

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 that any action for payment under the bond instituted by a claimant must be in accordance with the notice and time limitation of s. 255.05(2), F.S.

The bill amends s. 255.05(3), (4) and (6), F.S., to provide that the payment provision of all bonds required by s. 255.05(1) shall be construed as statutory bonds and shall not be converted to common law bonds. The effect of this change is intended to cause all such bonds to fall under the statute of limitations applicable to these statutory bonds (1 year) rather than the common law contract statute of limitations (5 years).

Finally, the bill deletes the requirement to reference, in the bond form, the notice and time limitation by section number.

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.

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.*

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 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.

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).

C. SECTION DIRECTORY:

Section 1: Amends 255.05 (3), (4), 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:

None.

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.

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

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

Both the Florida Association of Counties⁸ and the Florida League of Cities⁹ support the bill as amended.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 23, 2004, the Committee on Local Government & Veterans' Affairs adopted one strike all amendment. The amendment amends s. 255.05, F.S., relating to public construction bonds. The amendment revises the bond form, requires that all public construction bonds be construed as statutory bonds, prohibits the conversion to common law bonds, and requires that public bond forms used by public owners comply with notice and time limitation provisions.

⁸ Carol Bracy, Legislative Director, Florida Association of Counties, 3/23/04.

⁹ Scott Dudley, Legislative Advocate, Florida League of Cities, 3/23/04.