

HOUSE OF REPRESENTATIVES STAFF ANALYSIS - Revised

BILL #: HB 1681 (FORMERLY PCB TR 05-01) Department of Transportation
SPONSOR(S): Transportation Committee and Rep. Sansom
TIED BILLS: IDEN./SIM. BILLS: SB 718

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Transportation Committee	12 Y, 0 N	Pugh	Miller
1) _____	_____	_____	_____
2) _____	_____	_____	_____
3) _____	_____	_____	_____
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5) _____	_____	_____	_____

SUMMARY ANALYSIS

The Florida Department of Transportation (FDOT) is responsible for managing a nearly \$31 billion, five-year Work Program of highway, turnpike, aviation, seaport, and public transit projects, financed with federal and state funds. It also has authority to enter into partnerships with local governmental entities and private entities to build and operate transportation facilities.

HB 1681 addresses the following transportation-related issues:

- o It corrects an oversight by giving the department specific rulemaking authority to implement the existing statutory provisions related to public-private partnerships to develop state right-of-way.
- o It establishes a percentage cap on the repayment amounts of State Infrastructure Bank (SIB) loans the FDOT has loaned itself for Work Program projects. The cap will be .75 percent of the revenues on deposit in the State Transportation Trust Fund.
- o It amends provisions related to environmental mitigation accounts for FDOT projects to delete the Florida Department of Environmental Protection (DEP) from the approval and decision-making process, reflecting that agency's non-existent role in actual practice. The water management districts (WMD's) will continue as the lead agencies in determining the environmental mitigation for state transportation projects. The bill also deletes obsolete language.
- o Adds a military base commander to the Strategic Intermodal Transportation Advisory Council and requires more coordination when planning transportation projects that impact military installations.
- o It gives FDOT discretion to fund planning and education projects performed by not-for-profit organizations that represent a majority of the state's public airports, such as the Florida Airports Council and the Secure Airports for Florida's Economy (SAFE) Council.
- o It clarifies current law to conform with FDOT practice on work-order changes and supplemental agreements, and their impacts on surety bonds.
- o It specifies that an FDOT contractor is not liable to a claimant for personal injury, property damage, or death arising from the performance of the contract work if at the time of the incident, the contractor was in compliance with the contract documents material to the condition or defect that was the proximate cause of the personal injury, property damage, or death.

HB 1681 has an indeterminate, but likely positive, impact on FDOT's budget and on state funds, in general. The legislation raises no apparent constitutional concerns.

The bill takes effect July 1, 2005.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government -- HB 1681 reduces the responsibilities of the Florida Department of Environmental Protection by removing the agency from the environmental mitigation plan approval process used for transportation projects.

B. EFFECT OF PROPOSED CHANGES:

Funding for eligible aviation planning and educational programs

Present Situation

FDOT funds as part of its Five-Year Work Program aviation-related projects at the 20 commercial airports and 111 public-use general aviation airports. In fiscal year 2004-2005, FDOT's aviation budget is \$92.24 million. The state excise tax on aviation fuel is 6.9 cents per gallon, and generates about \$50 million annually. General transportation revenues, such as motor fuel taxes and vehicle registration fees, deposited into the State Transportation Trust Fund, comprise the rest of the annual funding.

In addition to funding capital projects, FDOT also provides staffing assistance and pays some administrative costs of the Secure Airports for Florida's Economy (SAFE) Council, a 27-member group representing aviation-related businesses and state agencies that was created in 2003 by the Legislature. The SAFE Council's primary responsibility is to prepare a five-year SAFE Master Plan, which recommends specific projects to acquire and construct transportation facilities that link airports to other transportation modes, or which protect the safety and security of passengers and cargo, or enhance international trade and other economic benefits. Since its creation, the SAFE Council has received funding from FDOT at the direction of proviso language in the annual General Appropriations Act.

In fiscal year 2003-2004, the SAFE Council received \$140,000 from FDOT, and this fiscal year is receiving \$411,717, according to FDOT staff.

Effect of Proposed Changes

HB 1681 codifies in statute FDOT's discretion to fund research and educational activities of the SAFE Council and any other group that represents the majority of Florida's public airports.

FDOT Work-Order Issues

Present Situation

Section 337.11, F.S., establishes the basic requirements for FDOT to enter into contracts with road builders, design professionals, product vendors, and others doing transportation-related business with the state. By rule and practice, FDOT has expanded upon these requirements.

