

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 Committee on Governmental Oversight and Accountability

BILL: CS/SB 346

INTRODUCER: Community Affairs Committee and Senator DiCeglie

SUBJECT: Public Construction

DATE: March 28, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Hunter</u>	<u>Ryon</u>	<u>CA</u>	<u>Fav/CS</u>
2.	<u>Harmsen</u>	<u>McVaney</u>	<u>GO</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 346 requires each contract for construction services between a local government entity and a contractor to include the estimated cost of each item necessary to complete the work. The contract balance must be paid within 20 days after such list is created, subject to certain exceptions.

The bill limits local governments' ability to withhold certain amounts under the contract to only those subject to a written good faith dispute or claims against public surety bonds. A state entity must submit a payment request to the CFO on a shortened 14-day timeframe from its receipt. A local government must pay the undisputed portions of an invoice or payment request according to the terms of the contract or 20 days after it receives the request, whichever is sooner. A local government must commence proceedings to resolve a disputed invoice or payment request within 30 days after receipt and must render its final decision within 45 days from receipt.

The bill revises the definition of "public works project" to prohibit the imposition of certain requirements on contractors for certain public construction projects that exceed \$350,000, in which either state or local funds are used.

The bill may have a negative fiscal impact on local governments; however, the impact is indeterminate.

The bill takes effect July 1, 2023.

II. Present Situation:

Prompt Payments for Public Construction Contracts

Contracts between local governments and private contractors for construction of public projects are subject to prompt payment requirements. The Local Government Prompt Payment Act¹ provides for timely payment by local governmental entities² to construction contractors.³ If an agent of the local government is not required to approve payment, then payment is due 20 business days after receipt of the payment request or invoice.⁴

If local government agent approval is required, payment is due 25 business days after proper receipt.⁵ A local government must identify its agent, employee, facility, or office to which the contractor may submit a payment request.⁶ Once an agent, employee, facility, or office receives a contractor's payment request, it must stamp the request as received; this begins the time period for payment or rejection of a payment request.⁷

If a payment request does not meet the contract requirements, the local government must reject the request in writing within 20 business days after its receipt. The rejection must specify both the deficiency and its resolution.⁸ If the contractor corrects the deficiency, the local government must pay the corrected payment request or invoice on the later of 10 business days after it received the corrected invoice, or, if the local government must approve the invoice, the first business day after its next regularly scheduled meeting.⁹

If a dispute between the local government and the contractor cannot be resolved by a local government's requirement for cure letter, the dispute must be resolved using the dispute resolution procedure or applicable ordinance provided in the contract.¹⁰ Absent a prescribed procedure, the dispute must be resolved pursuant to a dispute resolution procedure established by the local government.¹¹

If a local government disputes a portion of a payment request or an invoice, it must still timely pay the undisputed portion.¹² A contractor who receives a local government's payment for labor, services, or materials must remit payments due to its subcontractors and suppliers within 10 days

¹ Section 218.70, F.S.

² 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. Section 218.72(5), F.S.

³ Section 218.71, F.S. A contractor is one who contracts directly with a local government to provide construction services.

Section 218.72(3), F.S.

⁴ Section 218.735(1)(b), F.S.

⁵ Section 218.735(1)(a), F.S. Proper receipt occurs when the payment request or invoice is stamped as received on the day that it is delivered to an agent or employee of the local government entity or of a facility or office of the local governmental entity, as provided in s. 218.74(1), F.S.

⁶ Section 218.735(1)(b), F.S. This requirement must be included in the contract or provided by the local governmental in a separate written notice, as required under the contract, no later than 10 days after the contract award or notice to proceed.

⁷ Section 218.735(1)(b), F.S.

⁸ Section 218.735(2), F.S.

⁹ Section 218.735(3), F.S.

¹⁰ Section 218.735(4), F.S.

¹¹ Section 218.76(2), F.S.

