

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 173

Construction Contracts

SPONSOR(S): Ross

TIED BILLS:

IDEN./SIM. BILLS: SB 682

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Insurance Committee		Callaway	Cooper
2) Business Regulation Committee			
3) Civil Justice Committee			
4) Commerce Council			
5) _____			

SUMMARY ANALYSIS

The bill addresses the issue of a subcontractor's failure to obtain insurance required by a construction contract between the general contractor and the subcontractor. There are currently no statutory provisions relating to this issue.

The bill creates statutory provisions allowing a general contractor to accept or reject an insurance policy or certificate of insurance submitted by a subcontractor at any time before the subcontractor begins work on the construction project. Once the insurance policy or certificate of insurance is accepted or deemed accepted by the general contractor and the subcontractor begins work on the project, the general contractor can later reject the subcontractor's insurance policy or certificate of insurance; however, the general contractor is responsible for paying the subcontractor for work performed until the rejection.

The bill also requires a general contractor to reject a subcontractor's insurance policy or certificate of insurance in writing within three days of its receipt of the document(s) from the subcontractor. If the general contractor does not reject the document(s) within the three day time period, he or she is deemed to approve the insurance policy or certificate of insurance. If the general contractor rejects the insurance policy or certificate of insurance within the three day time period, he or she must state the reason for rejection in writing to the subcontractor.

The bill's provisions also apply to certificates of insurance required by construction contracts between general contractors, subcontractors, sub-subcontractors, and materialmen.

There does not appear to be a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill creates statutory provisions governing the actions of contractors who are parties to a construction contract relating to acceptance or rejection of certificates of insurance and the resulting payment for work done or materials supplied. There are currently no statutory provisions relating to this issue.

Safeguard Individual Liberty: The bill restricts when a general contractor can reject work done by a subcontractor or withhold payment for work done by a subcontractor due to the subcontractor not having insurance coverage required in the construction contract. The bill also provides a time limit when a general contractor must reject a certificate of insurance from a subcontractor. Noncompliance with the time limit provided results in a general contractor's deemed acceptance of the certificate of insurance.

B. EFFECT OF PROPOSED CHANGES:

Background

Most owners, general contractors, and subcontractors carry numerous kinds of insurance, such as workers' compensation and commercial liability.¹ In commercial construction, insurance costs are factored into the contractors' bids on a construction project. Insurance requirements for a particular construction project are included in the resulting construction contracts between the owner and general contractor, the general contractor and subcontractor, and/or subcontractor and sub-subcontractor or materialman.

Although there are no laws specifically addressing the practice, a general contractor or subcontractor may require a certificate of insurance or an insurance policy to be submitted by a subcontractor as a condition of work. The certificate of insurance is evidence of insurance in lieu of an actual copy of an insurance policy. At some point upon signing a construction contract, sometimes before the work begins and sometimes after, the subcontractor provides a certificate of insurance to the general contractor listing the insurance provided by the subcontractor. Most times the general contractor reviews all documents, including the certificate of insurance, prior to paying the first invoice for each subcontractor. If an insurance policy or certificate of insurance is not submitted or if it does not meet the standards of the general contractor requiring the policy, the contractor may prohibit the other party from working on the construction project or may withhold payment for work already done until the proper insurance is submitted.

According to proponents of the bill, a practice of misuse of certificates of insurance by general contractors has emerged that is of serious concern to the subcontractors and their insurance agents.² This practice involves a general contractor demanding their subcontractors supply them with certificates of insurance containing non-standard and sometimes unavailable provisions, such as hold harmless agreements or waiver of subrogation rights.

¹ Employers in the construction industry with one or more employee must provide workers' compensation coverage for its' employees. s. 440.02(17)(b)2., F.S. (2005). If a subcontractor does not have workers' compensation coverage, the general contractor must provide workers' compensation benefits for any injured employee of the subcontractor. This is true even if the subcontractor lied to the general contractor about his or her workers' compensation insurance coverage or gave the general contractor a fraudulent certificate of workers' compensation insurance coverage. John J. Dubreuil, *Florida Workers' Compensation Handbook*, 3-43 (2003 Edition, 2003).

² Florida Association of Insurance Agents, *300 Words (more or less) about Certificates of Insurance* (2006) (on file with committee).