Typically, when a new unit price or other contract item needs to be renegotiated, FDOT and the contractor enter into a "supplemental agreement," which the contractor's surety company must approve. Even changes representing a small percentage or dollar amount of the overall contract must be approved.

FDOT by practice issues "work orders" for a wide range of activities, not just for actual planning, engineering, and construction of a project. Its contract accounting systems also designate certain types of work orders as "contingency pay items" and "contingency supplemental agreements," typically executed after project completion. FDOT treats these types of agreements similarly as it does supplemental agreements, even though they are not mentioned in statute.

FDOT's terminology has created some confusion among contractors and surety companies.

Additionally, there can be as much as a two-month delay in closing out the contract while waiting for

a surety company's approval of a small-dollar supplemental pay item project. This means the contractor waits on final payment on a job finished weeks earlier, and FDOT is delayed in closing out its project accounting.

Effect of Proposed Changes

Section 337.11, F.S., is amended to add the terms "work order," contingency pay item, and contingency supplemental agreement. This is intended to legitimize these terms and legally make them subject to FDOT's statutory contract requirements.

In addition, surety companies' approval will only be required on modified contract amounts greater than 25 percent of the original contract amount. Surety companies will remain fully liable for all costs of a modified contract amount up to 25 percent of the original contract price even though they weren't made aware of the work-order change or supplemental agreement

Strategic Intermodal System

Present Situation

Created by the Legislature in 2003, the Strategic Intermodal System (SIS) is a network of highways, bridges, airports, ports, and other transportation facilities that provides statewide and interregional movement of people and goods, and which is intended to encourage Florida's economic growth and competitiveness. The SIS, and so-called "Emerging Systems" of transportation facilities in growing areas, were identified in 2002 by a statewide task force comprised of transportation stakeholders using specific numeric criteria. After some minor modifications, the initial recommendation was adopted by FDOT, which periodically will review the current SIS and adjust its components as population and use change.

Basically, the SIS is comprised of the Florida Intrastate Highway System, the state's seven busiest airports, its seven largest seaports, Cape Canaveral Spaceport and major rail lines. There also are a number of highways, airports and sea ports, and other transportation facilities that are defined as "emerging systems." (More information and maps of the SIS are available at the website <http://www.dot.state.fl.us/planning/sis/default.htm>.)

The 2003 legislation did not dedicate any funding to implementation of the SIS, directing FDOT to instead work within its existing Work Program to focus resources on the strategic system. Many of the system components already are represented in the Work Program. But in 2004, the Legislature gave FDOT statutory authority to reallocate at least 50 percent of its new flexible funding to the SIS. FDOT plans to slowly increase the SIS' share of these new funds to upwards of 62 percent in coming years.

As state and local governmental officials and planners, as well as the traveling public, adjust to the SIS, some changes have been recommended and even adopted. For example, FDOT has created a new category of SIS-related project – the "planned facility," referring to transportation improvements in the planning stages that, shortly after completion, will meet the criteria to be classified as part of the SIS. Earlier this year, FDOT made some modifications to the SIS. It also has added to its SIS policy documents a greater recognition of the impact military facilities have on Florida's public transportation system and its economic viability.

Effect of Proposed Changes

HB 1681 makes several changes to the SIS statutes. Many of these changes reflect FDOT's recent changes to SIS policy documents. The amended language:

- Adds "economic development and job growth" to the SIS goals.
- Directs the Florida Transportation Commission to annually review the progress of the SIS in meeting its goals.
- Directs FDOT to coordinate with its federal and local partners in planning and implementing transportation improvements on roads and rail corridors linked to military installations.
- Adds to the Strategic Intermodal Transportation Advisory Council (SITAC) a military representative with command responsibilities. This person will be appointed by the Governor.

-- Adds definitions and deletes obsolete provisions.

Rulemaking authority for certain public-private partnerships

Present Situation

Section 337.251 F.S., enacted in 1990, allows FDOT to enter into leases with other public agencies and with private entities to use and develop right-of-way along state highways. These proposals must meet a series of public-interest tests, and must be selected through a competitive bidding process. One of the largest and most complex of these project proposals is the Miami Intermodal Center.

