invoice is stamped as received; or
- The first business day after the next meeting of the governing body, if the governing body must approve the invoice.

If a dispute between a local governmental entity and the contractor cannot be resolved pursuant to the procedure in this section, the dispute must be resolved in accordance with the 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. All payments due from a local governmental entity not made within the time period specified by this section are to bear interest as specified in s. 218.74(4), F.S.

Section 218.74, F.S., requires each local governmental entity to establish procedures whereby each invoice received by the local governmental entity shall be marked as having been received on the date on which it is first delivered into the hands of an agent or employee of the local governmental entity or is first delivered to a facility or office of the local governmental entity. The date so marked shall be the date on which the invoice is received. For other than construction services, the payment due date is 45 days from the date on which the proper invoice is received or when one of the criteria specified in s. 218.73, F.S., are met for the delivery of services to the local government. For construction services, the payment due date is as specified in s. 218.735, F.S.

Pursuant to s. 218.74, F.S., all payments due from a local governmental entity and not made within the time period specified are to bear interest from 30 days after the due date at the rate of 1 percent per month on the unpaid balance. The vendor must invoice the local governmental entity for any interest accrued in order to receive the interest payment. Any overdue period of less than one month is to be considered as one month in computing interest. Unpaid interest compounds monthly. With respect to each past due payment, interest ceases to accrue after interest on that payment has accrued for 12 months. Section 218.75, F.S., provides that no contract between a local governmental entity and a vendor may prohibit the vendor from invoicing the local governmental entity for late payment interest charges allowable under part VII of chapter 218, 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 invoice is submitted by a vendor, the local governmental entity has 10 days after the improper invoice is received to notify the vendor that the invoice is improper and indicate what corrective action on the part of the vendor is needed to make the invoice proper. In the event a dispute occurs between a vendor and a local governmental entity concerning payment of an invoice, such disagreement shall be finally determined by the local governmental entity. 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 invoice was received by the local governmental entity and shall be concluded by final decision of the local governmental entity not later than 60 days after the date on which the proper invoice was received by the local governmental entity. Such procedures are not subject to chapter 120, F.S. If the dispute is resolved in favor of the local governmental entity, then interest charges shall begin to accrue 15 days after the local governmental entity's final decision. If the

dispute is resolved in favor of the vendor, then interest begins to accrue as of the original date the payment became due.

Bill proponents indicate that although improvements were made in the statute in 1995, with specific time periods for processing payment for construction materials and services being incorporated, there are still some problems processing these types of payment requests. The statute provides specific time periods within which a local governmental entity must process an invoice. However, in most instances, a local governmental entity requires an architect or engineer to approve the invoice before processing. Under the current statute there are no time periods for this to occur, often causing substantial delays in the payment process, according to bill proponents.

Another problem is that construction contractors do not actually use an invoice similar to other types of services. In the construction business, the submission of written "payment requests" are typically utilized which request payment for work performed and materials furnished through a date certain.

An additional problem is that a provision also exists which causes interest on late payments to cease after one year. Bill proponents indicate that they have been unable to ascertain why a local governmental entity would not be required to pay interest on a payment that is past due for more than one year. This provision seems to remove some of the incentive to make payment that was intended by the inclusion of interest on late payments.

Payment to Subcontractors

Delays in paying contractors also affect subcontractors. Section 255.071, F.S., provides that any person, firm, or corporation who receives a payment from the state or any county, city, or political subdivision of the state, 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 shall pay, in accordance with the contract terms, the undisputed contract obligations for labor, services, or materials provided on account of such improvements. The section provides that the failure to pay any undisputed obligations for such labor, services, or materials within 30 days after the date the labor, services, or materials were furnished and payment for such labor, services, or materials became due, or within 30 days after the date payment for such labor, services, or materials is received, whichever last occurs, shall entitle any person providing such labor, services, or materials to file a verified complaint against the contractor. After service of the complaint, the court must conduct an evidentiary hearing on the complaint, upon not less than 15 days' written notice. The person providing labor, services, or materials is entitled to the following remedies to the extent of the undisputed amount due for labor or services performed or materials supplied, and upon proof of each allegation in the complaint:

- (a) An accounting of the use of any such payment from the person who received such payment.
- (b) A temporary injunction against the person who received the payment, subject to the bond requirements specified in the Florida Rules of Civil Procedure.
- (c) Prejudgment attachment against the person who received the payment, in accordance with each of the requirements of chapter 76, F.S.
- (d) Such other legal or equitable remedies as may be appropriate in accordance with the requirements of the law.

The prevailing party in any proceeding under this section is entitled to recover costs, including a reasonable attorney's fee, at trial and on appeal. The provisions of this section shall also apply to any contract between a subcontractor and a sub-subcontractor or supplier and any contract between a sub-subcontractor and supplier on any project 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.

C. EFFECT OF PROPOSED CHANGES:

This bill applies the "Florida Prompt Payment Act" to school boards, school districts, authorities, special taxing districts, other political subdivisions, and community colleges, in addition to counties and municipalities, which are currently governed by the act. The bill revises the prompt payment process for construction services, labor, and materials. A definition for "payment request" is provided to allow an alternative to the use of an invoice for construction services. The bill provides a definition of "agent," which includes any agency or person acting on behalf of a local governmental entity, in addition to a project architect or engineer, and provides that if an agent must approve the payment request or invoice prior to either being submitted to the local government entity, payment is due 25 business days after the date the payment request or invoice is stamped as received. The bill requires undisputed portions of a payment request or invoice to be paid within specified timeframes.

