

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 74

SPONSOR: Governmental Oversight and Productivity Committee and Senator Campbell

SUBJECT: Culpable Negligence

DATE: February 3, 1999 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Lombardi</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>CJ</u>	_____
3.	_____	_____	<u>FP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

The committee substitute creates as a felony offense causing public financial injury through culpable negligence. The offense occurs when any person, given control and custody of public property, causes losses of the assets greater than \$100,000 over 12-months or the contract period, whichever is longer, through culpable negligence.

The bill requires that notice of the new offense accompany every state contract more than \$50,000.

The bill has an effective date of July 1, 1999.

## II. Present Situation:

The state awards contracts to investment agents<sup>1</sup> who are in control and custody of public property or state financial assets. Reference is made in the statutes to professional plan administrators, for example in s. 287.057(22), F.S., and independent, nonprofit colleges and universities may be named as managers or administrators in the award of a state service contract to an agency of the state.<sup>2</sup> These entities, also fall under the oversight of persons in control and custody of public property<sup>3</sup>, specifically professional services.

<sup>1</sup>Section 518.122, F.S., provides for the delegation of investment functions.

<sup>2</sup>Section 287.057(21), F.S.

<sup>3</sup>Section 812.012, F.S., defines "Property" as anything of value, including: (a) real property, including things growing on, affixed to, and found in land. (b) Tangible or intangible personal property, including rights, privileges, interests, and claims. (c) Services. "Services" means anything of value resulting from a person's physical or mental labor or skill, or from the use, possession, or presence of property, and includes: (a) Repairs or improvements to property. (b) Professional services. (c) Private, public, or government communication, transportation, power, water, or sanitation services. (d) Lodging accommodations. (e) Admissions to places of exhibition or entertainment.

Section 215.32, F.S., defines state funds<sup>4</sup> and requires that these funds be deposited in the State Treasury unless specifically provided otherwise. The State Treasury and the Department of Banking and Finance then account for the funds and disburse them among the three types of state funds: the General Revenue Fund, trust funds<sup>5</sup>, and Working Capital Funds.

State trust funds earmark monies for a specific purpose and objective and establish specific projects and programs in conjunction with the appropriation. Governmental agencies cannot always manage these projects and programs in whole or part either because they do not possess the internal resources to manage the project or program or they do not possess the necessary systems and expertise to support the task. Consequently, the state may look outside to companies or entities that possess the necessary expertise to manage the project or program more efficiently and cost effectively.

The Auditor General, under the provisions of s. 11.45, F.S., has the authority to conduct performance audits, and periodically monitor and review programs, activities, and functions of these contract managers and program administrators. Although a deterrent, it does not preclude an individual who has access to monetary resources from misdirecting funds. Although specific sanctions may exist for theft<sup>6</sup>, embezzlement, or conspiracy<sup>7</sup>, no statute sanctions poor performance or equates poor performance with culpable negligence.

Many public officers are required to furnish a bond that insures the faithful performance of their respective duties, particularly in cases in which duties of the office pertain to the oversight of public monies or other assets, or the safety and protection of citizens. To this end, the State Treasurer is required<sup>8</sup> to give a bond in the amount of \$100,000; the Comptroller is required<sup>9</sup> to give a bond in the amount of \$50,000; and the Commissioner of Agriculture is required<sup>10</sup> to give bond in the amount of \$10,000. In addition, the Division of Purchasing of the Department of Management Services purchases a blanket faithful performance of duty bond that includes state employees and public officials.

On a case by case basis, the State Board of Administration contractually imposes on its external investment managers fidelity bonding requirements to indemnify the state from potential losses.

---

<sup>4</sup>Revenue is defined as including licenses, fees collected or received under the authority of the laws of the state by each and every state official, office, employee, bureau, division, board, commission, institution, agency, or undertaking of the state or the judicial branch.

