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 1710

SPONSOR: Banking and Insurance Committee and Senator Dockery

SUBJECT: Construction Contracts

DATE: March 25, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Deffenbaugh	BI	Fav/CS
2.			RI	
3.			JU	
4.				
5.				
6.				

I. Summary:

Committee Substitute for Senate Bill 1710 states that indemnification agreements or promises to have someone named as an additional insured between the parties to a construction contract (an architect, engineer, general contractor, subcontractor, sub-subcontractor or materialman) are void if the indemnitor promises to indemnify the indemnitee for damages caused by the indemnitee. Indemnification agreements are permissible whereby the indemintor provides indemnification or coverage for damages caused by the indemnitor or the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, agents, or employees. The bill also provides that indemnification provided to a third party to a construction contract can only protect the third party against imputed or vicarious liability that results from the third party's actions.

The bill states that owners of real property can enter into indemnification agreements with a general contractor that provide coverage against damages resulting from his or her negligence as well as the acts of the indemnitor. A public utility may also contract with a general contractor, subcontractor, architect, or engineer etc., to be indemnified against the utility's own negligence or the negligence of the indemnitor. Either type of indemnification agreement must contain a monetary limitation on the indemnification coverage that bears a reasonable commercial relationship to the construction contract. The indemnification agreement must be for a minimum of 1 million per incident unless the parties agree otherwise. The property owner or public utility cannot receive indemnification for damages resulting from its own negligence, willful, wanton or intentional misconduct, statutory violations or punitive damages. However, indemnification for a property owner or public utility is available if the statutory violation or punitive damages are caused by the indemnitor or an employee of the general contractor.

The bill also states that if a general contractor or subcontractor requires in a written construction contract that a subcontractor, sub-subcontractor or materialman provide an insurance policy or

certificate of insurance extending coverage rights to an additional insured, if the contract is not rejected, the general contractor or subcontractor shall be deemed to have accepted the policy and cannot use the lack of conforming insurance to withhold payment for work completed or materials delivered. However, the certificate is not deemed accepted if the certificate was fraudulently issued, reflects coverage not contained in the policy, or if the underlying policy is cancelled, non-renewed, materially or adversely altered during the term of the contract.

This bill substantially amends section 725.06 of the Florida Statutes.

II. Present Situation:

Unenforceable Contracts

Chapter 725, F.S., deals with contracts that are unenforceable under Florida law. Generally, a contract is declared unenforceable when it contains certain provisions that are contrary to public policy. For instance, a contract whereby X agrees to marry Y in exchange for consideration (perhaps money or land) is unenforceable by law in Florida because it is contrary to public policy. (s. 725.01, F.S.)

Construction Contracts and Indemnification

Section 725.06, F.S., contains provisions detailing when a "construction contract" that contains certain types of indemnification provisions is void and unenforceable. By "construction contract," the statute includes any agreement made in connection with the construction, alteration, repair, or demolition of a building, structure, appurtenance or appliance and includes excavation or moving associated with these activities. (s. 725.06(1), F.S.) Indemnification involves an assurance by which one person secures another against an anticipated loss or liability due to the act or omissions of one of the two parties, or a third party. (Black's Law Dictionary, 4th ed.)

In Florida, a party to a construction contract[1] (indemnitee) may require another party (indemnitor) to the contract to indemnify the indemnitee for liability for damages to persons or property caused by the indemnitee that arises from the contract so long as the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents. (s. 725.06(1), F.S.) The statute also mandates a minimum indemnification amount of $1 million dollars unless the parties agree otherwise. Such an indemnification contract may only cover damages caused by:

- The indemnitor;
- The indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees; or
- The indemnitee or its officers, directors, agents, or employees.

[1] The owner of real property, architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman.

The indemnification contract cannot cover damages caused by the indemnitee's gross negligence, willful, wanton, or intentional misconduct of the indemnitee or its officers, directors, agents or employees, or for statutory violation or punitive damages.

