

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1986

SPONSOR: Governmental Oversight and Productivity and Senator Sebesta

SUBJECT: Public Construction Bonds

DATE: April 1, 2003 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Greenbaum</u>	<u>Roberts</u>	<u>JU</u>	<u>Favorable</u>
2.	<u>White</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute amends s. 255.05(3), F.S., to provide that the performance and payment bonds required by government entities for public buildings and works projects must be the same as the model public construction bond form contained in the subsection. The bill amends the model bond form to require that it contain: (a) the bond number; (b) the principal business address and telephone numbers of the contractor, surety, and public owner; (c) the amount of bond; (d) a description of the project; (e) a statement indicating that s. 255.05, F.S., controls the rights and obligations of the parties; and (f) the dates of the contract and bond.

This bill substantially amends s. 255.05, F.S.

II. Present Situation:

In Florida, “surety insurance” is defined to include payment and performance bonds.¹ Such bonds are contracts in which a surety company, which is paid a premium by a principal, e.g., a general contractor, agrees to stand in the place of the principal in the event the principal defaults either as to performance of the contract or as to payment of its subcontractors/suppliers.^{2 3}

Unlike a normal insurance situation in which there is a two-party relationship, i.e., the insurer and the insured, the nature of surety is a triparty relationship, which consists of: (a) the obligee,

¹ Section 624.606, F.S.

² *Surety Bonds: A Basic User’s Guide for Payment Bond Claimants and Obligees*, Construction Lawyer, Daniel Toomey and Tamara McNulty, Winter, 2002.

³ Although surety is oft times referred to in law as “surety insurance,” legal commentators have explained that this is somewhat of a misnomer, as it does not insure the purchaser of the surety, i.e., the general contractor, against claims such as poor workmanship; rather, the surety insurance protects the obligee against the general contractor’s default. *Id.*

which may be either the person purchasing the performance from the contractor in the case of a performance bond or the subcontractor/supplier expecting payment from the contractor in the case of a payment bond; (b) a principal, e.g., the contractor; and (c) the surety that provides the bond to protect against the principal's default. A second difference between a normal insurance relationship and a surety relationship is that the surety requires a principal to indemnify the surety against losses sustained by the carrier if the surety must perform or pay under the bonds. In this instance, the principal is referred to as the indemnitor to the surety.⁴

Section 255.05(1)(a), F.S., provides that any person who enters into a formal contract with the state or any county, city, or political subdivision thereof, 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 is required to deliver to the public owner a payment and performance bond with a state authorized surety insurer. The bond is to be conditioned on the contractor's timely and satisfactory performance of the contract and on the prompt payment of all persons defined in s. 713.01, F.S., the Mechanic's Lien Law, who furnish labor, services, or materials for the prosecution of the work provided in the contract.⁵

The payment and performance bond must state on its front page: (a) the name, principal business address, and phone number of the contractor, the surety, the owner of the property being improved, and, if different from the owner, the contracting public entity; (b) the contract number assigned by the contracting public entity; and (c) a description of the project sufficient to identify it, such as a legal description or the street address of the property being improved, and a general description of the improvement.⁶ Section 255.05(3), F.S., further provides that this bond may be in substantially the same form as a model form public construction bond that is provided in the subsection, and s. 255.05(6), F.S., provides that that all bonds executed pursuant to the section make reference to the section number and must contain a reference to the notice and time limitation provisions of this section.

The section's notice and time limitations require: (a) a claimant, who is not a laborer, who is not in contractual privity with the contractor, and who has not received payment, to furnish, either before commencing or no later than 45 days after commencing to furnish labor, materials or supplies for the prosecution of the work, the contractor with a notice that he or she intends to look to the bond for protection; and (b) a claimant, who is not in privity with the contractor and who has not received payment for his or her labor, materials, or supplies, to deliver, either 45 or more days into the progress of the work, but no more than 90 days after the completion of the work, to the contractor and to the surety written notice of the performance of labor or delivery of the materials or supplies and of the nonpayment.⁷

Section 255.05(4), F.S., states that the payment provisions of all bonds furnished for public work contracts must, regardless of form, be construed as statutory bond provisions, subject to all notice and time limitations in the section. Nevertheless, courts have construed a bond, even though furnished pursuant to a public works contract, that is written on a more expanded basis

⁴ *Id.*

⁵ Section 255.05(1)(a), F.S.

⁶ *Id.*

⁷ Section 255.05(2), F.S.

than that required by statute as a common-law bond.⁸ In this event, the statutory notice and time limitations do not apply; instead, claims against the bond may be brought within the general statute of limitations for suits on written contracts, which, pursuant to s. 95.11, F.S., is five-years.

III. Effect of Proposed Changes:

The bill amends s. 255.05(3), F.S., to provide that the performance and payment bonds required by government entities for public buildings and works projects must be the same as the model public construction bond form contained in the subsection, and to specify that any deviation from the form that is required by the public owner or furnished by the contractor is to be disregarded. This amendment should have the effect of requiring courts to construe all such performance and payment bonds as statutory, rather than common law, bonds.

The bill also amends the model form contained in subsection (3) to require the bond to contain the following: (a) the bond number; (b) the principal business address and telephone numbers of the contractor, surety, and public owner; (c) the amount of bond; (d) a description of the project; (e) a statement indicating that s. 255.05, F.S., controls the rights and obligations of the parties; and (f) the dates of the contract and bond.

Further, the bill strikes s. 255.05(6), F.S., which requires that all bonds executed pursuant to the section make reference to s. 255.05, F.S., and contain a reference to the notice and time limitation provisions of this section. This subsection is no longer necessary given that the bill requires that the mandatory bond form contain a statement that the section controls the parties' rights and obligations.

The bill provides that it takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

⁸ See *Southwest Florida Water Management Dist., for Use and Benefit of Thermol Acoustic Corp. v. Miller Const. Co., Inc. of Leesburg*, 355 So.2d 1258 (Fla. Dist. Ct. App. 2d Dist. 1978).

B. Private Sector Impact:

This bill requires use of a uniform public construction bond form and provides that any deviation from the form is to be disregarded. Thus, the bill removes the discretion currently provided in law for parties to alter the terms of the bond form. This change should result in all public construction bonds being construed as statutory bonds subject to the statutory notice and time limitations for claims against the bonds.

The 90-day notice requirement for statutory bond claims is significantly shorter than the five-year requirement claims associated with common-law bonds. Accordingly, this bill should assist contractors in receiving more timely notice of claims, which will allow the contractor to timely require its subcontractors/suppliers to pay their subcontractors/suppliers.

The Department of Management Services (DMS) has indicated that the bill's mandatory bond form requirement will benefit vendors doing business with the government by clarifying the rights and obligations of the parties.

C. Government Sector Impact:

This bill requires public entities to use a uniform public construction bond form and provides that any deviation from the form is to be disregarded. There does not appear to be any fiscal impact to the government as a result of this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.