

CHAPTER 2020-173

Committee Substitute for House Bill No. 101

An act relating to public construction; amending s. 218.735, F.S.; revising the amount of retainage that certain local government entities and contractors may withhold from progress payments for any construction services contract; conforming a provision to changes made by the act; amending s. 255.05, F.S.; revising requirements for Department of Management Services rules governing certain contracts; amending s. 255.077, F.S.; conforming a cross-reference; amending s. 255.078, F.S.; revising the amounts of retainage that certain public entities and contractors may withhold from progress payments for any construction services contract; conforming a provision to changes made by the act; providing applicability; providing an effective date.

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

Section 1. Paragraph (i) of subsection (7) and subsection (8) of section 218.735, Florida Statutes, are amended to read:

218.735 Timely payment for purchases of construction services.—

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

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

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

~~(b) After 50 percent completion of the construction services purchased pursuant to the contract, the local governmental entity must reduce to 5 percent the amount of retainage withheld from each subsequent progress payment made to the contractor. For purposes of this subsection, the term "50 percent completion" has the meaning set forth in the contract between the local governmental entity and the contractor or, if not defined in the contract, the point at which the local governmental entity has expended 50 percent of the total cost of the construction services purchased as identified in the contract together with all costs associated with existing change orders and other additions or modifications to the construction services provided for in the contract. However, notwithstanding this subsection, a municipality having a population of 25,000 or fewer, or a county having a population of 100,000 or fewer, may withhold retainage in an amount not exceeding 10 percent of each progress payment made to the contractor until final completion and acceptance of the project by the local governmental entity.~~

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

~~(d) After 50 percent completion of the construction services purchased pursuant to the contract, the contractor may present to the local governmental entity a payment request for up to one-half of the retainage held by the local governmental entity. The local governmental entity shall promptly make payment to the contractor, unless the local governmental entity has grounds, pursuant to paragraph (f), for withholding the payment of retainage. If the local governmental entity makes payment of retainage to the contractor under this paragraph which is attributable to the labor, services, or materials supplied by one or more subcontractors or suppliers, the contractor shall timely remit payment of such retainage to those subcontractors and suppliers.~~

~~(b)(e)~~ This section does not prohibit a local governmental entity from withholding retainage at a rate less than 5 ~~10~~ percent of each progress payment, from incrementally reducing the rate of retainage pursuant to a schedule provided for in the contract, or from releasing at any point all or a portion of any retainage withheld by the local governmental entity which is attributable to the labor, services, or materials supplied by the contractor or by one or more subcontractors or suppliers. If a local governmental entity makes any payment of retainage to the contractor which is attributable to the labor, services, or materials supplied by one or more subcontractors or

suppliers, the contractor must shall timely remit payment of such retainage to those subcontractors and suppliers.

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

(d)(g) The time limitations set forth in this section for payment of payment requests apply to any payment request for retainage made pursuant to this section.

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

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

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

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

(1) A person entering into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority or private entity, 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 be required, before commencing the work or before recommencing the work after a default or abandonment, to execute and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety. A public entity may not require a contractor to secure a surety bond under this section from a specific agent or bonding company.

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

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

2. Procedures for requiring certification from laborers, materialmen, and subcontractors, as defined in s. 713.01, before final payment to the contractor that such laborers, materialmen, and subcontractors have no

claims against the contractor resulting from the completion of the work provided for in the contract.

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

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

255.077 Project closeout and payment of retainage.—

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

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

255.078 Public construction retainage.—

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

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

~~(3) After 50-percent completion of the construction services purchased pursuant to the contract, the contractor may elect to withhold retainage from payments to its subcontractors at a rate higher than 5 percent. The specific amount to be withheld must be determined on a case-by-case basis and must be based on the contractor’s assessment of the subcontractor’s past performance, the likelihood that such performance will continue, and the contractor’s ability to rely on other safeguards. The contractor shall notify the subcontractor, in writing, of its determination to withhold more than 5 percent of the progress payment and the reasons for making that~~

determination, and the contractor may not request the release of such retained funds from the public entity.

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

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

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

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

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

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

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

(2) The amendments made to ss. 255.05 and 255.078, Florida Statutes, by this act do not apply to contracts executed under chapter 337, Florida Statutes.

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

Approved by the Governor September 18, 2020.

Filed in Office Secretary of State September 18, 2020.