¹² Section 218.735(5), F.S. Payment must be made within 25 days after the payment request or invoice is properly received, or within 20 days of the submission of an invoice by a contractor (if an agent does not need to approve the payment).

after it receives payment from the local government. A subcontractor must remit payments due to its subcontractors and suppliers within 7 days after it receives payment.¹³

Deliverables List

Each local government contract for construction services must provide for the development of a single list of items required to render complete, satisfactory, and acceptable construction services purchased by the local governmental entity.¹⁴ The contract must specify the process and a reasonable time for developing the list, including the responsibilities of the local government and the contractor in developing and reviewing the list.¹⁵ Generally, the deliverables list (also called a “punch list”) is required to be created after substantial completion of the construction project and must include those projects necessary to repair or complete the project in its entirety.¹⁶

For construction projects of less than \$10 million, the list must be developed within 30 calendar days after reaching substantial completion of construction as defined in the contract or, if not defined, upon reaching beneficial occupancy or use.¹⁷ The general deadline for completion of the list for construction projects that cost \$10 million or more is the same (30 days after reaching substantial completion), but the deadline may be extended by contract to up to 60 calendar days after reaching substantial completion of construction as defined in the contract or, if not so defined, upon reaching beneficial occupancy or use.¹⁸ The local government’s contract must specify the date that the deliverables list must be given to the contractor. This date cannot be later than 5 days after the deliverables list completion and review.

If the project relates to construction services on more than one building or structure, or involves a multi-phased project, the same general timeframes apply for creation of a deliverables list, but a list must be created for each building, structure, or phase of the project.¹⁹

The final contract completion date must be at least 30 days after the deliverables list is given to the contractor. If the list is not provided to the contractor by the agreed upon delivery date, the contract’s completion date must be extended by the number of days the local government exceeded the list delivery date. Damages may not be assessed against a contractor for its failure to complete a project within the time required, unless the contractor failed to complete the project within the contract period as extended.²⁰ The failure to include any corrective work or pending items not yet completed on the list does not alter the responsibility of the contractor to complete all the construction services purchased pursuant to the contract.²¹

¹³ Section 218.735(6), F.S.

¹⁴ Section 218.735(7), F.S.

¹⁵ Section 218.735(7)(a), F.S.

¹⁶ See, e.g., Town of Jupiter Island, *Construction General Conditions*, s. 9.4, <https://townofjupiterisland.com/wp-content/uploads/2019/01/Construction-General-Conditions.pdf> (last visited Mar. 27, 2023); and Monroe County, Florida, *General Conditions of the Contract for Construction*, s. 9.8.2, https://www.monroecounty-fl.gov/DocumentCenter/View/28603/General-Requirements-from-RFP_22021---DO-NOT-DELETE?bidId= (last visited Mar. 27, 2023).

¹⁷ Section 218.735(7)(a)1., F.S.

¹⁸ Section 218.735(7)(a)2., F.S.

¹⁹ Section 218.735(7)(b), F.S.

²⁰ Section 218.735(7)(c), F.S.

²¹ Section 218.735(7)(d), F.S.

Retainage

A local government can withhold up to 5 percent of each progress payment as retainage.²² Once a contractor has completed all items on the deliverables list, it can submit a payment request for all remaining retainage withheld by the local government.²³ If a good faith dispute exists as to whether one or more items on the deliverables list have been properly completed, the local government may continue to withhold up to 150 percent of the total costs to complete such items.²⁴ All items requiring correction to complete the contract and that are identified after preparation and delivery of the list remain the contractor's obligation as defined by the contract.²⁵ Warranty items or items not included in the list may not affect the final payment of retainage nor payment as provided in contracts between the contractor and its subcontractors and suppliers.²⁶ A local government or contractor cannot withhold retainage to secure payment of insurance premiums, and the final payment of retainage may not be delayed pending a final audit by the local government's or contractor's insurance provider.²⁷

