

Bill No. CS for CS for SB 544

Amendment No. \_\_\_\_ Barcode 162146

CHAMBER ACTION

Senate

House

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Senators Bennett and Sebesta moved the following amendment:

**Senate Amendment (with title amendment)**

On page 19, line 22, through page 22, line 24, delete those lines

and insert:

Section 13. Section 255.05, Florida Statutes, is amended to read:

255.05 Bond of contractor constructing public buildings; form; action by materialmen.--

(1)(a) Any person entering 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 shall be required, before commencing the work or before recommencing the work after a default or abandonment, to execute, deliver to the public owner, and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized

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1 to do business in this state as surety. A public entity may  
2 not require a contractor to secure a surety bond under this  
3 section from a specific agent or bonding company. The bond  
4 must state on its front page: the name, principal business  
5 address, and phone number of the contractor, the surety, the  
6 owner of the property being improved, and, if different from  
7 the owner, the contracting public entity; the contract number  
8 assigned by the contracting public entity; and a description  
9 of the project sufficient to identify it, such as a legal  
10 description or the street address of the property being  
11 improved, and a general description of the improvement. Such  
12 bond shall be conditioned upon the contractor's performance of  
13 the construction work in the time and manner prescribed in the  
14 contract and promptly making payments to all persons defined  
15 in s. 713.01 who furnish labor, services, or materials for the  
16 prosecution of the work provided for in the contract. Any  
17 claimant may apply to the governmental entity having charge of  
18 the work for copies of the contract and bond and shall  
19 thereupon be furnished with a certified copy of the contract  
20 and bond. The claimant shall have a right of action against  
21 the contractor and surety for the amount due him or her,  
22 including unpaid finance charges due under the claimant's  
23 contract. Such action shall not involve the public authority  
24 in any expense. When such work is done for the state and the  
25 contract is for \$100,000 or less, no payment and performance  
26 bond shall be required. At the discretion of the official or  
27 board awarding such contract when such work is done for any  
28 county, city, political subdivision, or public authority, any  
29 person entering into such a contract which is for \$200,000 or  
30 less may be exempted from executing the payment and  
31 performance bond. When such work is done for the state, the

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1 Secretary of the Department of Management Services may  
2 delegate to state agencies the authority to exempt any person  
3 entering into such a contract amounting to more than \$100,000  
4 but less than \$200,000 from executing the payment and  
5 performance bond. In the event such exemption is granted, the  
6 officer or officials shall not be personally liable to persons  
7 suffering loss because of granting such exemption. The  
8 Department of Management Services shall maintain information  
9 on the number of requests by state agencies for delegation of  
10 authority to waive the bond requirements by agency and project  
11 number and whether any request for delegation was denied and  
12 the justification for the denial.

13 (b) The Department of Management Services shall adopt  
14 rules with respect to all contracts for \$200,000 or less, to  
15 provide:

16 1. Procedures for retaining up to 10 percent of each  
17 request for payment submitted by a contractor and procedures  
18 for determining disbursements from the amount retained on a  
19 pro rata basis to laborers, materialmen, and subcontractors,  
20 as defined in s. 713.01.

21 2. Procedures for requiring certification from  
22 laborers, materialmen, and subcontractors, as defined in s.  
23 713.01, prior to final payment to the contractor that such  
24 laborers, materialmen, and subcontractors have no claims  
25 against the contractor resulting from the completion of the  
26 work provided for in the contract.

27

28 The state shall not be held liable to any laborer,  
29 materialman, or subcontractor for any amounts greater than the  
30 pro rata share as determined under this section.

31 (2)(a)1. If a claimant is no longer furnishing labor,

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1 services, or materials on a project, a contractor or the  
2 contractor's agent or attorney may elect to shorten the  
3 prescribed time in this paragraph within which an action to  
4 enforce any claim against a payment bond provided pursuant to  
5 this section may be commenced by recording in the clerk's  
6 office a notice in substantially the following form:

7  
8 NOTICE OF CONTEST OF CLAIM  
9 AGAINST PAYMENT BOND

10

11 To: ...(Name and address of claimant)...

12

13 You are notified that the undersigned contests your  
14 notice of nonpayment, dated ....., ....., and served  
15 on the undersigned on ....., ....., and that the  
16 time within which you may file suit to enforce your claim is  
17 limited to 60 days after the date of service of this notice.

