

By Senator Hooper

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1 A bill to be entitled
2 An act relating to public construction; amending s.
3 218.735, F.S.; revising the amount of retainage that
4 certain local governmental entities and contractors
5 may withhold from progress payments for any
6 construction services contract; conforming a provision
7 to changes made by the act; amending s. 255.05, F.S.;
8 revising requirements for Department of Management
9 Services rules governing certain contracts; amending
10 s. 255.077, F.S.; conforming a cross-reference;
11 amending s. 255.078, F.S.; revising the amounts of
12 retainage that certain public entities and contractors
13 may withhold from progress payments for any
14 construction services contract; conforming a provision
15 to changes made by the act; providing applicability;
16 providing an effective date.

17
18 Be It Enacted by the Legislature of the State of Florida:

19
20 Section 1. Paragraph (i) of subsection (7) and subsection
21 (8) of section 218.735, Florida Statutes, are amended to read:
22 218.735 Timely payment for purchases of construction
23 services.—

24 (7) Each contract for construction services between a local
25 governmental entity and a contractor must provide for the
26 development of a single list of items required to render
27 complete, satisfactory, and acceptable the construction services
28 purchased by the local governmental entity.

29 (i) If a local governmental entity fails to comply with its

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30 responsibilities to develop the list required under paragraph
31 (a) or paragraph (b) within the time limitations provided in
32 paragraph (a), the contractor may submit a payment request for
33 all remaining retainage withheld by the local governmental
34 entity pursuant to this section; and payment of any remaining
35 undisputed contract amount, less any amount withheld pursuant to
36 the contract for incomplete or uncorrected work, must be paid
37 within 20 business days after receipt of a proper invoice or
38 payment request. If the local governmental entity has provided
39 written notice to the contractor specifying the failure of the
40 contractor to meet contract requirements in the development of
41 the list of items to be completed, the local governmental entity
42 need not pay or process any payment request for retainage if the
43 contractor has, in whole or in part, failed to cooperate with
44 the local governmental entity in the development of the list or
45 to perform its contractual responsibilities, if any, with regard
46 to the development of the list or if paragraph (8) (c) ~~(8) (f)~~
47 applies.

48 (8) (a) With regard to any contract for construction
49 services, a local governmental entity may withhold from each
50 progress payment made to the contractor an amount not exceeding
51 5 ~~10~~ percent of the payment as retainage ~~until 50-percent~~
52 ~~completion of such services.~~

53 ~~(b) After 50-percent completion of the construction~~
54 ~~services purchased pursuant to the contract, the local~~
55 ~~governmental entity must reduce to 5 percent the amount of~~
56 ~~retainage withheld from each subsequent progress payment made to~~
57 ~~the contractor. For purposes of this subsection, the term "50-~~
58 ~~percent completion" has the meaning set forth in the contract~~

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59 ~~between the local governmental entity and the contractor or, if~~
60 ~~not defined in the contract, the point at which the local~~
61 ~~governmental entity has expended 50 percent of the total cost of~~
62 ~~the construction services purchased as identified in the~~
63 ~~contract together with all costs associated with existing change~~
64 ~~orders and other additions or modifications to the construction~~
65 ~~services provided for in the contract. However, notwithstanding~~
66 ~~this subsection, a municipality having a population of 25,000 or~~
67 ~~fewer, or a county having a population of 100,000 or fewer, may~~
68 ~~withhold retainage in an amount not exceeding 5 10 percent of~~
69 ~~each progress payment made to the contractor until final~~
70 ~~completion and acceptance of the project by the local~~
71 ~~governmental entity.~~

72 ~~(c) After 50 percent completion of the construction~~
73 ~~services purchased pursuant to the contract, the contractor may~~
74 ~~elect to withhold retainage from payments to its subcontractors~~
75 ~~at a rate higher than 5 percent. The specific amount to be~~
76 ~~withheld must be determined on a case-by-case basis and must be~~
77 ~~based on the contractor's assessment of the subcontractor's past~~
78 ~~performance, the likelihood that such performance will continue,~~
79 ~~and the contractor's ability to rely on other safeguards. The~~
80 ~~contractor shall notify the subcontractor, in writing, of its~~
81 ~~determination to withhold more than 5 percent of the progress~~
82 ~~payment and the reasons for making that determination, and the~~
83 ~~contractor may not request the release of such retained funds~~
84 ~~from the local governmental entity.~~

85 ~~(d) After 50 percent completion of the construction~~
86 ~~services purchased pursuant to the contract, the contractor may~~
87 ~~present to the local governmental entity a payment request for~~

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88 up to one half of the retainage held by the local governmental
89 entity. The local governmental entity shall promptly make
90 payment to the contractor, unless the local governmental entity
91 has grounds, pursuant to paragraph (f), for withholding the
92 payment of retainage. If the local governmental entity makes
93 payment of retainage to the contractor under this paragraph
94 which is attributable to the labor, services, or materials
95 supplied by one or more subcontractors or suppliers, the
96 contractor shall timely remit payment of such retainage to those
97 subcontractors and suppliers.