If a local government fails to develop the deliverables list in a timely manner, the contractor may submit a payment request for all remaining retainage withheld by the local government and payment of any remaining undisputed contract amounts, less any amount withheld under the contract for incomplete or uncorrected work, which must be paid within 20 business days after receipt of a request. If the local government gives the contractor written notice that it failed to meet contract requirements in developing the deliverables list, then the local government need not pay or process any payment request for retainage.²⁸

Improper Payment Requests and Resolution of Disputes

If a vendor submits an improper payment request, the local government must notify the vendor that its request is improper within 10 days of its receipt. The local government's notice must indicate what corrective action is required.²⁹

If a dispute arises between a vendor and a local government concerning a payment request, the dispute is adjudicated under the dispute resolution procedure established the local governmental entity. Proceedings to resolve the dispute must begin within 45 days after the date the payment request was received; the local government must render its final decision within 60 days after the date the payment request was received. If the dispute is resolved in favor of the local government, interest begins to accrue 15 days after the final decision. If the dispute is resolved in favor of the vendor, interest accrual relates back to the original date the payment became due.³⁰

²² Section 218.735(8), F.S.

²³ Section 218.735(7)(e), F.S.

²⁴ *Id.*

²⁵ Section 218.735(7)(f), F.S.

²⁶ Section 218.735(7)(g), F.S.

²⁷ Section 218.735(7)(h), F.S.

²⁸ Section 218.735(7)(i), F.S.

²⁹ Section 218.76(1), F.S.

³⁰ Section 218.76(2)(a), F.S.

Public Entity Construction Contracts

State government public construction contracts are subject to the Florida Prompt Payment Act.³¹ If a public entity³² disputes a portion of a payment request, the undisputed portion must be timely paid.³³

Under procedures established by the public entity, each payment request is marked as received on the date it is delivered to the agent, employee, designated facility or office of the public entity. If the terms under which a purchase is made allow for partial deliveries and a payment request is submitted for a partial delivery, the time for such payment must be calculated from the time of the partial delivery and the submission of the payment request. A public entity must submit a payment request to the Chief Financial Officer for payment no more than 20 days after receipt.³⁴

Prohibited Governmental Actions Related to Public Works Projects

Except as required by federal or state law, the state or any political subdivision³⁵ that contracts for a public works project³⁶ may not:

- Prevent a certified, licensed, or registered contractor, subcontractor, or material supplier or carrier, from participating in the bidding process based on the geographic location of the company headquarters or offices of the contractor, subcontractor, or material supplier or carrier submitting a bid on a public works project or the residences of employees of such contractor, subcontractor, or material supplier or carrier;
- Require a contractor, subcontractor, or material supplier or carrier engaged in the project to:
 - Pay employees a predetermined amount of wages or prescribe any wage rate;
 - Provide employees a specified type, amount, or rate of employee benefits;
 - Control, limit, or expand staffing; or
 - Recruit, train, or hire employees from a designated, restricted, or single source.
- Prohibit any contractor, subcontractor, or material supplier or carrier from submitting a bid on the project if such individual is able to perform the work described and is qualified, licensed, or certified as required by state law.³⁷

The foregoing governmental actions are prohibited only for projects that:

- Exceed \$1 million in value;
- Are paid for with any state-appropriated funds; and

³¹ Section 255.0705, F.S. This act expressly excludes local governments as defined in s. 218.72, F.S. Section 255.072(5), F.S.

³² The state, or any office, board, bureau, commission, department, branch, division, or institution thereof. Section 255.072(5), F.S.

³³ Section 255.073(2), F.S.

³⁴ Section 255.074, F.S.

³⁵ “Political subdivision” means a separate agency or unit of local government created or established by law or ordinance and the officers thereof. The term includes, but is not limited to, a county; a city, town, or other municipality; or a department, commission, authority, school district, taxing district, water management district, board, public corporation, institution of higher education, or other public agency or body thereof authorized to expend public funds for construction, maintenance, repair, or improvement of public works. *See* s. 255.0992(1)(a), F.S.

