

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/SB 954

INTRODUCER: Transportation Committee and Senator Sebesta

SUBJECT: Transportation

DATE: April 1, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Eichin</u>	<u>Meyer</u>	<u>TR</u>	<u>Fav/CS</u>
2.	<u>McKay</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable</u>
3.	_____	_____	<u>TA</u>	_____
4.	_____	_____	<u>WM</u>	_____
5.	_____	_____	<u>RC</u>	_____
6.	_____	_____	_____	_____

I. Summary:

The bill concerns expressway authorities' ability to contract with outside parties for services. The CS clarifies the ability for all expressway authorities to engage in public-private partnerships. The Orlando-Orange County Expressway Authority (OOCEA) is provided authorization to waive the requirement for surety bonds on projects less than \$500,000 when the contract is awarded under the provisions of a local economic development program.

The bill also provides that only section 348.0004(9) of Part I of Chapter 348, applies to any other statutorily-created expressway authority, transportation authority, bridge authority, or toll authority.

This CS substantially amends sections 348.0004, 348.0012, and 348.754 of the Florida Statutes.

II. Present Situation:

Florida's expressway authorities are formed by the Florida Expressway Authority Act (Chapter 348, Part I of the Florida Statutes) or by act (Parts II through X) of the Legislature for the purpose of constructing, maintaining, and operating tolled transportation facilities complementing the State Highway System and the Florida Turnpike Enterprise. Most existing expressway authorities were created before Chapter 348, Part I, was enacted in 1990 and are, therefore, not subject to many of its provisions.

Public Private Partnerships (P³)

Public-private partnerships are arrangements of roles and relationships in which public and private entities coordinate or combine complementary resources and share risks and rewards in order to improve public services in the most effective and efficient manner. Generally, private

partnerships are new forms of relationships between government transportation agencies and private entities designed to:

- Facilitate improved faster delivery of transportation facilities
- Access additional sources of revenue and finance
- Improve the performance of maintenance and operation

Section 348.0004(9), F.S., was created by the Legislature in 2004 to provide expressway authorities the ability to engage in public-private partnerships. The section provides that:

- Expressway authorities may receive or solicit proposals and contract with private parties for the building, operation, ownership, or financing of transportation facilities if:
 - The project is in the public's best interest,
 - No state funds are required unless the project provides increased mobility on the State Highway System (SHS), and
 - No additional costs or service disruptions would be borne by the public.
- The cost of reviewing public-private project submissions is borne by the private entity
- Any tolls or fares imposed by the private entity are subject to regulation by the expressway authority.
- P³ projects must comply with all applicable federal, state, and local laws, comprehensive plans, rules, policies, procedures, and standards, as well as any other conditions which the expressway authority determines to be in the public's interest.
- The expressway authority may provide development and construction services, including eminent domain. Expressway authorities may pay all or part of the operating and maintenance costs or provide services for which it receives full or partial reimbursement.
- If an expressway authority receives an unsolicited proposal, the authority must publish weekly for two weeks an invitation for competing proposals, which will be received for up to 60 days from the initial publication. Proposals will be ranked and the authority may negotiate with multiple proposers.
- Loans from the Toll Facilities Revolving Trust Fund may be made for P³ toll facilities.

Since the changes made in 2004 were placed in Part I of Chapter 348, some concern has been raised relative to the provisions' applicability to expressway authorities formed in Parts II through X.

The Orlando-Orange County Expressway Authority's Small Business Program

Currently, the OOCEA has a program that seeks to encourage Orlando-area small-business owners to bid on components of expressway authority projects. In its eight years' of existence, the "micro-contract" program has attracted more than 100 small companies to perform such tasks as erecting guard rails, installing landscaping, and striping toll roads. One of the benefits of the program to small businesses has been the waiver of a performance bond for project contracts of \$200,000 or less. This waiver is available to all state agencies. See s. 255.05, F.S. Persons or entities awarded public contracts greater than \$200,000 must post a surety bond to guarantee the work will be performed to the state agency's specifications. The recent unprecedented increases in transportation construction materials and labor in Florida have resulted in increased bid prices for these micro-contracts, according to the OOCEA staff. The OOCEA has proposed amending

s. 348.754, F.S., which specifies the OOCEA's purposes and powers, to raise the \$200,000 threshold to \$500,000.

Payment and performance bonds for public construction projects

In Florida, "surety insurance" is defined to include payment and performance bonds.¹ Such bonds are contracts where a surety company that is paid a premium by a principal, e.g., a general contractor, agrees to stand in the place of the principal in the event that the principal defaults either as to performance of the contract or as to payment of its subcontractors/suppliers.^{2, 3}

Unlike a customary insurance agreement in which there is a two-party relationship, i.e., the insurer and the insured, a surety is a tripartite agreement consisting of: (a) the obligee, who 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. Another difference between a customary 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. "Payment bond" is a bond which guarantees payment of money from the contractor to persons who furnish labor, material equipment and/or supplies for use in the performance of the contract.⁵ "Performance bond" is a bond which guarantees that the contractor will perform the contract in accordance with its terms.⁶ A payment and performance 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., of the Construction Lien Law, who furnish labor, services, or materials for the prosecution of the work provided in the contract.⁷

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; and (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 a general

¹ Section 624.606, F.S.

