

**BOARD OF COUNTY COMMISSIONERS  
AGENDA ITEM SUMMARY**

Meeting Date: April 16, 2008

Division: Engineering

Bulk Item: Yes X No     

Department: Facilities Development

Staff Contact Person/Phone #: Jerry Barnett X4416

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**AGENDA ITEM WORDING:** Approval to reduce retainage from 10% to 5% for Fonticiella Construction Corp. for the construction of the Medical Examiner's Facility.

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**ITEM BACKGROUND:** In accordance to State Statute 218.735 (8)(b) a county having a population of 100,001 or more, must reduce to 5% the amount of retainage withheld from each subsequent progress payment after 50% completion of construction. Although Monroe County has a population of less than 100,00, construction is over 80% complete and the contractor is requesting a 5% reduction. Substantial Completion is scheduled for April 21, 2008. See attached.

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**PREVIOUS RELEVANT BOCC ACTION:** N/A

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**CONTRACT/AGREEMENT CHANGES:** To reduce retainage from 10% to 5%. As of February 29, 2008, the amount of retained funds would be reduced from \$318,440.17 to \$159,220.09.

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**STAFF RECOMMENDATIONS:** Approval as stated above.

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**TOTAL COST:** N/A

**BUDGETED:** Yes X No     

**COST TO COUNTY:** N/A Funds already earned

**SOURCE OF FUNDS:** Retainage Payable

**REVENUE PRODUCING:** Yes      No X **AMOUNT PER MONTH**      **Year**     

**APPROVED BY:** County Atty      OMB/Purchasing      Risk Management     

**DOCUMENTATION:** Included X Not Required     

**DISPOSITION:**     

**AGENDA ITEM #**

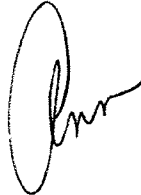
*MONROE COUNTY  
FACILITIES DEVELOPMENT*

**M E M O R A N D U M**

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**TO:** David Koppel  
County Engineer

**FROM:** Ann Riger, Contracts Administrator  
Facilities Development



**DATE:** April 1, 2008

**RE: Agenda Item – Medical Examiner Facility**

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**AGENDA ITEM WORDING:** *Approval to reduce retainage from 10% to 5% for Fonticiella Construction Corp. for the construction of the Medical Examiner's Facility.*

**ITEM BACKGROUND:** *The contractor, Fonticiella Construction Corp. is requesting a retainage reduction from 10% to 5% from their payment applications. State Statue 218.735 (8)(b) states that a county having a population of 100,001 or more, must reduce the retainage withheld to 5% after 50% of construction is completed. The Medical Examiner's Facility is over 80% complete.*

**PREVIOUS RELEVANT BOCC ACTION:** *N/A*

**CONTRACT/AGREEMENT CHANGES:** *Reduce retainage from 10% to 5%.*

**STAFF RECOMMENDATIONS:** *Approval as stated above.*

*Thank you. If you have any questions please call me at ext. 4439.*

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# MONROE COUNTY FACILITIES DEVELOPMENT DEPARTMENT

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## M E M O R A N D U M

DATE: 18 March 2008

TO: Jerry Barnett

FROM: Kevin Wilson



SUBJECT: Reduction of Retainage for Medical Examiner's Building Project

Recommendation: Approve a reduction of retainage to 5% and seek a Board of County Commissioners (BOCC) resolution to pay the released retainage amount to the contractor upon receipt of a properly documented application for such payment.

Basis for Recommendation:

1. The project was approximately 80% complete at the end of February 2008.
2. Retention of five (5) percent is adequate to ensure project completion.
2. Florida Statutes § 218.735 (8)(b) requires reduction in retainage to five (5) percent for most Florida counties when a project reaches the 50 percent completion point.
3. The contractor has requested a reduction of his retainage to five(5) percent.

Background:

Florida Statutes §218.735 (8)(b) require that counties with a population of 100,000 or greater reduce the retained funds in construction contracts to five (5) percent upon reaching 50 percent completion. The 50 percent completion point is defined either by the contract or by the current percent billed. Smaller counties (including Monroe) are not obligated to reduce the retention. The Clerk has, in the past, required a BOCC resolution to reduce retained funds after the 50 percent completion point. Our department has, on previous occasions, requested such a resolution when confident that the remaining retained funds are adequate to ensure completion of the contracted work.

The contractor has billed (as of 29 February 2008) for approximately 80 percent of the total cost of the contract. The contractor's quality of work is excellent and he continues to work toward an early April substantial completion date for the building. Reduction of retainage to 5 percent will result in retained funds slightly in excess of \$157,000 plus an unclaimed/unpaid balance of just over \$900,000. Upon substantial completion 5 percent retainage will amount to approximately \$200,000. These are adequate protection to ensure completion.