When the statute was enacted, no specific rulemaking authority was included, but FDOT promulgated administrative rule Chapter 14-109, Florida Administrative Code (F.A.C.) to provide information to applicants for joint public-private development projects about specifics of how to make application and pursue this transaction. This rule was promulgated pursuant to FDOT's general rulemaking authority. In the mid-1990s, the Legislature mandated that an agency cannot promulgate rules unless there is specific authority granted within the statute. A recent review of FDOT's statutes by its General Counsel's Office revealed that there is no explicit statutory authority for Chapter 14-109, F.A.C., and FDOT has requested specific statutory authority in order to maintain the current rule.

Effect of Proposed Changes

HB 1681 gives FDOT specific statutory authority to draft rules to implement s. 337.251, F.S., related to public-private partnerships to develop right-of-way.

State Infrastructure Bank Loans

Present Situation

Since 1997, FDOT has operated a federally funded "infrastructure bank," a self-sustaining, revolving loan fund that can lend funds and provide credit enhancement assistance to public and private entities. Florida, California, Rhode Island, and Missouri were the four states selected to establish infrastructure banks as pilot projects pursuant to the federal transportation funding program, TEA-21.

The federally funded "bank" was so popular that the Legislature, at FDOT's request, created a State Infrastructure Bank (SIB) in 2000 as part of the Governor's Mobility 2000 initiative. It received \$93.5 million over two years in state general revenue to capitalize the fund. The SIB has a federal sub-account and a state sub-account, in order to keep the funds separate. The federal funds have a more limited use than those contributed by the state.

Generally, the SIB provides loans to help fund transportation projects that are on the State Highway System or which provide greater mobility on the state transportation system, and which otherwise may be delayed or not built. The SIB loans typically pay for only a portion of the total cost of the project. Among the project criteria are: consistency with local government comprehensive plans; availability of a dedicated repayment source to ensure the loan is repaid; and indications of economic benefits. FDOT staff review the applications, and make recommendations to the Secretary, based on whether criteria are met. The FDOT Secretary makes the final determination of which applicants receive SIB loans.

Since its creation, the SIB has attracted more than \$120 million in federal capital and \$101.1 million in state capital, plus interest earnings. According to a 2003 chart on FDOT's website, 26 loans using federal funds and 22 loans using state funds have been approved so far, for projects valued in excess of \$4.4 billion. The SIB program is helping fund transportation projects – mostly road improvements -- in all seven FDOT districts and for the Turnpike Enterprise.

The Legislature in 2003 changed the SIB law to allow FDOT to leverage the existing SIB portfolio of loan repayments by issuing revenue bonds -- in much the same way as banks leverage mortgage loans. The bonds will be repaid by the loan payments from the cities, counties and other entities that obtained the loans through the SIB.

As structured, SIB loans to other governmental entities or private entities are repaid from revenues generated by the project, such as tolls or other pledged resources. The repayments are then re-loaned to fund additional transportation projects. That is what makes it a self-sustaining revolving loan fund.

The SIB loans FDOT makes to itself – called “internal loans” – are made to advance FDOT projects and are repaid with future program allocations from the STTF. To date there have been no restrictions on the amount or volume of either loan type.

According to FDOT staff, the Division of Bond Finance requested that FDOT limit these internal SIB loans as one way to manage the state’s bonded indebtedness.

FDOT has made internal SIB loans of \$142.37 million since 2002; about \$105 million of that amount will be spent to acquire right-of-way and begin construction on improvements to State Road 50 in District 5.

Effect of Proposed Changes

HB 1681 places a cap on the total amount of internal SIB loan repayments over the average terms of the loans. The cap will be set at .75 percent of the revenues deposited in the State Transportation Trust Fund. If this cap were in place today, FDOT’s internal SIB loan repayments could not exceed a total of \$34.9 million a year.

Environmental Mitigation

Present Situation

Enacted in 1996, s. 373.4137, F.S., directed FDOT to annually submit for approval to DEP and the WMD’s a plan to mitigate the adverse environmental impacts of transportation projects to wetlands, wildlife, and other aspects of the natural environment. This program was initiated with an advance transfer of \$12 million from FDOT to DEP, to be spent down through the use of “mitigation credits” of \$75,000 per acre mitigated through fiscal year 2005-2006. The ecosystem-based mitigation plan was to be based on an environmental impact inventory reflecting habitats that would be adversely impacted by projects listed in the next three years of the tentative work programs.

Expressway authorities created pursuant to chapters 348 and 349, F.S., also are able to create similar escrow accounts with the WMD’s and DEP for their mitigation requirements.

