

Bill No. CS for CS for SB 544

Amendment No. \_\_\_\_ Barcode 423626

CHAMBER ACTION

Senate

House

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Senators Bennett and Sebesta moved the following **substitute for amendment** (162146):

**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

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

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

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

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

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

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

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1           (2)(a)1. If a claimant is no longer furnishing labor,  
2 services, or materials on a project, a contractor or the  
3 contractor's agent or attorney may elect to shorten the  
4 prescribed time in this paragraph within which an action to  
5 enforce any claim against a payment bond provided pursuant to  
6 this section may be commenced by recording in the clerk's  
7 office a notice in substantially the following form:

8

9

NOTICE OF CONTEST OF CLAIM

10

AGAINST PAYMENT BOND

11

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

13

14

15

16

17

18

19

20

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

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

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1 upon mailing.

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

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

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

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WAIVER OF RIGHT TO CLAIM  
AGAINST THE PAYMENT BOND  
(PROGRESS PAYMENT)

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

7  
8 (description of project)

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

12  
13 DATED ON ....., .....

14 ... (Claimant)...

15 By:.....

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

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

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

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(description of project)

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



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1           2. Promptly makes payments to all claimants, as  
2 defined in Section 255.05(1), Florida Statutes, supplying  
3 Principal with labor, materials, or supplies, used directly or  
4 indirectly by Principal in the prosecution of the work  
5 provided for in the contract; and

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

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

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

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

21  
22           DATED ON \_\_\_\_\_, \_\_\_\_\_.

23  
24           ... (Name of Principal) ...

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

26           ... (Name of Surety) ...

27

28           (4) The payment provisions of all bonds required by  
29 furnished for public work contracts described in subsection  
30 (1) shall, regardless of form, be construed and deemed  
31 statutory bonds furnished pursuant to this section and such

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1 bonds shall not under any circumstances be converted into  
2 common law bonds bond provisions, subject to all requirements  
3 of subsection (2).

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

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

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

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

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

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

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

18  
19 (Redesignate subsequent sections.)

20  
21

22 ===== T I T L E   A M E N D M E N T =====

23 And the title is amended as follows:

24           On page 2, line 5, after the semicolon

25  
26 insert:

27           revising the form for a public construction  
28           bond; requiring the payment provisions of all  
29           public construction bonds to be construed as  
30           statutory bonds; prohibiting conversion to  
31           common law bonds; deleting a requirement that

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bond forms used by public owners reference  
certain notice and time limitation provisions;