³⁶ “Public works project” means an activity exceeding \$1 million in value that is paid for with any state-appropriated funds and which consists of the construction, maintenance, repair, renovation, remodeling, or improvement of a building, road, street, sewer, storm drain, water system, site development, irrigation system, reclamation project, gas or electrical distribution system, gas or electrical substation, or other facility, project, or portion thereof that is owned in whole or in part by any political subdivision. *See* s. 255.0992(1)(b), F.S.

³⁷ Section 255.0992, F.S.

- Are to construct, maintain, repair, renovate, remodel, or improve any building, road, street, sewer, storm drain, water system, site development, irrigation system, reclamation project, gas or electrical distribution system, gas or electrical substation, or other facility, project, or portion thereof that is owned in whole or in part by any political subdivision.³⁸

Under current law, a political subdivision, for instance, may impose the otherwise prohibited requirements on contractors for projects that are paid for entirely with local funds or, if state funds are used, for projects up to \$1 million.

III. Effect of Proposed Changes:

Prompt Pay for Public Construction

The bill amends the requirements for construction service contracts between local government and contractors for public construction projects.

List of Deliverables

Under **section 1** of the bill, a local government's deliverables list, which evinces the projects or goods that are required to complete the contract, must assign a dollar valuation required to complete each item on the list. The contractor's valuation must be reasonably determined as a portion of the contract value.

The bill removes the local government's ability to extend the timeframe in which a deliverables list must be agreed upon. Therefore, parties to all contracts—whether they are valued at more or less than \$10 million—must create the list within 30 calendar days after the contractor reaches substantial completion of the project.

If a local government fails to develop a deliverables list within 30 days of the project's substantial completion, then the contractor may at that time, submit a payment request for all remaining unpaid contract sums, including the retainage, and the local government must pay it within 20 days. Conversely, if a contractor fails to coordinate with the local government to create a deliverables list in the required timeframe and the local government has given written notice of the failure, then the local government may keep back 150 percent of the estimated costs required to complete its version of the deliverables list, from its payment due to the contractor of the remaining contract balance, which includes the retainage.

The bill adds a new requirement that the local government pay the remaining contract balance within 20 days after the list of deliverables has been developed. This payment must include the remaining retainage withheld, minus the estimated cost to complete the items on the list of deliverables. The bill makes conforming, non-substantive changes to reflect that the local government cannot withhold the retainage until the contract is fully completed, but may withhold up to 150 percent of the amount assigned to the incomplete projects on the list of deliverables.

Once the contractor completes all items on the list of deliverables, it may submit a payment request for all remaining contract sums that have been withheld by the local government up to

³⁸ Section 255.0992(1)(b), F.S.

this point—which are limited to 150 percent of the value given to those incomplete projects on the deliverables list. The local government must pay, unless a good faith dispute exists regarding the completion of one or more items on the deliverables list, pursuant to the contract. If a good faith dispute exists, then the local government can continue to withhold up to 150 percent of the total cost to complete those items.

Pursuant to the bill, a local government can no longer withhold any amounts for payment or release that are subject to a claim or demand by the local government or contractor, limiting withholding only for good faith disputes made in writing pursuant to the contract or for certain bond claims disputed pursuant to s. 255.05, F.S.

Payment Disputes, s. 218.76, F.S.

Section 2 of the bill reduces the time afforded for a contract dispute regarding improper payment. A local government must begin its dispute proceeding within 30 days after it received a contractor's payment request. The local agency must render a final decision in the dispute within 45 days of its receipt of the payment request, versus 60 days.

Public Entity Provisions

Section 5 of the bill requires construction contracts with public entities to also require the creation of a deliverables list with an itemized list of the costs associated with projects required to complete the contract, consistent with changes to local government construction contracts.

If the public entity fails to coordinate to create the list of deliverables, then it must pay the contractor all retainage withheld within 20 days of receipt of the contractor's payment request. However, a public entity is not required to pay or process a payment request for retainage if the contractor did not cooperate or failed to perform its contractual duties in the development of the deliverables list.