<sup>5</sup>Section 19(f), Art. III, Florida Constitution, states that no trust fund may be created by the state or other public body without a three-fifths vote of the membership of each house of the legislature. Section 215.3207, F.S., provides that each trust fund must be created by statutory language that specifies: the name of the trust fund, the agency or branch of state government responsible for administering the trust fund, the requirements or purpose that the trust fund is established to meet, and the sources of moneys to be credited to the trust fund or specific sources of receipts to be deposited in the trust fund.

<sup>6</sup>Section 812.014, F.S.

<sup>7</sup>Section 777.04, F.S.

<sup>8</sup>Section 18.01, F.S.

<sup>9</sup>Section 17.01, F.S.

<sup>10</sup>Section 19.14, F.S.

The bonding requirements encompass both real estate transactions and investment securities transactions and can range from \$1-2 million.

### III. Effect of Proposed Changes:

**Section 1.** “[C]ulpable negligence” is defined in CS/SB 74 to mean

*...negligence of a gross and flagrant character that evinces a reckless disregard for public property and is so outrageous as to raise a presumption that the offender was indifferent to the consequences of his or her action or inaction.*

Additionally, any person in custody or control of public property, through oral, written, or tacit contracts, or whether a fiduciary relationship exists between the individual and the state, they are subject to the same standards and sanctions under the application of this bill.

The application includes public property that the state has given custody of and disbursement authority over to the contract manager by means of a contract, without regard to whether there exists a fiduciary relationship between the state and the contract manager. Further, “state financial assets,” as created in the context of this law, specifically means monetary funds intended for, existing in, or owed to any state trust fund, *except funds held by the state for investment purposes, including public employee retirement or pension funds*, and includes any negotiable or other monetary instrument drawn on or disbursed from a trust fund.

Section 287.133, F.S., prohibits persons convicted of crimes against a public entity from conducting business transactions with state government.<sup>11</sup>

Three elements must be proved for conviction of this felony: the person must be in control and custody of public property; the person causes loss, or through inactions, causes loss of public property greater than \$100,000 over 12-months or the contract period, whichever is longer; and the person causing the loss does so by being culpably negligent to the extent that the loss could have been reasonably foreseen and prevented.

A felony is created and is punishable as a misdemeanor of the first degree or a felony in the third degree. In this context, a misdemeanor of the first degree is punishable by not more than 1 year in prison and a \$1,000 fine for losses valued at \$100,000 or more, but less than \$500,000. A third degree felony is punishable by not more than 5 years in prison and a \$5,000 fine for losses valued greater than \$500,000. Section 775.083(1)(f), F.S., also provides for a higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim. The state attorney or the Statewide Prosecutor reserves the right to prosecute on behalf of the state for violations of this act.

---

<sup>11</sup>Section 287.133, F.S., denies the right to those already convicted of a public entity crime to transact business with public entities. Those denied the right of conducting business transactions include: a predecessor or successor of a person convicted of a public entity crime; an entity controlled by a person who also actively manages and has been convicted of a public entity crime not to the exclusion of officers, directors, executives, partners, shareholders, employees, members, and agents; ownership by one person constituting a controlling interest in another person; or a person who knowingly enters into a joint venture with another who has been convicted of a public entity crime during the preceding 36 months.

The bill requires that notice of the new offense accompany every state contract more than \$50,000.

**Section 2.** The act shall take effect July 1, 1999.

**IV. Constitutional Issues:**

**A. Municipality/County Mandates Restrictions:**

While the provisions of this bill apply to local governments it does not impose an affirmative duty to do something; instead it requires them to avoid operational practices which could lead to significant liability exposure.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:**

Section 112.3173, F.S., implemented Art. II, s. 8(d), State Constitution, to sanction those public officers or employees who committed, aided, or abetted an embezzlement of public funds; the theft of funds of an employer; committed bribery in connection with employment; committed an impeachable offense; or who willfully and intentionally defrauded the public or the public agency from which the public officer or employee acts. In addition, any public officer or employee who is convicted of a felony involving a breach of public trust will be subject to forfeiture of right and privileges under a public retirement system or pension plan in such manner as may be provided by law.

