



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Current Situation**

Section 255.05, F.S., requires a payment and performance bond to protect contractors and subcontractors who provide work and materials on public projects because they may not perfect a mechanics lien on public property. See *American Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 363 (Fla. 2005). The payment portion of the bond guarantees that all subcontractors and materialmen will be paid and the performance part of the bond guarantees that the contract will be fully performed. Section 255.05(1), F.S., requires delivery and filing of a bond which guarantees the payment of subcontractors and performance of the underlying contract with the governmental unit. See *Palm Beach County v. Trinity Industries*, 661 So. 2d 942, 944 (Fla. 4th DCA 1995)(finding county liable to subcontractor for cost of materials when the contractor became insolvent and the county had failed to ensure that the contractor post a payment and performance bond before the construction commenced). This section requires that before entering into a contract with a public authority for the construction or repair of a public building or work, the contractor must deliver a payment and performance bond with a surety insurer authorized to do business in Florida as a surety. Section 255.05(1)(a), F.S., any provision in a payment bond that "restricts the classes of persons as defined in s. 713.01<sup>1</sup> protected by the bond or the venue of any proceeding relating to such bond is unenforceable."

##### **Effect of Proposed Changes**

##### **Payment Bond**

The bill requires a payment bond in an amount equal to the full contract amount to protect claimants supplying labor or materials to the contractor or the contractor's subcontractors. The payment bond is not for the protection of persons providing any design services, preconstruction services, finance services, maintenance services, operations services, or other related services provided for the contract. The bill provides that for construction manager at-risk construction services and design-build construction services, the amount of the bond covers the price of construction only and not any design, preconstruction, finance, maintenance, or related services.

##### **Performance Bond**

The bill also requires a performance bond equal to the full contract amount except that construction manager at-risk construction services and design-build construction services exclude the same services as described above.

The bill allows prime contractors to reduce the amount of payment and performance bonds by the amount of bonds the contractor requires of subcontractors that name both the contractor and public entity as obligees.

#### C. SECTION DIRECTORY:

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<sup>1</sup> The classes of persons includes architects, engineers, materialmen, and general contractors who provide architectural or engineering services under a design build contract.

Section 1: Describes requirements for payment bonds and performance bonds, as well as authorizing the amount of the bonds to be reduced by the amount of any dual-obligee bonds.

Section 2: Provides an effective date of July 1, 2007.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

2. Expenditures:

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

2. Expenditures:

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

### D. FISCAL COMMENTS:

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require cities or counties to spend funds or take an action requiring expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

### B. RULE-MAKING AUTHORITY:

None.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill allows the contractor, to the extent the contractor requires its subcontractors to provide performance and payment bonds that names both the contractor and public entity, to reduce the amount of the payment and performance bond by the amount of bonds provided by subcontractors.

The bill appears to have two issues that may need to be addressed further. First, by excluding certain services from protection of payment and performance bonds, the bill leaves those individuals unprotected and is internally inconsistent with the statute. See s. 255.05(1)(a), F.S., conditioning the bond on the contractor “promptly making payments to all persons defined in s. 713.01 who furnish labor, services, or materials” and stating that “[a]ny provision in a payment bond furnished for public work contracts as provided by this subsection which restricts the classes of persons as defined in s. 713.01 protected by the bond . . . is unenforceable.

Second, by reducing the amount of the prime contractor’s bond, subcontractors would have insufficient protection. For example, if the prime contractor has failed to pay its subcontractors, the subcontractors remedy would be limited by the amount of the prime contractor’s bond, which has been reduced by the amount of all dual-obligee bonds.

While subcontractors may not receive the full amount of labor or materials supplied because of the reduction in the prime contractor’s bond, it does not appear that the public entity would be liable for the amount. So long as the public entity received a payment and performance bond in accordance with the statute, the subcontractor would not have a cause of action against the public entity.

**D. STATEMENT OF THE SPONSOR**

No statement submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**