

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 535 Public Construction Bonds
SPONSOR(S): Murzin
TIED BILLS: **IDEN./SIM. BILLS:** SB 1600

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Local Government & Veterans' Affairs</u>	_____	<u>Grayson</u>	<u>Cutchins</u>
2) <u>State Administration</u>	_____	_____	_____
3) <u>Appropriations</u>	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

This bill amends s. 255.05(3) and (6), F.S., to provide that the performance and payment bonds required by government entities for public buildings and works projects must be in a single mandatory form contained in subsection (3). The bill amends the model bond form to require that it contain: (a) the bond number; (b) the name, principal business address, and telephone number 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.

The Department of Management Services' bill analysis indicates that this bill would have no fiscal impact on state or local government.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0535.lgv.doc
DATE: March 19, 2004

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | 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. EFFECT OF PROPOSED CHANGES:

The law requires that when any person enters into a formal contract with the state, any county, city, political subdivision, or other public authority, for the construction of a public building, a public work, or repairs upon a public building or public work, that person must execute and deliver a surety bond to the public owner. Currently, the law provides a suggested form that may be used for such surety bond (s. 255.05(3), F.S.); and requires that reference be made in the bond to the statutory provisions, including to the notice and time limitations of the statute (s. 255.05(6), F.S.).

Public construction bonds protect construction projects for the benefit of the taxpaying public.

This bill amends existing law to require the use of a single mandatory form that combines both performance bond and payment bonds into one bond document. The bill also deletes the citation requirement of s. 255.05(6), F.S., as the required references are now included in the mandatory form.

Background

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}

Payment bonds are furnished by the general contractor for the benefit of the subcontractors and suppliers; the bond guarantees that the general contractor will pay the subcontractors, laborers, and materialmen. They are the substitute for a mechanics’ lien because such liens cannot be levied against public property.

Performance bonds protect the governmental owner from the financial loss is the general contractor fails to perform the contract in accordance with the terms and conditions of the contract, including agreed-to price and the time allowed for completion.

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 tri-party relationship, which consists of: (a) the obligee, which may be either the person purchasing the performance from the contractor in the case of a performance bond or the

¹ Section 624.606, F.S.

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

³ Although surety is often 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.*

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 Construction Lien Law) who furnish labor, services, or materials for the prosecution of the work provided in the contract. 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; (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 (d) a general description of the improvement.

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 all bonds executed pursuant to the section must 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.⁵

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, which is written on a more expanded basis than that required by statute as a common-law bond.⁶ 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.

This 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.

⁴ *Id.*

⁵ Section 255.05(2), F.S.

⁶ 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).

This bill also amends the model form contained in subsection (3) to require the bond to contain the following: (a) the bond number; (b) the name, principal business address, and telephone number 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, this 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.

C. SECTION DIRECTORY:

Section 1: Amends 255.05 (3) and (6), F.S., relating to the form for public construction bonds.

Section 2: Provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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 a contractor in receiving more timely notice of claims, which will allow the contractor to timely require its subcontractors/suppliers to pay their subcontractors/suppliers.

In its analysis of HB 485 (2003), the Department of Management Services indicated that the HB 485's mandatory bond form requirement would benefit vendors doing business with the government by clarifying the rights and obligations of the parties.

D. FISCAL COMMENTS:

The Department of Management Services' bill analysis indicates that this bill would have no fiscal impact on state or local government.⁷

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Issues

None.

Other Comments

This bill was introduced as HB 485 during the 2003 Legislative Session and was heard by the Transportation & Economic Development, Subcommittee on Appropriations. Two amendments that were favorably recommended by that Subcommittee on April 11, 2003, are not included in HB 535. Those two amendments

- Amendment 1 – Provided a space on the model form established by this bill for a bond number to be listed which would assist with the identification and tracking of documents associated with a bond.
- Amendment 2 – Amended the model form established by this bill to contemplate more than one surety sharing the risk of a large project.

Interested Parties

Support: The bill is supported by the Florida Surety Association,⁸ the Associated Builders and Contractors of Florida, Inc,⁹ and the Associated General Contractors.¹⁰

Oppose: Comments in opposition were received by the Florida Association of Counties, the Florida League of Cities, Palm Beach County, and Miami-Dade County.

⁷ Department of Management Services 2004 Substantive Bill Analysis, HB 535, 1/23/04.

⁸ Richard Watson, Lobbyist, 2/2/04.

⁹ Richard Watson, Lobbyist, 2/2/04.

¹⁰ Allen Douglas, Lobbyist, 2/3/04.

Florida Association of Counties, and the Florida League of Cities: Both the Florida Association of Counties¹¹ and the Florida League of Cities¹² have stated a number of similar concerns regarding the bill as further described below.

1. The single mandatory bond form contained in the bill does not allow local government to recover all damages, including consequential, liquidated, and delay damages that are a part of the underlying construction contract.
2. The bill precludes governmental entities from having the same “freedom of contracting” to protect public funds that the private sector has to protect private funds. Private project owners can use any bond form.
3. By blending both the performance bond and payment bond into a single mandatory form, the bond will tend to undervalue the possibility that both of these contingencies (non performance and nonpayment) may occur at one time. The result is that there may be a competition for collection by both the government and the subcontractors for this single pot of money with no provision for how much should cover each contingency.
4. The mandatory bond form does not provide for more than one surety, as may be the case in a larger scale project.
5. The mandatory bond form contains new language (contained in lines 72 and 73 of the bill as filed), the affect of which is unclear.
6. The bill imposes a one-size-fits-all public construction bond form on the state and all counties, cities, community colleges, and the public authorities for any public construction project over \$200,000.

Palm Beach County: An additional concern was raised by a representative of Palm Beach County¹³ regarding the addition of language covering certain unique contingencies. This representative offered as example the fact that the county recently recovered approximately \$1.6 million in liquidated damages from a surety under one bond, noting that the mandatory form proposed in the bill does not allow for the inclusion of liquidated damages. Further, he stated that the county adds a provision to their bonds limiting the venue for any actions under the bond to state courts of competent jurisdiction in an effort to avoid the expense and delay associated with litigating in Federal court.

Miami-Dade County: A representative of Miami-Dade County¹⁴ had similar concerns but added his concern about the how the mandatory bond form would create additional problems related to a government’s claims concerning warranty recovery, latent defects, and liquidated damages. According to this representative, the proposed bond form also eliminates the ability to separate the payment and performance bonds as preferred on certain Federal contracts.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.

¹¹ Ginger Delegal, General Counsel, Florida Association of Counties, 2/4/04.

¹² Scott Dudley, Senior Legislative Advocate, Florida League of Cities, 2/3/04.

¹³ Jim Mize, Palm Beach County, jmize@co.palm-beach.fl.us (2/18/04).

¹⁴ Roger Hernstadt, Capital Construction Department, Miami-Dade County, 1/29/04.