**V. Economic Impact and Fiscal Note:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

There is joint exposure by both public sector and private sector contracting parties. Whether these exposures will be mitigated due to the presence of contractual indemnification agreements or liquidated damages clauses is unclear. It is well understood that a party may not contract liability away.

### C. Government Sector Impact:

The application of the bill is to all units of government whether, state, county, municipal, or special district. The magnitude of the impact is difficult to ascertain but it would be inclusive of all contracted responsibilities. Almost 30% of the operating budget of the State of Florida is comprised of Special Category appropriations, that is, payments to vendors for public services delivered by other public or private contractors. There are significant contractual undertakings at the local governmental level such as cable television and solid waste collection and disposal.

### VI. Technical Deficiencies:

The context of the bill appears to infer that its provisions extend only to the State of Florida and its agencies. However, it uses the phrase “. . . or political subdivision of the state.” A county is, among other units of government defined in s. 1.01, F.S., a political subdivision. The above comments on custodian relationships with tangible and intangible property should be made applicable to local governments as well.

### VII. Related Issues:

Section 768.28(9)(a), F.S., contains the governing standard on the application of waiver of sovereign immunity in tort actions. The statute provides, in part, that

*The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.*

While there is some similarity in the behavior subject to this standard, committee substitute for SB 74 does provide a definition in which “willful” is excluded as a modifier. It is plausible that a person could commit a culpably negligent act under this definition within the scope of employment and not run afoul of s. 768.28, F.S., which would require actions only outside of the scope of employment for exclusion of sovereign immunity protection. In this regard the bill relies upon the case law definition of culpable negligence contained in *Killingsworth v. State*, 584 So.2d 647 (Fla. 1 DCA 1991). That definition, cited in the Office of Statewide Prosecution Presentment, is “recklessness of a gross and flagrant character which evinces a reckless disregard for the *safety* of others; it is that entire want of care which raises a presumption of indifference to consequences.”

It is unclear how this bill will relate to compliance activities noted above when there has been a documented failure to perform accurately or on time. One interpretation could be the criminalizing of behavior that was clearly grossly deficient but for which there was no intent or personal gain. The consequences of such actions upon public employees with line or contract management responsibilities, and the contract vendors themselves, could be real and substantial and make them averse to any assumption of risk.

An impetus for this bill stems from an investigation undertaken by the Statewide Prosecutor of the circumstances under which the State of Florida contracted the management of its state employees' health insurance program to a third party administrator, Unisys, Incorporated. During the course of the contract, cumulative recurring and nonrecurring losses exceeding \$300 million were experienced. Testimony elicited from the Division of State Group Insurance, and from the presentment of the Statewide Grand Jury in its report dated June 19, 1997, has attributed these losses to several factors: the inability of the third party administrator to perform its duties under terms of the contract, the contractor's inability to receive the represented discounts from providers, the contractor's inability to assemble internal systems capable of executing its responsibilities, the suppression of premium increases by the State for the prior five years, and mismanagement by both state agency and corporation officials. In mid-1997 Unisys entered into an agreement in which it terminated its active management of the plan effective January 1, 1998. Blue Cross and Blue Shield of Florida was designated the successor third party administrator for the plan. Unisys paid several million dollars in liquidated damages for its performance shortcomings. Shortly thereafter, the company realigned its business operations to close several manufacturing and service operations. The self-insurance trust fund has had to borrow money from the General Revenue Fund to maintain its solvency and will require at least two years to rebuild its financial position.