On a quarterly basis, FDOT and the participating expressway authorities are required to transfer to their escrow accounts sufficient funds for the current fiscal year to pay for mitigation of projected acreage impacts resulting from projects identified in the inventory. At the end of each year, the projected acreage impacts are compared to the actual acreage of impact of projects as permitted, including permit modifications. The escrow balances are then adjusted accordingly to reflect any overtransfer or undertransfer of funds.

DEP and the WMD’s, meanwhile, can request a release of funds from the escrow accounts no sooner than 30 days prior to the date the money is needed to pay for a mitigation activity.

FDOT staff say the method of escrow accounting required in the statute is time-consuming, and results in constant adjustment to the escrow balance, as the projected adverse environmental impacts are frequently changing as new or revised project conditions and requirements are encountered and modifications occur during the transportation project’s construction. The frequent adjustments similarly produce budget instability for the WMD’s, as those budgets are prepared based on the projected impacts contained in the annual impact inventory. The timing restrictions on the release of the funds to the WMD’s also hampers their ability to plan ecosystem-based mitigation.

These accounting processes are one reason that as of September 2004, FDOT still has \$3.875 million from its original \$12 million advance in escrow.

FDOT and the other agencies involved also have identified obsolete or awkward provisions in s. 373.4137, F.S., that have become apparent in the last nine years. For example, DEP has, at best, a limited role in mitigation plan review and approval, and the statutory requirement that it approve the plans slows the process.

Effect of Proposed Changes

HB 1681 changes the escrow transfer of funds for federally funded transportation projects from a quarterly basis to an annual basis. These lump-sum amounts would be based on FDOT's (and the expressway authorities') projected impact acreage and would be tracked as excess mitigation to be used at a later date, or adjusted to cover an underestimate of impacts. Because FDOT historically overestimates its impacts, there will typically be unused mitigation available for future use, at today's dollars.

In addition, the WMD's in many instances will be able to request a lump-sum, one-time payment from the escrow accounts, which should improve their ability to plan and develop large-scale mitigation projects. The WMD's will be able to request the one-time payments for: current projects in the long-term monitoring and maintenance phase; for mitigation projects for all federally funded transportation projects beginning in fiscal year 2005-2006; and for non-federally funded and federally funded transportation projects in fiscal year 2009-2010.

FDOT says the reduction in administrative burden and the cost savings resulting from potential large-scale mitigation activities due to greater WMD budget stability likely would increase FDOT efficiency and potentially reduce transportation project delays. Also, this proposal would allow FDOT to fund mitigation activities for future transportation projects on an ecosystem-wide basis at current prices, thus ensuring suitable mitigation opportunities exist and avoiding project delays, as well as realizing a savings to the taxpayer.

The legislation also removes DEP from the mitigation plan approval process because it currently has, at best, a minimal role in the decision-making. It also deletes obsolete language and reorganizes the statute.

Contractor Liability

Current Situation

Sovereign immunity is a legal concept that prohibits suits against the government, unless the government waives the protection. Article X, section 13 of the Florida Constitution recognizes that the concept of sovereign immunity applies to the state, although the state may waive its immunity through an enactment of general law. Sovereign immunity extends to all subdivisions of the state, including counties and school boards.

In 1973, the Legislature enacted s. 768.28, F.S., a partial waiver of sovereign immunity allowing individuals to sue state government, subdivisions of the state, and municipalities. The statute imposes a \$100,000 limit on the government's liability to a single person. Furthermore, it imposes a \$200,000 limit on the government's liability for claims arising out of a single incident. These limits do not preclude plaintiffs from obtaining judgments in excess of the recovery cap. However, plaintiffs cannot force the government to pay damages that exceed the recovery cap. However, plaintiffs in such cases can receive additional compensation through passage of a claims bill filed with the Florida Legislature.

Florida also has long provided a limited waiver of its sovereign immunity for ordinary tort liability. Section 728.28, F.S., confers sovereign immunity on a number of entities that perform public service. Among those entities are professional firms that provide monitoring and inspection services of work required for FDOT roadway, bridge, or other transportation facility projects.

