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**DATE:** December 19, 2001

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
BUSINESS REGULATION  
ANALYSIS**

**BILL #:** HB 427  
**RELATING TO:** Insurance Plans Participation  
**SPONSOR(S):** Representative(s) Brown  
**TIED BILL(S):**

**ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:**

- (1) BUSINESS REGULATION YEAS 9 NAYS 0
  - (2) SMARTER GOVERNMENT COUNCIL
  - (3)
  - (4)
  - (5)
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I. SUMMARY:

Currently, numerous provisions of law address business relationships between the private sector and the public sector when providing goods and services. Various statutory sections address requirements for those who qualify to provide these goods and services. Among these provisions are guidelines that establish criteria for work on public construction projects, such as bonding.

Current law also deals with public procurement of personal property and services. The Department of Management Services (DMS) maintains certain statutory powers, duties, and functions in the procurement process. Among other responsibilities, DMS must establish a system of coordinated and uniform procurement policies to be used by agencies; prescribe the methods of securing competitive sealed bids and proposals or negotiating and awarding commodity and contractual services contracts; and adopt rules necessary to carry out the purposes of the public procurement process.

As a general practice, a traditional approach has been taken by state and local government to provide insurance coverage for public construction projects and the procurement of goods and services. Contractors and subcontractors are required to assume full liability for loss, and to purchase and maintain adequate insurance. Consolidated insurance coverage is a centralized insurance program where one party is responsible for procuring certain insurance coverage that apply to all participants in the project under the contract rather than having each party provide their own insurance

The bill addresses certain contract relationships for public projects relating to building construction, professional architectural, engineering, landscape architectural, or surveying and mapping services, and procurement of commodities or contractual services. The bill prohibits parties to these public contracts from requiring a contractor or subcontractor to participate in an insurance arrangement in which the owner or contractor of the project obtains insurance coverage for parties operating under the contract. These provisions of the bill allow an operator under the contract to opt out of a consolidated insurance program.

The bill has an indeterminate fiscal impact on state or local government.

The Committee on Business Regulation adopted one amendment that removes professional services from the bill. The amendment is traveling with the bill.

SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- |                                   |   |                             |   |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u>         | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u>             | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u>      | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/>            |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u>      | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

**Public Contracts**

Chapter 255, F.S., deals with public property and publicly owned buildings. More specifically, the chapter specifies the requirements for construction firms and requires bonds be posted between a public entity and any contractors, subcontractors, or materialmen that are involved in the project.

Section 255.05, F.S., provides that any person entering into a formal contract with the state or any county, city, or political subdivision, or other public authority, 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 must deliver to the public owner a payment and performance bond. This bond requires the contractor to perform the contract in the time and manner prescribed in the contract and that the contractor make prompt payments to all persons defined in s. 713.01, F.S., whose claims derive directly or indirectly from the prosecution of the work provided for in the contract. This section defines the following persons: a contractor; a subcontractor; a sub-subcontractor; a laborer; a materialman who contracts with the owner, contractor, subcontractor, or a sub-subcontractor; and a professional lienor. Any person providing materials, labor, or services under the improvement contract who does not receive proper payment has a claim against the bond for the amount due.

Chapter 287, F.S., deals with public procurement of personal property and services. This chapter requires the ethical procurement of commodities and contractual services and the adherence to uniform procedures in carrying out such procurement. "The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically."

Section 287.055, F.S., the Consultants' Competitive Negotiation Act, (CCNA), requires agencies to acquire certain professional services through a competitive negotiation process under certain circumstances. An agency must make a public announcement when professional services are needed for a project, the basic construction cost of which is estimated to exceed the threshold amount provided for by statute, or for a planning or study activity when the fee for professional services exceeds the threshold amount provided in the law. Each agency is required to encourage firms wanting to provide professional services to submit annually statements of qualifications and performance data. Any firm that desires to provide professional services must first be certified by that agency as qualified pursuant to law and the regulations of the agency. The agency is required

to determine that the firm to be employed is fully qualified to render the required service. Among the factors to be considered are the capabilities, adequacy of personnel, past record, and experience of the firm. An agency must also evaluate whether the firm is a certified minority business enterprise and endeavor to meet minority business enterprise procurement goals.

For each proposed project, an agency must evaluate current statements of qualifications and performance data. The agency is required to select in order of preference no fewer than three firms deemed to be the most highly qualified to perform the required services. The agency may request, accept, and consider proposals for the compensation to be paid under the contract only during competitive negotiations under s. 287.055 (5), F.S.

Section 287.055(2)(b), F.S., defines the term "agency" to mean the state, a state agency, a municipality, a political subdivision, a school district, or a school board. Section 287.055(2)(a), F.S., defines the term "professional services" to mean those services within the scope of the practice of architecture, professional engineering, landscape architecture, or registered surveying and mapping, as defined by the laws of the state, or those performed by any architect, professional engineer, landscape architect, or registered surveyor and mapper in connection with his or her professional employment or practice.

Section 287.057, F.S., outlines the conditions of public procurement of commodities or contractual services. Unless otherwise authorized by law, all contracts for the purchase of commodities or contractual services for the purchase of commodities must be awarded by competitive sealed bidding. When an agency determines in writing that the use of competitive sealed bidding (invitation to bid), is not practicable, commodities or contractual services must be procured by competitive sealed *proposals* (request for proposals). Particular situations are exempt from the competitive bid process, including when the agency head determines emergency state action is required, the commodities or contractual services are available only from a single source, it is in the best interest of the State, or it is involving prescriptive assistive devices for rehabilitative purposes.