The above situation was not the only large-scale operational failure of a public/private infrastructure information system. Some years earlier the State of Florida experienced similar problems in implementation of a fully automated on-line benefits management system for beneficiaries of its social service entitlement programs. That system, rushed to implementation and completion ahead of its original timetable, experienced significant performance failures and costly retrofits. Litigation followed between the state agency and its prime contractor and required the expenditure of additional funds by all parties and participating federal agency funding sources to resolve these failures. A subsequent grand jury review of these matters found substantial managerial fault but could not successfully attribute any criminal responsibility due to profit, gain or advantage. Since then, the system has become satisfactorily operational.

Two other large-scale systems have also been affected by delays in their implementation due to technical and nontechnical matters. The Statewide Automated Child Welfare Information System and the 800 Megahertz Law Enforcement Radio System are similar large-scale attempts at taking emergent technology and applying them across multiple governmental sectors. Poorly integrated project plans have characterized the former project thus resulting in cost underestimates as high as \$83 million. The latter has suffered through unrealistic implementation schedules, funding underestimations, and technological obsolescence. Its full implementation is not complete and is years behind its original expectation.

The 1998 Legislature addressed potential systemic failures in its own and contracted automation systems in anticipation of Year 2000 date calculation failures. Provisions contained in Committee Substitute for House Bill 3619 provided immunity for state agencies, units of local government, and designated public or private health care providers. By the end of January 1999 the Office of the Governor reported substantial compliance among most state-agency information systems. The drivers' licensing system in the Department of Highway Safety and Motor Vehicles and the trial court system are still questionable.

In *Miccosukee Tribe of Indians of Florida v. United States of America, et. al*, Case No. 95-0533-Civ-Davis (United States District Court, Southern District of Florida, September 11, 1998), a federal court concluded that state officials had violated state narrative standards for agricultural runoff in the Everglades Agricultural Area, also in violation of federal water quality standards. The court also found that the state act violated the federal *Clean Water Act*. Were these state officials protected because they were operating under color of state law, the *Everglades Forever Act*, or could they be determined to be culpably negligent and criminally prosecutable, under terms of this bill, because their actions led to an admitted further degradation of *protected public property at considerable remedial expense within the scope of their authority*? The Board of Trustees of the Internal Improvement Trust Fund, the Governor and Cabinet, is the owner of many state lands. Some of these lands are managed by the Department of Corrections which leases them to the prison industry corporation created under Part II of ch. 946. That corporation then subleases them to proprietary concerns for the growing and harvesting of sugar cane, also in the vicinity of the Everglades Agricultural Area.

When Congress deauthorized the Cross Florida Barge Canal in 1992 it transferred ownership, title, and liability for the locks at the eastern and western terminus of the canal (Buckman and Inglis) to the State of Florida. The Department of Environmental Protection has been advised repeatedly of the locks' deteriorating physical condition but no actions have been taken to address the engineering findings and recommendations. A lock failure could cause significant, widespread property and environmental damage to which some form of liability would attach.

A 1997 Florida Senate publication entitled *Procurement and Contracting Reform* discussed the growth of contracted public services among Florida governmental agencies. The report noted significant variations in agency styles in the administration of contracted services. Its principal recommendation was the development of organizational training incentives for personnel charged with negotiating and managing major financial commitments. Writing in the July/August issue of the *Public Administration Review*, authors Mary Maureen Brown and Jeffrey Brudney noted that the public sector will reap the benefits of contracted technology only when it equips its own public managers with the skills to make informed decisions which invest in their internal agency capacities. One positive application of this training investment was reported in that same issue by Frances Stokes Berry and others on the successful implementation of technology without the sacrifice of supervisory discretion in the Florida Department of Highway Safety and Motor Vehicles as it affected employee disciplinary proceedings.

Section 921.001(1)(b), F.S., requires an economic impact estimation for any Act of the Legislature which creates, enhances, or reclassifies a crime as a felony. That impact review is undertaken by the Legislature's Office of Economic and Demographic Research. The impact is not believed to be large.

## **VIII. Amendments:**

None.