# The 2007 Florida Statutes

**Title XIV**  
TAXATION AND  
FINANCE

**Chapter 218**  
FINANCIAL MATTERS PERTAINING TO  
POLITICAL SUBDIVISIONS

**View Entire  
Chapter**

**218.735 Timely payment for purchases of construction services.--**

- (1) The due date for payment for the purchase of construction services by a local governmental entity is determined as follows:
  - (a) If an agent must approve the payment request or invoice prior to the payment request or invoice being submitted to the local governmental entity, payment is due 25 business days after the date on which the payment request or invoice is stamped as received as provided in s. 218.74(1).
  - (b) If an agent need not approve the payment request or invoice which is submitted by the contractor, payment is due 20 business days after the date on which the payment request or invoice is stamped as received as provided in s. 218.74(1).
- (2) The local governmental entity may reject the payment request or invoice within 20 business days after the date on which the payment request or invoice is stamped as received as provided in s. 218.74(1). The rejection must be written and must specify the deficiency in the payment request or invoice and the action necessary to make the payment request or invoice proper.
- (3) If a payment request or an invoice is rejected under subsection (2) and the contractor submits a corrected payment request or invoice which corrects the deficiency specified in writing by the local governmental entity, the corrected payment request or invoice must be paid or rejected on the later of:
  - (a) Ten business days after the date the corrected payment request or invoice is stamped as received as provided in s. 218.74(1); or
  - (b) If the governing body is required by ordinance, charter, or other law to approve or reject the corrected payment request or invoice, the first business day after the next regularly scheduled meeting of the governing body held after the corrected payment request or invoice is stamped as received as provided in s. 218.74(1).
- (4) If a dispute between the local governmental entity and the contractor cannot be resolved by the procedure in subsection (3), the dispute must be resolved in accordance with the dispute resolution procedure prescribed in the construction contract or in any applicable ordinance. In the absence of a prescribed procedure, the dispute must be resolved by the procedure specified in s. 218.76(2).
- (5) If a local governmental entity disputes a portion of a payment request or an invoice, the undisputed portion shall be paid timely, in accordance with subsection (1).
- (6) When a contractor receives payment from a local governmental entity for labor, services, or materials furnished by subcontractors and suppliers hired by the contractor, the contractor shall remit payment due to those subcontractors and suppliers within 10 days after the contractor's receipt of payment. When a subcontractor receives payment from a contractor for labor, services, or materials furnished by subcontractors and suppliers hired by the subcontractor, the subcontractor shall remit payment due to those subcontractors and suppliers within 7 days after

the subcontractor's receipt of payment. Nothing herein shall prohibit a contractor or subcontractor from disputing, pursuant to the terms of the relevant contract, all or any portion of a payment alleged to be due to another party if the contractor or subcontractor notifies the party whose payment is disputed, in writing, of the amount in dispute and the actions required to cure the dispute. The contractor or subcontractor must pay all undisputed amounts due within the time limits imposed by this section.

(7)(a) Each contract for construction services between a local governmental entity and a contractor must provide for the development of a list of items required to render complete, satisfactory, and acceptable the construction services purchased by the local governmental entity. The contract must specify the process for the development of the list, including responsibilities of the local governmental entity and the contractor in developing and reviewing the list and a reasonable time for developing the list, as follows:

1. For construction projects having an estimated cost of less than \$10 million, within 30 calendar days after reaching substantial completion of the construction services purchased as defined in the contract, or, if not defined in the contract, upon reaching beneficial occupancy or use; or
2. For construction projects having an estimated cost of \$10 million or more, within 30 calendar days, unless otherwise extended by contract not to exceed 60 calendar days, after reaching substantial completion of the construction services purchased as defined in the contract, or, if not defined in the contract, upon reaching beneficial occupancy or use.

(b) If the contract between the local governmental entity and the contractor relates to the purchase of construction services on more than one building or structure, or involves a multiphased project, the contract must provide for the development of a list of items required to render complete, satisfactory, and acceptable all the construction services purchased pursuant to the contract for each building, structure, or phase of the project within the time limitations provided in paragraph (a).

(c) The failure to include any corrective work or pending items not yet completed on the list developed pursuant to this subsection does not alter the responsibility of the contractor to complete all the construction services purchased pursuant to the contract.

(d) Upon completion of all items on the list, the contractor may submit a payment request for all remaining retainage withheld by the local governmental entity pursuant to this section. If a good faith dispute exists as to whether one or more items identified on the list have been completed pursuant to the contract, the local governmental entity may continue to withhold an amount not to exceed 150 percent of the total costs to complete such items.


(e) All items that require correction under the contract and that are identified after the preparation and delivery of the list remain the obligation of the contractor as defined by the contract.

(f) Warranty items may not affect the final payment of retainage as provided in this section or as provided in the contract between the contractor and its subcontractors and suppliers.

(g) Retainage may not be held by a local governmental entity or a contractor to secure payment of insurance premiums under a consolidated insurance program or series of insurance policies issued to a local governmental entity or a contractor for a project or group of projects, and the final payment of retainage as provided in this section may not be delayed pending a final audit by the local governmental entity's or contractor's insurance provider.

(h) If a local governmental entity fails to comply with its responsibilities to develop the list required under paragraph (a) or paragraph (b), as defined in the contract, 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. 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 failed to perform its contractual responsibilities, if any, with regard to the development of the list or if paragraph (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 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.

(e) This section does not prohibit a local governmental entity from withholding retainage at a rate less than 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 shall timely remit payment of such retainage to those subcontractors and suppliers.

(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.

(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.

(h) 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.

(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.

(9) All payments due under this section and not made within the time periods specified by this section shall bear interest at the rate of 1 percent per month, or the rate specified by contract, whichever is greater.

**History.**--s. 3, ch. 95-331; s. 3, ch. 2001-169; s. 3, ch. 2005-230.

**From:** Armando J. Fonticiella [ajfont@fonticiella.com]

**Sent:** Tuesday, March 11, 2008 5:32 PM

**To:** Wilson-Kevin

**Cc:** Herminia M. Fonticiella; Leonardo J. Fonticiella

**Subject:** Reduction of retainage to 5%.

Hello Kevin,

Florida Statutes allows the reduction of retainage to 5-percent when the construction has reached 50-percent completion. At this time we are approximately 80-percent complete, as reflected in the Feb. pay request, and anticipate 100-percent completion in the month of April. We respectfully request that you obtain approval, as required, for us to request these funds as soon as possible. Thank you in advance.

Regards,

**Fonticiella Construction Corp.**

Armando J. Fonticiella

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