² Toomey, Daniel and McNulty, Tamara, *Surety Bonds: A Basic User's Guide for Payment Bond Claimants and Obligees*, Construction Lawyer, Winter, 2002.

³ Although surety is oft 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.*

⁴ *Id.*

⁵ United States Small Business Administration.

⁶ United States Small Business Administration.

⁷ Section 255.05(1)(a), F.S.

description of the improvement.⁸ 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 make reference to the section number and must contain a reference to the notice and time limitation provisions in s. 255.05(2), F.S.

Section 255.05(9), F.S., provides that on any public works project for which the public authority requires a performance and payment bond, legal actions may be brought and maintained by and against the public authority on any contract claim arising from breach of a written agreement or a written directive issued by the public authority pursuant to the written agreement. In any such suit, the public authority and the contractor have all of the same rights and obligations as a private person under a like contract except that no liability may be based on an oral modification of either the written contract or written directive. The provision does not waive sovereign immunity of the state and its political subdivisions and applies only to contracts entered into on or after July 1, 1999.

III. Effect of Proposed Changes:

Section 1 creates a new paragraph (6) of s. 348.754, F.S., authorizing the OOCEA to waive the requirements for payment and performance bonds (surety) on public construction projects of \$500,000 or less, when the project is awarded under the provisions of an economic development program for the encouragement of local small businesses. Criteria for participation in the program requires that a participant be an independent business principally headquartered in the Orange County Standard Metropolitan Statistical Area, employing a maximum of 25 persons. Eligible businesses also must have gross annual construction sales averaging \$3 million or less over the previous three calendar years; be accepted into the OOCEA's economic-development program; and participate in the OOCEA technical assistance or other educational programs.

The OOCEA's procedures for waiving bonds on projects between \$200,000 and \$500,000 must provide that bonds will only be set aside on projects set aside to be competitively bid on by participants in the development program. The executive director or his or her designee determines whether specific construction projects are suitable for bidding under the micro contracts program, and waiver of the bond. The decision to waive the bond must be based on the executive director's investigation and conclusion that there exists "sufficient competition" so that the authority receives a "fair price" and does not undertake any "unusual risk" with respect to such project.

The waiver of surety does not affect the OOCEA's obligation to pay for services rendered. Any small business which has been the successful bidder on six micro-contracts is ineligible to continue participating in the program. The OOCEA is required to prepare a report on the program every two years and submit it to the Orange County legislative delegation, beginning December 31, 2008.

Section 2 amends s. 348.0004(9), F.S., to provide that any expressway authority, transportation authority, bridge authority, or toll authority established in Part I of chapter 348, F.S., or any other

⁸ *Id.*

statute, may engage in public-private partnerships. The bill also provides that use of the powers granted in subsection (9) may not subject a statutorily-created expressway authority, transportation authority, bridge authority, or toll authority, to any of the other requirements of Part I of Chapter 348 other than those contained in s. 348.0004(9), F.S. The effect is that other authorities created are only subject to the provisions of Part I relating to public-private partnerships.

Section 3 amends s. 348.0012, F.S., to clarify the Florida Expressway Authority Act (Part I, ch. 348, F.S.) does not apply to other parts of the chapter, except as expressly provided within Part I. The effect is that other authorities created are only subject to the provisions of Part I relating to public-private partnerships.

Section 4 provides an effective date of July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

A federal district court in Florida struck down as unconstitutional a state statute granting preferences to minority business enterprises by encouraging state agencies to meet spending goals based on the racial classification of the business owner.⁹ Because the classification was based upon race, the court relied upon the reasoning in *City of Richmond v. J.A. Croson*,¹⁰ in which a preference based upon race was subjected to strict scrutiny, and found that the statute at issue was not narrowly tailored to meet a compelling governmental interest.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

⁹ *Florida A.G.C. Council, Inc. v. Florida*, 303 F. Supp. 2d 1307 (N.D. Fla. 2004)

¹⁰ 488 U.S. 469 (1989)

B. Private Sector Impact:

Business firms meeting the requirements of the OOCEA's economic-development program may benefit from enhanced opportunities to contract with the OOCEA.

C. Government Sector Impact:

The OOCEA may benefit from increased competition in certain projects. However, the OOCEA may take on additional risk by not having the protection of the payment and performance bonds.

VI. Technical Deficiencies:

None.

VII. Related Issues:

In the new s. 348.754(6)(c), F.S., created by the bill, the terms "sufficient competition," "fair price," and "unusual risk" are not defined. Not defining the terms means the authority's executive director is given wide discretion in determining when to procure from smaller entities, and when to forgo obtaining a bond. The Legislature may wish to provide that the executive director and his or her designee have no interest in any of the entities participating in the economic-development program.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