18

19 DATED on ....., .....

20

21 Signed:...(Contractor or Attorney)...

22

23 The claim of any claimant upon whom such notice is served and  
24 who fails to institute a suit to enforce his or her claim  
25 against the payment bond within 60 days after service of such  
26 notice shall be extinguished automatically. The clerk shall  
27 mail a copy of the notice of contest to the claimant at the  
28 address shown in the notice of nonpayment or most recent  
29 amendment thereto and shall certify to such service on the  
30 face of such notice and record the notice. Service is complete  
31 upon mailing.

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1           2. A claimant, except a laborer, who is not in privity  
2 with the contractor shall, before commencing or not later than  
3 45 days after commencing to furnish labor, materials, or  
4 supplies for the prosecution of the work, furnish the  
5 contractor with a notice that he or she intends to look to the  
6 bond for protection. A claimant who is not in privity with the  
7 contractor and who has not received payment for his or her  
8 labor, materials, or supplies shall deliver to the contractor  
9 and to the surety written notice of the performance of the  
10 labor or delivery of the materials or supplies and of the  
11 nonpayment. The notice of nonpayment may be served at any time  
12 during the progress of the work or thereafter but not before  
13 45 days after the first furnishing of labor, services, or  
14 materials, and not later than 90 days after the final  
15 furnishing of the labor, services, or materials by the  
16 claimant or, with respect to rental equipment, not later than  
17 90 days after the date that the rental equipment was last on  
18 the job site available for use. Any notice of nonpayment  
19 served by a claimant who is not in privity with the contractor  
20 which includes sums for retainage must specify the portion of  
21 the amount claimed for retainage. No action for the labor,  
22 materials, or supplies may be instituted against the  
23 contractor or the surety unless both notices have been given.  
24 Notices required or permitted under this section may be served  
25 in accordance with s. 713.18. ~~An action, except for an action~~  
26 ~~exclusively for recovery of retainage, must be instituted~~  
27 ~~against the contractor or the surety on the payment bond or~~  
28 ~~the payment provisions of a combined payment and performance~~  
29 ~~bond within 1 year after the performance of the labor or~~  
30 ~~completion of delivery of the materials or supplies. An action~~  
31 ~~exclusively for recovery of retainage must be instituted~~

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1 ~~against the contractor or the surety within 1 year after the~~  
2 ~~performance of the labor or completion of delivery of the~~  
3 ~~materials or supplies, or within 90 days after receipt of~~  
4 ~~final payment (or the payment estimate containing the owner's~~  
5 ~~final reconciliation of quantities if no further payment is~~  
6 ~~earned and due as a result of deductive adjustments) by the~~  
7 ~~contractor or surety, whichever comes last. A claimant may not~~  
8 waive in advance his or her right to bring an action under the  
9 bond against the surety. In any action brought to enforce a  
10 claim against a payment bond under this section, the  
11 prevailing party is entitled to recover a reasonable fee for  
12 the services of his or her attorney for trial and appeal or  
13 for arbitration, in an amount to be determined by the court,  
14 which fee must be taxed as part of the prevailing party's  
15 costs, as allowed in equitable actions. The time periods for  
16 service of a notice of nonpayment or for bringing an action  
17 against a contractor or a surety shall be measured from the  
18 last day of furnishing labor, services, or materials by the  
19 claimant and shall not be measured by other standards, such as  
20 the issuance of a certificate of occupancy or the issuance of  
21 a certificate of substantial completion.