98 (b)~~(e)~~ This section does not prohibit a local governmental
99 entity from withholding retainage at a rate less than 5 ~~10~~
100 percent of each progress payment, from incrementally reducing
101 the rate of retainage pursuant to a schedule provided for in the
102 contract, or from releasing at any point all or a portion of any
103 retainage withheld by the local governmental entity which is
104 attributable to the labor, services, or materials supplied by
105 the contractor or by one or more subcontractors or suppliers. If
106 a local governmental entity makes any payment of retainage to
107 the contractor which is attributable to the labor, services, or
108 materials supplied by one or more subcontractors or suppliers,
109 the contractor must ~~shall~~ timely remit payment of such retainage
110 to those subcontractors and suppliers.

111 (c)~~(f)~~ This section does not require the local governmental
112 entity to pay or release any amounts that are the subject of a
113 good faith dispute, the subject of a claim brought pursuant to
114 s. 255.05, or otherwise the subject of a claim or demand by the
115 local governmental entity or contractor.

116 (d)~~(g)~~ The time limitations set forth in this section for

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117 payment of payment requests apply to any payment request for
118 retainage made pursuant to this section.

119 (e)~~(h)~~ Paragraph (a) does Paragraphs ~~(a)~~~~(d)~~ do not apply
120 to construction services purchased by a local governmental
121 entity which are paid for, in whole or in part, with federal
122 funds and are subject to federal grantor laws and regulations or
123 requirements that are contrary to any provision of the Local
124 Government Prompt Payment Act.

125 (f)~~(i)~~ This subsection does not apply to any construction
126 services purchased by a local governmental entity if the total
127 cost of the construction services purchased as identified in the
128 contract is \$200,000 or less.

129 Section 2. Paragraph (f) of subsection (1) of section
130 255.05, Florida Statutes, is amended to read:

131 255.05 Bond of contractor constructing public buildings;
132 form; action by claimants.—

133 (1) A person entering into a formal contract with the state
134 or any county, city, or political subdivision thereof, or other
135 public authority or private entity, for the construction of a
136 public building, for the prosecution and completion of a public
137 work, or for repairs upon a public building or public work shall
138 be required, before commencing the work or before recommencing
139 the work after a default or abandonment, to execute and record
140 in the public records of the county where the improvement is
141 located, a payment and performance bond with a surety insurer
142 authorized to do business in this state as surety. A public
143 entity may not require a contractor to secure a surety bond
144 under this section from a specific agent or bonding company.

145 (f) The Department of Management Services shall adopt rules

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146 with respect to all contracts for \$200,000 or less, to provide:

147 1. Procedures for retaining up to 5 ~~10~~ percent of each
148 request for payment submitted by a contractor and procedures for
149 determining disbursements from the amount retained on a pro rata
150 basis to laborers, materialmen, and subcontractors, as defined
151 in s. 713.01.

152 2. Procedures for requiring certification from laborers,
153 materialmen, and subcontractors, as defined in s. 713.01, before
154 final payment to the contractor that such laborers, materialmen,
155 and subcontractors have no claims against the contractor
156 resulting from the completion of the work provided for in the
157 contract.

158
159 The state is not liable to any laborer, materialman, or
160 subcontractor for any amounts greater than the pro rata share as
161 determined under this section.

162 Section 3. Subsection (8) of section 255.077, Florida
163 Statutes, is amended to read:

164 255.077 Project closeout and payment of retainage.—

165 (8) If a public entity fails to comply with its
166 responsibilities to develop the list required under subsection
167 (1) or subsection (2), as defined in the contract, within the
168 time limitations provided in subsection (1), the contractor may
169 submit a payment request for all remaining retainage withheld by
170 the public entity pursuant to s. 255.078. The public entity need
171 not pay or process any payment request for retainage if the
172 contractor has, in whole or in part, failed to cooperate with
173 the public entity in the development of the list or failed to
174 perform its contractual responsibilities, if any, with regard to

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175 the development of the list or if s. 255.078(3) ~~s. 255.078(6)~~
176 applies.