The bill requires that a contractor who receives payment from a local government for labor, services, or materials furnished by subcontractors and suppliers hired by the contractor must pay those subcontractors or material suppliers within 15 days after receipt of the payment. Subcontractors are required to provide payment to their subcontractors and material suppliers within the same time frames.

The bill provides for minimum interest payments of 1 percent per month on all past due payments for purchases of construction services, including payments from contractors to subcontractors and to suppliers. The bill deletes a statutory provision limiting interest payments on past due payments to 12 months, and provides that no contract between a local government and vendor or a provider of construction services may prohibit the collection of late payment interest charges. The bill also provides that in an action to recover amounts dues under the Prompt Payment Act, the prevailing party is entitled to recover court costs and attorney's fees at trial and on appeal.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Section 218.72, F.S., is amended to add or change the following definitions:

"Local governmental entity" is changed to include school board, school district, authority, special taxing district, other political subdivision, and community college, in addition to a county or municipal government or any office, board, bureau, commission, department, branch, division, or institution thereof or any project supported by county or municipal funds.

"Purchase" is changed to include purchase of construction services, in addition to the purchase of goods or services, the purchase or lease of personal property, or the lease of real property by a local governmental entity.

"Construction services" is changed to include labor and materials provided, in addition to the purchase of services provided in connection with the construction, alteration, repair, demolition, and reconstruction to real property.

"Payment request" is added to mean a request for payment for construction services that conforms with all statutory requirements and with all requirements specified by the local governmental entity to which the payment request is submitted if:

(a) Such requirements have been adopted by formal action of the local governmental entity taken prior to the transaction to which the payment request applies.

(b) The local governmental entity made such requirements available to vendors.

"Agent" is added to mean a project architect, engineer, or any other agency or person acting on behalf of the local governmental entity.

Section 2. Section 218.73, F.S., is amended to clarify that the section applies to timely payment for nonconstruction services.

Section 3. Section 218.735, F.S., is amended to revise the prompt payment process for construction services, labor and materials. The section adds "payment request" as an alternative to an invoice throughout the section. Subsection (1)(a) is amended to provide that if an agent must approve the payment request or invoice prior to either being submitted to the local government entity, payment is due 25 business days after the date the payment request or invoice is stamped as received as provided in s. 218.74(1), F.S. Subsection (3) is amended to provide that if a payment request or invoice is rejected and the contractor submits a corrected payment request or invoice which corrects the deficiency specified in writing by the local governmental entity, the payment request or invoice must be paid or rejected within current statutory timelines. Subsection (5) is amended to provide that if a local governmental entity disputes a portion of a payment request or invoice, the undisputed portion must be paid timely, in accordance with subsection (1).

A new subsection (6) is added to provide that a contractor who receives payment from a local governmental entity for labor, services, or materials furnished by subcontractors and suppliers hired by the contractor, must remit payment due to those subcontractors and suppliers within 15 days after the contractor's receipt of the payment. The section also provides that 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. Finally, the subsection provides that nothing herein shall prohibit a contractor or subcontractor from disputing, pursuant to the terms of the relevant contract, all or any portion of a payment alleged to be due to another party. The subsection provides that in the event of such a dispute, the contractor or subcontractor may withhold the disputed portion of any such payment but the undisputed portion must be remitted within the time limits imposed by the subsection.

Subsection (6) is renumbered as subsection (7) and amended to provide that all payments due under this subsection, including payments from contractors to subcontractors and to suppliers, not made on time shall accrue interest of 1% per month or at the rate specified in the contract, whichever is greater.

Section 4. Section 218.74, F.S., is amended to allow a payment request to suffice in lieu of an invoice, to provide that the section applies to the purchase of goods and services other than construction services, and to delete a provision that interest on past due payments ceases to accrue after interest has accrued for 12 months.

Section 5. Section 218.75, F.S., is amended to include providers of construction services and to provide that no contract may prohibit the collection of late payment interest charges.

Section 6. Section 218.76, F.S., is amended to allow a payment request to suffice in lieu of an invoice and to provide that the prevailing party in a collection action under the prompt payment act is entitled to recover attorney's fees at trial and on appeal.

Section 7. An effective date of July 1, 2001, is provided.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill has no impact on state revenues.

2. Expenditures:

This bill has no impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill has no impact on local government revenues.

2. Expenditures:

This bill may require local governmental entities to spend funds. As noted in the "Effects of Proposed Changes" section, the bill applies the "Florida Prompt Payment Act" to school boards, school districts, authorities, special taxing districts, other political subdivisions, and community colleges, in addition to counties and municipalities. The expenditure of funds would occur if the new time lines on prompt payment cannot be met, and the local government had to pay interest. Since the number of instances in which the local government would fail to meet the time frames for payment cannot be known, the amount of interest which could be assessed cannot be projected. Local governments have not, to date, chosen to make that argument or provide any quantifiable data alleging adverse fiscal impact.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The fiscal effect upon the private sector should be positive. Contractors, subcontractors, and materials suppliers will receive payment in a more timely fashion.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill may require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The expenditure of funds would occur if the new time lines on prompt payment cannot be met, and the local government had to pay interest. Since the number of instances in which the local government would fail to meet the time frames for payment cannot be known, the amount of interest which could be assessed cannot be projected. Local governments have not, to date, chosen to make that argument or provide any quantifiable data alleging adverse fiscal impact. Without quantifiable data regarding the aggregate amount of interest payments this bill might cause, it is impossible to conclude if the amount would meet the "significant fiscal impact" standard of \$.10 times the population of Florida, or \$1.5 million based on 1999 census estimates.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON LOCAL GOVERNMENT & VETERANS AFFAIRS:

Prepared by:

Staff Director:

Thomas L. Hamby, Jr.

Joan Highsmith-Smith