22 (b) When a person is required to execute a waiver of  
23 his or her right to make a claim against the payment bond in  
24 exchange for, or to induce payment of, a progress payment, the  
25 waiver may be in substantially the following form:

26  
27 WAIVER OF RIGHT TO CLAIM  
28 AGAINST THE PAYMENT BOND  
29 (PROGRESS PAYMENT)  
30

31 The undersigned, in consideration of the sum of \$....,

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1 hereby waives its right to claim against the payment bond for  
2 labor, services, or materials furnished through ...(insert  
3 date)... to ...(insert the name of your customer)... on the  
4 job of ...(insert the name of the owner)..., for improvements  
5 to the following described project:

6  
7 (description of project)

8  
9 This waiver does not cover any retention or any labor,  
10 services, or materials furnished after the date specified.

11  
12 DATED ON ....., .....

13 ... (Claimant)...

14 By:.....

15  
16 (c) When a person is required to execute a waiver of  
17 his or her right to make a claim against the payment bond, in  
18 exchange for, or to induce payment of, the final payment, the  
19 waiver may be in substantially the following form:

20  
21 WAIVER OF RIGHT TO CLAIM  
22 AGAINST THE PAYMENT BOND (FINAL PAYMENT)

23  
24 The undersigned, in consideration of the final payment  
25 in the amount of \$...., hereby waives its right to claim  
26 against the payment bond for labor, services, or materials  
27 furnished to ...(insert the name of your customer)... on the  
28 job of ...(insert the name of the owner)..., for improvements  
29 to the following described project:

30  
31 (description of project)

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DATED ON ....., .....

...(Claimant)...

By:.....

(d) A person may not require a claimant to furnish a waiver that is different from the forms in paragraphs (b) and (c).

(e) A claimant who executes a waiver in exchange for a check may condition the waiver on payment of the check.

(f) A waiver that is not substantially similar to the forms in this subsection is enforceable in accordance with its terms.

(3) The bond required in subsection (1) may be in substantially the following form:

PUBLIC CONSTRUCTION BOND

Bond No. (enter bond number)

BY THIS BOND, We \_\_\_\_\_, as Principal and \_\_\_\_\_, a corporation, as Surety, are bound to \_\_\_\_\_, herein called Owner, in the sum of \$\_\_\_\_\_, for payment of which we bind ourselves, our heirs, personal representatives, successors, and assigns, jointly and severally.

THE CONDITION OF THIS BOND is that if Principal:

1. Performs the contract dated \_\_\_\_\_, \_\_\_\_\_, between Principal and Owner for construction of \_\_\_\_\_, the contract being made a part of this bond by reference, at the times and in the manner prescribed in the contract; and

2. Promptly makes payments to all claimants, as



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1 defined in Section 255.05(1), Florida Statutes, supplying  
2 Principal with labor, materials, or supplies, used directly or  
3 indirectly by Principal in the prosecution of the work  
4 provided for in the contract; and

5           3. Pays Owner all losses, damages, expenses, costs,  
6 and attorney's fees, including appellate proceedings, that  
7 Owner sustains because of a default by Principal under the  
8 contract; and

9           4. Performs the guarantee of all work and materials  
10 furnished under the contract for the time specified in the  
11 contract, then this bond is void; otherwise it remains in full  
12 force.

13           Any action instituted by a claimant under this bond for  
14 payment must be in accordance with the notice and time  
15 limitation provisions in Section 255.05, Florida Statutes.

16           Any changes in or under the contract documents and  
17 compliance or noncompliance with any formalities connected  
18 with the contract or the changes does not affect Surety's  
19 obligation under this bond.

20  
21           DATED ON \_\_\_\_\_, \_\_\_\_\_.

22  
23           ... (Name of Principal) ...

24           By ... (As Attorney in Fact) ...

25           ... (Name of Surety) ...

26  
27           (4) ~~The payment provisions of All bonds required by~~  
28 ~~furnished for public work contracts described in subsection~~  
29 (1) shall, regardless of form, be construed and deemed  
30 statutory bonds furnished pursuant to this section and such  
31 bonds shall not under any circumstances be converted into

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1 ~~common law bonds bond provisions, subject to all requirements~~  
2 ~~of subsection (2).~~

3 (5) In addition to the provisions of chapter 47, any  
4 action authorized under this section may be brought in the  
5 county in which the public building or public work is being  
6 constructed or repaired. This subsection shall not apply to  
7 an action instituted prior to May 17, 1977.