Indemnification agreements are also permissible in a construction contract involving a public agency. (s. 725.06(2), F.S.) The contract may require the indemnitor to indemnify and hold harmless the other party to the contract from liabilities, damages, and losses and costs, to the extent such liability is caused by the negligence, recklessness, or intentional wrongful misconduct of the indemnifying party and persons employed or utilized by the indemnifying party in the performance of the construction contract. However, any indemnification agreement in a public agency construction contract that requires any other types of indemnification is void. (s. 725.06(3), F.S.)

Required Certificates of Insurance

Although there are no laws specifically addressing the practice, a general contractor or subcontractor may require that a certificate of insurance or insurance policy be submitted by a subcontractor, sub-subcontractor or materialman as a condition of work. If an insurance policy or certificate is not submitted, or if it does not meet the standards of the general contractor or subcontractor requiring the policy, that contractor may prohibit the other party from working on the project, or may withhold payment for work already done until the proper insurance is submitted.

III. Effect of Proposed Changes:

Section 1. Amends s. 725.06, F.S., to state that indemnification agreements or promises to have someone added as an additional insured between the parties to a construction contract (specifically, an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman) are void as against public policy if the indemnitor (the party providing the indemnification) promises to indemnify or insure the indemnitee (the party receiving the indemnification) against damages caused by the indemnitee. Property owners are not included in this prohibition. Indemnification provisions in contracts may require that the indemnitor indemnify the indemnitee for damages to persons or property caused by any act or omission, or default of the indemnitor or any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees.

Indemnification agreements between the owner of real property and a general contractor are permissible if the contract contains a monetary limitation on the extent of the indemnification coverage that bears a reasonable commercial relationship to the construction contract and is part of any existing project specifications or bid documents. The indemnification agreement provided to the owner of real property must be for a minimum of 1 million per incident unless otherwise agreed by the parties. The property owner cannot receive indemnification for damages resulting from his or her own negligence, willful, wanton or intentional misconduct, statutory violations or punitive damages. However, indemnification for a property owner is available if the statutory violation or punitive damages are caused by the indemnitor (i.e. general contractor) or a party employed by the general contractor (i.e. subcontractor, materialmen, employees, etc).

The bill also specifies that a public utility may contract with a general contractor, subcontractor, architect, engineer, etc. to be indemnified against the utility's own negligence or the negligence of the indemnitor. The contract must contain a monetary limitation that bears a reasonable commercial relation to the construction contract and provide at least 1 million in indemnification to the property owner per occurrence. The public utility cannot receive indemnification for damages resulting from its own negligence, willful, wanton or intentional misconduct, statutory violations or punitive damages. However, indemnification for a property owner is available if the statutory violation or punitive damages are caused by the indemnitor (i.e. general contractor) or a party employed by the general contractor (i.e. subcontractor, materialmen, employees, etc).

When a general contractor or subcontractor in a written construction contract requires a subcontractor, sub-subcontractor or materialman to provide an insurance policy or certificate of insurance that extends coverage rights to an additional insured, the general contractor or subcontractor may accept or reject the policy as being nonconforming prior to the date the subcontractor, sub-subcontractor or materialman commences work or delivers material to the project. If the contract is not rejected, the general contractor or subcontractor shall be deemed to have accepted the policy and cannot use the lack of conforming insurance to withhold payment for work completed or materials delivered. However, the contractor or subcontractor is not deemed to have accepted the certificate of insurance if the certificate was fraudulently issued by the agent or insurer, reflects coverage or conditions not in the underlying policy, if the policy is cancelled or non-renewed, or if the policy is materially and adversely altered during the term of the contract.

The provisions of the bill do not affect contracts or agreements entered into before the effective date of the bill.

Section 2. Provides that the bill 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.

B. Private Sector Impact:

The bill should have a positive financial impact on subcontractors, materialmen, and other laborers, but will result in higher costs for general contractors and some subcontractors. The bill will lessen the burden on subcontractors and others to provide insurance that indemnifies general contractors and subcontractors. To the extent indemnification is desired, the general contractor or subcontractor will have to purchase the insurance themselves.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.