### **Insurance Coverage**

As a common practice project owners, such as state agencies or local government, as well as, contractors and subcontractors purchase insurance independently to protect against financial losses related to the project under contract.

Consolidated insurance programs are commonly referred to as "Owner Controlled Insurance Programs (OCIPs)" and "Contractor Controlled Insurance Programs (CCIPs)". These programs are also referred to as "wrap-up insurance." This coverage is a centralized insurance program that covers the project owner and all contractors and subcontractors. Rather than having each party provide their own insurance, one party is responsible for procuring certain insurance coverage that will apply to all participants in the project under the contract. Florida law does not appear to specifically prohibit or restrict these type of consolidated policies. Coverage, generally, includes workers' compensation, general liability, builders' risk, excess liability and professional liability.

As a general practice, a traditional approach has been taken by state and local government to insure public projects and the procurement of goods and services. Contractors are required to assume full liability for loss, and to purchase and maintain adequate insurance. In recent years, the practice of consolidating insurance coverage has begun to occur in greater frequency.

C. EFFECT OF PROPOSED CHANGES:

The bill addresses three sections of the statutes addressing contract relationships for public contracts relating to building construction, professional architectural, engineering, landscape architectural, or surveying and mapping services, or procurement of commodities or other contractual services. The bill prohibits parties to public contracts under these sections from requiring a contractor or subcontractor to participate in an insurance arrangement in which the owner or contractor of the project obtains insurance coverage for the contractor or subcontractors. Thus the bill allows a participant under the contract to opt out of a consolidated insurance program.

The bill also prohibits parties to the contract from penalizing a contractor or subcontractor for not participating in an owner or contractor controlled insurance policy.

D. SECTION-BY-SECTION ANALYSIS:

**Section 1.** Amends s. 255.05, F.S., to prohibit parties to contracts for public building construction from requiring a contractor or subcontractor to participate in an insurance arrangement in which the owner or contractor of the project obtains insurance coverage for the contractor or subcontractors. The bill also prohibits parties to the contract from penalizing a contractor or subcontractor for not participating in an owner or contractor controlled insurance policy.

**Section 2.** Amends s. 287.055, F.S., to prohibit parties to contracts for professional services under the "Consultants' Competitive Negotiation Act" from requiring a contractor or subcontractor to participate in an insurance arrangement in which the owner or contractor of the project obtains insurance coverage for the contractor or subcontractors. The bill also prohibits parties to the contract from penalizing a contractor or subcontractor for not participating in an owner or contractor controlled insurance policy.

**Section 3.** Amends s. 287.057, F.S., to prohibit parties to contracts for public procurement of commodities or services from requiring a contractor or subcontractor to participate in an insurance arrangement in which the owner or contractor of the project obtains insurance coverage for the contractor or subcontractors. The bill also prohibits parties to the contract from penalizing a contractor or subcontractor for not participating in an owner or contractor controlled insurance policy.

**Section 4.** Effective date is upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See D. below.

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See D. below.

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See D. below.

D. FISCAL COMMENTS:

Wrap-up insurance can be identified as "insurance in bulk." Benefits of economies of scale can be recognized with associated savings in premium costs. Savings can be impacted through increased safety awareness and improved claims management. Should operators under a contract opt out from coverage under a consolidated wrap-up insurance program, the public owner or contractor could recognize a reduction in the anticipated savings associated with economies of scale. Private sector benefits may be recognized through management of their own insurance program.

Contractors with good safety records can receive rebates on their premiums from insurance carriers, thereby generating profits. In contrast, under a consolidated insurance program the owner pays the premiums and receives the rebates on the basis of a project's safety record. Obviously, certain risks are assumed that the project will maintain favorable loss ratios.

Under traditional insurance, contractors' costs for insurance are included in bids and are thus paid by the project owner. With a traditional project, a contractor with a good safety record has an advantage over an operator with a less favorable coverage rating. This record would be reflected in lower insurance premiums. This lower cost can be reflected in a lower bid for the project. Under a wrap-up coverage scenario this advantage is lost because insurance is not a part of a contractor's bid.

According to industry publications, with wrap-up insurance a contractor may bear additional record keeping costs. These costs are generally associated with workers' compensation insurance. In reporting for workers' compensation purposes, a contractor must segregate the payroll for a project using wrap-up insurance from the payrolls for other projects. When a project requires changes to the original specifications, the contractor has to remove insurance costs from the change order costs and again segregate the labor costs. Thus, a contractor incurs costs in a wrap-up insurance program that, under the traditional insurance, would not be necessary.

III. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

IV. COMMENTS:

A. CONSTITUTIONAL ISSUES:

On May 26, 1993, the Attorney General opined (AGO 93-34) that the School Board of Dade County was not authorized to purchase insurance for or indemnify school board contractors or subcontractors who work on capital construction projects of the board. Presently, school districts, as well as other local governmental entities, are authorized to provide insurance for officers and employees of the district and their dependents. The attorney general stated that the "...mere fact of contracting with a school board to undertake capital construction projects would not appear to qualify either contractors or their subcontractors as officers or employees of the school district." Therefore, the school district "...would appear to be precluded from extending insurance benefits to contractors or subcontractors who work on capital construction projects for the district."

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

None.

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On December 18, 2001 the Committee on Business Regulation adopted one amendment with title amendment that is traveling with the bill. The amendment removes changes to s. 287.055, F.S., relating to professional services of architects, engineers, landscape architects, surveyors and mappers and thereby, retains current law.

VI. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION:

Prepared by:

Staff Director:

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Alan W. Livingsston

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Paul Liepshutz