Section 3 of the bill requires a public entity to pay the undisputed portions of a construction contractor's payment request, as required under the contract or within 20 days of the request, whichever is earlier.

Section 4 reduces the time in which a public entity must submit a payment request to the Chief Financial Officer for payment from 20 to 14 days after its receipt of the payment request.

Section 6 of the bill clarifies that the public entity is always permitted to withhold a retainage payment that is the subject of a good faith dispute or the subject of a claims against public surety bonds, but can no longer withhold amounts that are subject to a claim or demand by the public entity or the contractor.

Public Works Projects

Section 7 of the bill amends the definition of "public works project" in s. 255.0992, F.S., to reduce the project threshold from \$1 million to \$350,000, for which the governmental actions

identified in s. 255.0992(2)(b)-(c), F.S., are prohibited. The bill also applies those prohibited governmental actions to public works projects paid for with local funds.

With this change, political subdivisions,³⁹ cannot, for example, exclude certain contractors from bidding on a public works project or impose certain wage and employment conditions on contractors if the value of the project exceeds \$350,000 and is paid for with any local or state-appropriated funds.

Section 8 provides that the bill takes effect on July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with 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.

³⁹ "Political subdivision" means a separate agency or unit of local government created or established by law or ordinance and the officers thereof. The term includes, but is not limited to, a county; a city, town, or other municipality; or a department, commission, authority, school district, taxing district, water management district, board, public corporation, institution of higher education, or other public agency or body thereof authorized to expend public funds for construction, maintenance, repair, or improvement of public works. *See* s. 255.0992(1)(a), F.S.

B. Private Sector Impact:

The bill may have a positive financial impact on building contractors to the extent payments of undisputed amounts under contracts are paid more promptly.

The change to the definition of “public works project” may result in a shift in the award of certain construction contracts among locally-based and out of town contractors. Preventing political subdivisions from imposing certain predetermined wage, benefit, and staffing requirements for certain public works projects may have a positive fiscal impact on contractors and a potential negative fiscal impact on contractor employees.

C. Government Sector Impact:

The bill may have a negative fiscal impact on local governments to the extent they must settle construction contracts under shorter deadlines.

The change to the definition of “public works project” may increase competition and lower costs for local public construction projects exceeding \$350,000.

VI. Technical Deficiencies:

Lines 62-66 and 67-72 are made identical by the bill’s changes—they can be collapsed into one subparagraph.

VII. Related Issues:

The timeframe required for the local government’s written notice of failure to coordinate to create a list of deliverables is unclear. If the local government waits, in good faith, until the 30th day based on an expectation that the contractor has created a list, it could be surprised by a contractor’s failure to have created one, and then by the contractor’s demand for payment on the basis of the local government’s failure to establish a list of deliverables.

Lines 101-106 require a local government to pay a contractor the remaining contract balance within 20 days “after the date the list is created.” There is no specific mechanism in the bill to fix or make publicly (or even privately) known at what point the list is created. Perhaps the bill should contemplate the date the list is agreed to between the parties in writing.

VIII. Statutes Affected:

This bill substantially amends sections 166.033, 218.735, 218.76, 255.073, 255.074, 255.077, 255.078, and 255.0992 of the Florida Statutes.

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 Community Affairs on March 15, 2023:

The CS removes section 1 of the bill relating to issuing development permits and orders.

As it pertains to the prompt pay provisions, the CS requires that the estimated costs to complete all items on a construction list must be “a dollar valuation, reasonably determined by the contractor as a portion of the contract value.” The bill as filed required estimated costs to be calculated “using reasonable market rates.”

The CS restores the ability for political subdivisions to impose the governmental actions identified in s. 255.0992(2)(b)-(c), F.S., for public works projects, but only for those projects that do not exceed \$350,000.

B. Amendments:

None.