FDOT, as well as construction contracting firms that perform work for FDOT, periodically are named as parties to litigation filed by plaintiffs involved in traffic accidents. FDOT has no statistics on the number of lawsuits filed naming it and its contractors as defendants. While the Florida Transportation Builders

Association (FTBA), representing the majority of road contractors in this state, also has no statistics, it has significant anecdotal information about litigation against its members.¹

The FTBA also has noted that lawsuits and claims can impose a financial burden on subcontractors, who often are small businesses or family-owned enterprises and who increasingly cannot afford to obtain the liability insurance required to participate in public construction projects. Besides the obvious costs of litigation and their effect on insurance and project costs, the FTBA says, there is the expense of lost man-hours for depositions, record recovery, and court appearances.

Effect of Proposed Changes

HB 1681 specifies that an FDOT contractor is not liable to a claimant for personal injury, property damage, or death arising from the performance of the contract work if at the time of the incident, the contractor was in compliance with the contract documents material to the condition or defect that was the proximate cause of the personal injury, property damage, or death. This provision is created in a new section of law, s. 337.195, F.S.

C. SECTION DIRECTORY:

Section 1: Amends s. 332.007, F.S., to allow FDOT to fund research and educational activities of not-for-profit organizations representing the majority of Florida's public airports.

Section 2: Amends s. 337.11, F.S., to update certain contracting procedures and contractor surety bond requirements.

Section 3: Creates s. 337.195, F.S. to exempt transportation contractors from liability under certain circumstances.

Section 4: Amends s. 337.251, F.S., to give FDOT specific rulemaking authority to implement the provisions of that section, related to public-private transportation partnerships.

Section 5: Amends s. 339.55, F.S., to control the amount of SIB loans FDOT can loan itself by capping the repayments on such loans to .75 percent of the State Transportation Trust Fund.

Sections 6-8: Amends ss. 339.61, 339.62, and 339.64, F.S., to make clarifying and technical changes to statutes related to the SIS. Adds to the SITAC a member with command responsibilities at a military installation. Deletes obsolete language.

Section 9: Amends s. 373.4137, F.S., to delete references to DEP. Deletes obsolete language. Clarifies existing language to better reflect actual practice of FDOT and the water management districts in addressing environmental mitigation for state transportation projects.

Section 10: Specifies an effective date of July 1, 2005.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments" below.

¹ March 9, 2005, email from FTBA on file with the House Transportation Committee.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Road and bridge contractors working on FDOT projects will benefit from the liability-immunity provision in HB 1681, in terms of reduced insurance and legal costs. The financial benefit can not be determined at this time.

D. FISCAL COMMENTS:

The liability-immunity provision for FDOT contractors could result in lower future costs, than anticipated, for state road and bridge projects because of the contractors' savings in insurance and legal costs.

Also, some of the changes to s. 373.4137, F.S., in section 9 of the bill, could save FDOT money over the long term. For example, the legislation will allow FDOT to fund anticipated mitigation activities for future transportation projects from current-year funds, thus staving off inflation-fueled increases in land or mitigation services in outer years. The amount of savings is unknown.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This mandates provision is not applicable to HB 1681 because the legislation does not require counties or municipalities to expend local funds or to raise local funds, nor does it reduce their state revenue-sharing.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Section 4 of HB 1681 rectifies an earlier oversight by giving FDOT specific authority to promulgate rules to implement s. 337.251, F.S., related to public-private partnerships for transportation projects. It will validate an existing administrative rule, chapter 14-109, F.A.C.

FDOT has sufficient existing rulemaking authority the bill's other provisions.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 3 – Contractor Liability

FDOT staff commented that this section of the bill does not impact the agency financially.

Section 9 – Mitigation for Transportation Projects

DEP and the WMD's have said they support Section 9 of the bill, related to the transportation mitigation plans.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

At its February 22, 2005, meeting, the House Transportation Committee adopted four amendments to the bill, originally PCB TR 05-01. Briefly:

- Amendment #1 makes a number of clarifying and technical changes to the existing SIS statutes to reflect recent policy changes by FDOT concerning the impact of military bases on transportation systems and other issues.
- Amendment #2 clarifies current law to conform with FDOT practice on work-orders and supplemental agreements with transportation contractors, and under what circumstances surety companies must be notified beforehand for their approval.
- Amendment #3 gives FDOT discretion to fund planning and education projects performed by not-for-profit organizations that represent a majority of Florida's public airports.
- Amendment #4 protects from liability contractors doing road and related projects for FDOT if they were in compliance with the terms of their contracts at the time of the personal injury, property damage, or death.

The committee then voted 12-0 to report the PCB as favorable with amendments. The legislation is now known as HB 1681.