Specifically, the subcontractor is told by the general contractor that in order to work on the construction project, the subcontractor must supply evidence of a liability policy with certain provisions. The subcontractor purchases an insurance policy and receives a certificate of insurance from his or her insurance agent which contains information about what type of insurance coverage the policyholder/subcontractor has in force. The subcontractor gives the certificate of insurance to the general contractor before starting work on the construction project.

According to the bill's proponents, once the subcontractor's work is complete, the general contractor often refuses payment to the subcontractor for work completed because the subcontractor did not carry insurance containing the general contractor's required specifications, even though the general contractor had the certificate of insurance from the outset of the subcontractor's work. The general contractor refuses payment to the subcontractor until the subcontractor provides the general contractor with a certificate of insurance meeting the general contractor's specifications.

The problem is furthered when the subcontractor asks his or her insurance agent to give him or her a new certificate of insurance with the appropriate specifications, to provide him or her with a retroactive insurance policy with corresponding certificate of insurance meeting the specifications, or to alter his or her existing certificate of insurance to reflect the appropriate specifications. Most agents refuse to alter the certificates of insurance as doing so subjects them to license discipline and administrative fines.³ Also, an agent doing so may incur an "errors and omission" problem.⁴

If an agent refuses to alter a certificate of insurance, the general contractor may ask the agent to issue a personal guarantee of the changes to the certificate of insurance the general contractor requires.⁵ A personal guarantee by the agent may expose him or her to suit if the insurer will not honor the changes required by the general contractor and personally guaranteed by the agent.

The same practices can occur when general contractors or subcontractors contract with sub-subcontractors or with materialmen and the sub-subcontractor or materialmen are required to provide certificates of insurance as proof of insurance coverage.

Proposed Legislation

The bill resolves the problem relating to certificates of insurance between contractors alleged by the bill's proponents. In that regard, the bill creates statutory provisions allowing a general contractor to accept or reject an insurance policy or certificate of insurance submitted by a subcontractor at any time before the subcontractor begins work on the construction project. Once the insurance policy or certificate of insurance is accepted or deemed accepted by the general contractor and the subcontractor begins work on the project, the general contractor can later reject the subcontractor's insurance policy or certificate of insurance; however, the general contractor is responsible for paying the subcontractor for work performed until the rejection.

The bill also requires a general contractor to reject a subcontractor's insurance policy or certificate of insurance in writing within three days of its receipt of the document(s) from the subcontractor. If the general contractor does not reject the document(s) within the three day time period, he or she is deemed to accept the insurance policy or certificate of insurance. If the general contractor rejects the insurance policy or certificate of insurance within the three day time period, he or she must state the reason for rejection in writing to the subcontractor. In such a case; however, the bill does not require the general contractor allow the subcontractor time to "cure" the reason the certificate of insurance was rejected.

³ s. 626.9541(1)(a)1., F.S. (2005); s. 626.9521, F.S. (2005); Informational Memorandum OIR-03-003M, issued by the Office of Insurance Regulation on February 21, 2003 (on file with committee).

⁴ Florida Association of Insurance Agents, *300 Words (more or less) about Certificates of Insurance* (2006) (on file with committee).

⁵ Id.

The bill's provisions also apply to certificates of insurance required by construction contracts between general contractors, subcontractors, sub-subcontractors, and materialmen.

C. SECTION DIRECTORY:

Section 1. Creates s. 627.442, F.S. providing provisions regarding acceptance and/or rejection of certificates of insurance by parties to a construction contract and payment on construction contracts.

Section 2. Provides an effective date of July 1, 2006.

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:

The bill may create costs to a general contractor or subcontractor when a subcontractor, sub-subcontractor, or materialman does not have the proper insurance. The increased costs may include costs associated with hiring a subcontractor, sub-subcontractor, or materialman that carries the required insurance. However, the bill's provisions precluding the general contractor or subcontractor from withholding payment for work completed by subcontractors, sub-subcontractors, or materialmen may have a positive financial impact on those parties by guaranteeing payment for services rendered.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None provided and none needed.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill, in parts, is somewhat confusing. Subsection (1) does little to clarify the bill and in fact perpetuates the confusion, especially when this subsection is read in para materia with other provisions in the bill. To improve its lucidity, the bill should be reworded to make it clear a general contractor or subcontractor can reject a certificate of insurance after an initial acceptance or a deemed acceptance and doing so does not preclude payment for work already performed or material delivered. Additionally, the bill should be reworded to clarify a subcontractor, sub-subcontractor, or materialman must be paid for work done, if any, during the three day window for rejection of a certificate of insurance by a general contractor or subcontractor.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.