

By the Committee on Governmental Oversight and Accountability;  
and 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 10 percent of each~~  
69 ~~progress payment made to the contractor until final completion~~  
70 ~~and acceptance of the project by the local governmental entity.~~

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

84 ~~(d) After 50-percent completion of the construction~~  
85 ~~services purchased pursuant to the contract, the contractor may~~  
86 ~~present to the local governmental entity a payment request for~~  
87 ~~up to one-half of the retainage held by the local governmental~~

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

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

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

115 (d)~~(g)~~ The time limitations set forth in this section for  
116 payment of payment requests apply to any payment request for

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117 retainage made pursuant to this section.

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

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

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

130 255.05 Bond of contractor constructing public buildings;  
131 form; action by claimants.—

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

144 (f) The Department of Management Services shall adopt rules  
145 with respect to all contracts for \$200,000 or less, to provide:

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

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

157  
158 The state is not liable to any laborer, materialman, or  
159 subcontractor for any amounts greater than the pro rata share as  
160 determined under this section.

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

163 255.077 Project closeout and payment of retainage.—

164 (8) If a public entity fails to comply with its  
165 responsibilities to develop the list required under subsection  
166 (1) or subsection (2), as defined in the contract, within the  
167 time limitations provided in subsection (1), the contractor may  
168 submit a payment request for all remaining retainage withheld by  
169 the public entity pursuant to s. 255.078. The public entity need  
170 not pay or process any payment request for retainage if the  
171 contractor has, in whole or in part, failed to cooperate with  
172 the public entity in the development of the list or failed to  
173 perform its contractual responsibilities, if any, with regard to  
174 the development of the list or if s. 255.078(3) ~~s. 255.078(6)~~

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175 applies.

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

178 255.078 Public construction retainage.—

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

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

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

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

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

221 ~~(2)(5) Neither~~ This section and ~~nor~~ s. 255.077 do not  
222 prohibit ~~prohibits~~ a public entity from withholding retainage at  
223 a rate less than 5 ~~10~~ percent of each progress payment, from  
224 incrementally reducing the rate of retainage pursuant to a  
225 schedule provided for in the contract, or from releasing at any  
226 point all or a portion of any retainage withheld by the public  
227 entity which is attributable to the labor, services, or  
228 materials supplied by the contractor or by one or more  
229 subcontractors or suppliers. If a public entity makes any  
230 payment of retainage to the contractor which is attributable to  
231 the labor, services, or materials supplied by one or more  
232 subcontractors or suppliers, the contractor must ~~shall~~ timely

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233 remit payment of such retainage to those subcontractors and  
234 suppliers.

235 ~~(3)(6) Neither~~ This section and ~~nor~~ s. 255.077 do not  
236 require ~~requires~~ the public entity to pay or release any amounts  
237 that are the subject of a good faith dispute, the subject of a  
238 claim brought pursuant to s. 255.05, or otherwise the subject of  
239 a claim or demand by the public entity or contractor.

240 ~~(4)(7)~~ The same time limits for payment of a payment  
241 request apply regardless of whether the payment request is for,  
242 or includes, retainage.

243 ~~(5)(8)~~ Subsection (1) does ~~Subsections (1) - (4) do~~ not apply  
244 to construction services purchased by a public entity which are  
245 paid for, in whole or in part, with federal funds and are  
246 subject to federal grantor laws and regulations or requirements  
247 that are contrary to any provision of the Florida Prompt Payment  
248 Act.

249 ~~(6)(9)~~ This section does not apply to any construction  
250 services purchased by a public entity if the total cost of the  
251 construction services purchased as identified in the contract is  
252 \$200,000 or less.

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

260 (2) The amendments made to ss. 255.05 and 255.078, Florida  
261 Statutes, by this act do not apply to contracts executed under

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262 chapter 337, Florida Statutes.

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