177 Section 4. Section 255.078, Florida Statutes, is amended to
178 read:

179 255.078 Public construction retainage.—

180 (1) With regard to any contract for construction services,
181 a public entity may withhold from each progress payment made to
182 the contractor an amount not exceeding 5 ~~10~~ percent of the
183 payment as retainage until ~~50 percent completion of such~~
184 ~~services.~~

185 ~~(2) After 50 percent completion of the construction~~
186 ~~services purchased pursuant to the contract, the public entity~~
187 ~~must reduce to 5 percent the amount of retainage withheld from~~
188 ~~each subsequent progress payment made to the contractor. For~~
189 ~~purposes of this section, the term "50 percent completion" has~~
190 ~~the meaning set forth in the contract between the public entity~~
191 ~~and the contractor or, if not defined in the contract, the point~~
192 ~~at which the public entity has expended 50 percent of the total~~
193 ~~cost of the construction services purchased as identified in the~~
194 ~~contract together with all costs associated with existing change~~
195 ~~orders and other additions or modifications to the construction~~
196 ~~services provided for in the contract.~~

197 ~~(3) After 50 percent completion of the construction~~
198 ~~services purchased pursuant to the contract, the contractor may~~
199 ~~elect to withhold retainage from payments to its subcontractors~~
200 ~~at a rate higher than 5 percent. The specific amount to be~~
201 ~~withheld must be determined on a case-by-case basis and must be~~
202 ~~based on the contractor's assessment of the subcontractor's past~~
203 ~~performance, the likelihood that such performance will continue,~~

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204 and the contractor's ability to rely on other safeguards. The
205 contractor shall notify the subcontractor, in writing, of its
206 determination to withhold more than 5 percent of the progress
207 payment and the reasons for making that determination, and the
208 contractor may not request the release of such retained funds
209 from the public entity.

210 (4) After 50-percent completion of the construction
211 services purchased pursuant to the contract, the contractor may
212 present to the public entity a payment request for up to one-
213 half of the retainage held by the public entity. The public
214 entity shall promptly make payment to the contractor, unless the
215 public entity has grounds, pursuant to subsection (6), for
216 withholding the payment of retainage. If the public entity makes
217 payment of retainage to the contractor under this subsection
218 which is attributable to the labor, services, or materials
219 supplied by one or more subcontractors or suppliers, the
220 contractor shall timely remit payment of such retainage to those
221 subcontractors and suppliers.

222 (2) ~~(5)~~ Neither This section and ~~nor~~ s. 255.077 do not
223 prohibit ~~prohibits~~ a public entity from withholding retainage at
224 a rate less than 5 ~~10~~ percent of each progress payment, from
225 incrementally reducing the rate of retainage pursuant to a
226 schedule provided for in the contract, or from releasing at any
227 point all or a portion of any retainage withheld by the public
228 entity which is attributable to the labor, services, or
229 materials supplied by the contractor or by one or more
230 subcontractors or suppliers. If a public entity makes any
231 payment of retainage to the contractor which is attributable to
232 the labor, services, or materials supplied by one or more

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233 subcontractors or suppliers, the contractor must ~~shall~~ timely
234 remit payment of such retainage to those subcontractors and
235 suppliers.

236 ~~(3)-(6) Neither~~ This section and ~~nor~~ s. 255.077 do not
237 require ~~requires~~ the public entity to pay or release any amounts
238 that are the subject of a good faith dispute, the subject of a
239 claim brought pursuant to s. 255.05, or otherwise the subject of
240 a claim or demand by the public entity or contractor.

241 ~~(4)-(7)~~ The same time limits for payment of a payment
242 request apply regardless of whether the payment request is for,
243 or includes, retainage.

244 ~~(5)-(8)~~ Subsection (1) does ~~Subsections (1)-(4) do~~ not apply
245 to construction services purchased by a public entity which are
246 paid for, in whole or in part, with federal funds and are
247 subject to federal grantor laws and regulations or requirements
248 that are contrary to any provision of the Florida Prompt Payment
249 Act.

250 ~~(6)-(9)~~ This section does not apply to any construction
251 services purchased by a public entity if the total cost of the
252 construction services purchased as identified in the contract is
253 \$200,000 or less.

254 Section 5. (1) This act does not apply to any contract for
255 construction services which is entered into or is pending
256 approval by a public entity, as defined in s. 255.072, Florida
257 Statutes, or by a local governmental entity, as defined in s.
258 218.72, Florida Statutes, or to any construction services
259 project advertised for bid by the public entity or local
260 governmental entity, on or before October 1, 2020.

261 (2) The amendments made to ss. 255.05 and 255.078, Florida

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262 Statutes, by this act do not apply to contracts executed under
263 chapter 337, Florida Statutes.

264 Section 6. This act shall take effect October 1, 2020.