8 ~~(6) All bonds executed pursuant to this section shall~~  
9 ~~make reference to this section by number and shall contain~~  
10 ~~reference to the notice and time limitation provisions of this~~  
11 ~~section.~~

12 ~~(6)(7)~~ In lieu of the bond required by this section,  
13 a contractor may file with the state, county, city, or other  
14 political authority an alternative form of security in the  
15 form of cash, a money order, a certified check, a cashier's  
16 check, an irrevocable letter of credit, or a security of a  
17 type listed in part II of chapter 625. Any such alternative  
18 form of security shall be for the same purpose and be subject  
19 to the same conditions as those applicable to the bond  
20 required by this section. The determination of the value of  
21 an alternative form of security shall be made by the  
22 appropriate state, county, city, or other political  
23 subdivision.

24 ~~(7)(8)~~ When a contractor has furnished a payment bond  
25 pursuant to this section, he or she may, when the state,  
26 county, municipality, political subdivision, or other public  
27 authority makes any payment to the contractor or directly to a  
28 claimant, serve a written demand on any claimant who is not in  
29 privity with the contractor for a written statement under oath  
30 of his or her account showing the nature of the labor or  
31 services performed and to be performed, if any; the materials

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1 furnished; the materials to be furnished, if known; the amount  
2 paid on account to date; the amount due; and the amount to  
3 become due, if known, as of the date of the statement by the  
4 claimant. Any such demand to a claimant who is not in privity  
5 with the contractor must be served on the claimant at the  
6 address and to the attention of any person who is designated  
7 to receive the demand in the notice to contractor served by  
8 the claimant. The failure or refusal to furnish the statement  
9 does not deprive the claimant of his or her rights under the  
10 bond if the demand is not served at the address of the  
11 claimant or directed to the attention of the person designated  
12 to receive the demand in the notice to contractor. The failure  
13 to furnish the statement within 30 days after the demand, or  
14 the furnishing of a false or fraudulent statement, deprives  
15 the claimant who fails to furnish the statement, or who  
16 furnishes the false or fraudulent statement, of his or her  
17 rights under the bond. If the contractor serves more than one  
18 demand for statement of account on a claimant and none of the  
19 information regarding the account has changed since the  
20 claimant's last response to a demand, the failure or refusal  
21 to furnish such statement does not deprive the claimant of his  
22 or her rights under the bond. The negligent inclusion or  
23 omission of any information deprives the claimant of his or  
24 her rights under the bond to the extent that the contractor  
25 can demonstrate prejudice from such act or omission by the  
26 claimant. The failure to furnish a response to a demand for  
27 statement of account does not affect the validity of any claim  
28 on the bond being enforced in a lawsuit filed before the date  
29 the demand for statement of account is received by the  
30 claimant.

31 ~~(8)(9)~~ On any public works project for which the

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1 public authority requires a performance and payment bond,  
 2 suits at law and in equity may be brought and maintained by  
 3 and against the public authority on any contract claim arising  
 4 from breach of an express provision or an implied covenant of  
 5 a written agreement or a written directive issued by the  
 6 public authority pursuant to the written agreement. In any  
 7 such suit, the public authority and the contractor shall have  
 8 all of the same rights and obligations as a private person  
 9 under a like contract except that no liability may be based on  
 10 an oral modification of either the written contract or written  
 11 directive. Nothing herein shall be construed to waive the  
 12 sovereign immunity of the state and its political subdivisions  
 13 from equitable claims and equitable remedies. The provisions  
 14 of this subsection shall apply only to contracts entered into  
 15 on or after July 1, 1999.

16 (9) An action, except an action for recovery of

17  
18 (Redesignate subsequent sections.)

19  
20  
21 ===== T I T L E A M E N D M E N T =====

22 And the title is amended as follows:

23 On page 2, line 5, after the semicolon

24  
25 insert:

26 revising the form for a public construction  
 27 bond; requiring all public construction bonds  
 28 to be construed as statutory bonds; prohibiting  
 29 conversion to common law bonds; deleting a  
 30 requirement that bond forms used by public  
 31 owners reference certain notice and time

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limitation provisions;