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Progress Report



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Better Contracting Practices Would Aid the Construction Industry in Florida

at a glance

In response to subcontractor proposals to limit or replace retainage, the 2000 Legislature directed OPPAGA to examine various construction industry practices and recommend whether Florida construction law should be revised.

OPPAGA concluded that any legislation that would limit contractual flexibility could interfere with the free market and have a negative effect on the construction industry. However, to facilitate improved contract negotiations, OPPAGA recommended that the Department of Management Services identify and disseminate best practices that could limit the barriers to final project completion and facilitate the equitable release of retainage.

To date, the Department of Management Services has not developed best practice guidelines for construction contracting.

Purpose

In accordance with state law, this progress report describes action taken in response to

recommendations made in a 2000 OPPAGA report.^{1,2}

Background

Retainage is a contractual provision that is commonly used in the construction industry. It allows the owner of a construction project to withhold a certain amount of each payment for completed work. Payments on construction projects are made on a periodic basis, generally monthly. When a general contractor submits a payment request, the project owner or the owner's representative reviews, approves or modifies the request. This initiates a payment from the owner to the contractor that is reduced by the amount of retainage, usually 10% of the payment amount. The contractor then pays his or her subcontractors for work performed and withholds retainage on the subcontractors, usually in the same percentage as was held on the contractor by the owner.

The project owner holds retainage as leverage to help bring construction to completion in a

¹ Section 11.51(6), *F.S.*

² *Special Review: Inflexibility in Construction Practices Could Hurt Construction Industry*, OPPAGA Report No. 00-26, December 2000.

timely manner. It is generally paid out at the time the project reaches final completion, although the owner may choose to release a portion of the retainage at an earlier time based on project progression or an earlier agreement. In addition to providing leverage, retainage serves as a safeguard against possible overpayment to the general contractor when the estimated percentage of project completion, used for periodic payments, exceeds the actual percentage completed.

Florida's subcontractors, who felt that retainage often created undue hardships, asked the 2000 Legislature to consider limiting the allowable percentage of compensation that could be retained in order to increase cash flow to subcontractors. The Legislature, in Ch. 2000-372, *Laws of Florida*, directed OPPAGA to study various construction industry practices and determine whether Florida construction law should be revisited.

Our 2000 Assessment—

OPPAGA determined that although there are many challenges within the construction industry, legislation that limits contractual flexibility could interfere with the operations of the free market, limit the entrance of new business or the growth of existing businesses, and have a negative effect on the construction industry as a whole. Therefore, OPPAGA concluded that any adjustments to the industry would occur better through improved contracting practices rather than through legislative mandate.

OPPAGA also determined that although contract terms are a negotiable business decision, due to the tremendous growth in the demand for construction in Florida, many new owners, general contractors, and subcontractors have entered the industry with limited experience in contract negotiation and management. To facilitate improved contract negotiations within the construction industry, OPPAGA recommended that the state Department of Management Services identify best practices that could be employed to limit the barriers to final project completion and facilitate the equitable release of retainage and provide this information to state and local governments through its technical assistance efforts.

Current Status—

The Department of Management Services has not yet implemented our recommendation to disseminate best practices in contract negotiations.³ We continue to believe that best contracting practices, if communicated and implemented, could facilitate final project completion and release of retainage.

While Florida's subcontracting industry reports some success negotiating more favorable contract provisions, it continues to propose legislating certain contract terms. To date, the Legislature has not passed any statutory amendments to limit the amount of retainage withheld.

³ Chapter 2001-283, *Laws of Florida*, eliminated the role of the Department of Management Services in providing construction management services to non-state governmental entities.

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Florida Monitor: <http://www.oppaga.state.fl.us/>

Project supervised by Debbie Gilreath (850/487-9278)

Project conducted by Janice Foley (850/487-9266)

John W. Turcotte, OPPAGA Director