

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

Public Construction Project Bonds

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., states that any provision in a payment bond that “restricts the classes of persons as defined in s. 713.01¹ protected by the bond or the venue of any proceeding relating to such bond is unenforceable.”

Consultant’s Competitive Negotiation Act

Section 287.055(9), F.S., requires municipalities, political subdivisions, school districts, and school boards to award design-build contracts through a competitive proposal selection process or by the use of a qualifications-based selection process pursuant to s. 287.055(3),(4), and (5), F.S., whereby the selected firm will subsequently establish a guaranteed maximum price (GMP) and guaranteed completion date (GCD). Through either the competitive proposal selection process or the GMP and GCD, the political subdivision is made aware of the total cost of the project.

In 2006, the Auditor General performed an Operational Audit of the City of Cape Coral. The audit found that the city entered into contracts with the selected firms without first negotiating fair, competitive, and reasonable compensation as required by s. 287.055(5), F.S. The audit concluded that when the city executed contracts that allowed compensation to be determined at various stages during the terms of the contract, it was effectively precluded from negotiating contracts with lower ranked qualified firms if the compensation demands of the selected firm were excessive.

In its response, the city contended that “nothing in [s. 287.055(5)(a), F.S.] requires the city to negotiate a guaranteed maximum price for all utility expansion assessment areas prior to the commencement of any work.” The city argued that during contract formation, it is difficult to predict the labor and materials costs five years out. The city contended that by using a master contract and separately negotiating each phase of the project it was able to determine whether the guaranteed maximum price for any

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

phase of the project was fair, competitive, and reasonable and that the city has the right to terminate the contract at any time if the guaranteed maximum price for any phase of the project is excessive.

The city then sought an Attorney General opinion on the question:

Does the use of a construction manager at risk or program manager at risk contract for the design and construction of a multi-phase project comply with s. 287.055(9)(c), F.S., when each phase of the project is separately negotiated for a guaranteed maximum price and completion date?

The Attorney General opined that “[n]othing in the act appears to contemplate the negotiation of a guaranteed maximum price and guaranteed completion date of each phase of a multi-phase project that has been awarded to a construction manager at risk or program manager at risk.” The Attorney General went on to state that separately negotiating each phase of a multi-phase project awarded to a construction manager at risk or program manager at risk does not comply with s. 287.055(9)(c), F.S.

Effect of Proposed Changes

Public Construction Bond

The bill provides that for a contract in excess of \$250 million, if the public entity finds that a bond in the amount of the contract is not reasonably available, the public entity may set the amount of the bond at the largest amount reasonably available, but not less than \$250 million.

For construction-management or design-build contracts, the bond may not be conditioned on the performance or payment of nonconstruction services, if those services are excluded from the amount of the bond.

Competitive Procurement

The bill creates s. 255.103, F.S., which authorizes a county, municipality, special district, or other political subdivision of the state to select a construction management entity or program management entity pursuant to s. 287.055, F.S., and, at the option of the public entity, to require a guaranteed maximum price or a guaranteed completion date.² If a project includes a grouping of substantially similar construction, rehabilitation, or renovation activities, the public subdivision may require a separate guaranteed maximum price and a separate guaranteed completion date for each grouping of substantially similar construction, rehabilitation, or renovation activities.

C. SECTION DIRECTORY:

Section 1: Authorizes the public entity to determine the reasonable amount of a bond for contracts in excess of \$250 million. Also provides that for construction-management or design-build contracts, the bond may not be conditioned on the performance or payment of nonconstruction services, if those services are excluded from the amount of the bond.

Section 2: Authorizes political subdivisions of the state to use construction management or program management entities and provides flexibility to decide when and if a guaranteed maximum price and a guaranteed completion date may be required.

Section 3: Provides an effective date of July 1, 2007.

² This provision is modeled after 1013.45, F.S., which authorizes school districts to select a construction management entity or program management entity pursuant to s. 287.055, F.S., and may require the entity to offer a guaranteed maximum price or a guaranteed completion date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The potential cost savings from the contractor relating to the purchase of bonds for construction management or design build contracts that exclude design or other nonconstruction services may be passed to the state.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The potential cost savings from the contractor relating to the purchase of bonds for construction management or design build contracts that exclude design or other nonconstruction services may be passed to the local government entity. Any savings a political subdivision of the state may realize by allowing a program management or construction management entity to handle multi-phase projects that has each phase negotiated individually is indeterminate at this time.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The cost of bonds for design build and construction management contracts may be reduced when those bonds exclude nonconstruction services from coverage.

D. FISCAL COMMENTS:

None.

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:

Competitive Procurement

As stated in the present situation, while s. 287.055(9)(c), F.S., does not contemplate the negotiation of a guaranteed maximum price and guaranteed completion date of each phase of a multi-phase project that has been awarded to a construction manager at risk or program manager at risk, this bill would

authorize such negotiations. Nevertheless, when read *in pari materia* with the bill it appears that the public entity would be required to obtain a GMP and GCD for the entire project and that the bill would enable the public entity to obtain a GMP and GCD for each grouping of substantially similar activities.

Section 287.055(9) contemplates that the public entity will know the anticipated cost of the project, either through competitive proposal selection or the GMP and GCD, prior to entering into a contract. The bill may authorize political subdivisions to enter into contracts with a construction-management entity or program-management entity without knowing the total cost of the project prior to execution of the contract. Consequently, it appears this portion of the bill would authorize those actions which the auditor general found not conducive to fair, competitive and reasonable compensation.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On April 18, 2007, the Government Efficiency & Accountability Council adopted a strike-all amendment which authorizes the public entity to determine the reasonable amount of a bond for contracts in excess of \$250 million. Also provides that for construction-management or design-build contracts, the bond may not be conditioned on the performance or payment of nonconstruction services, if those services are excluded from the amount of the bond. The bill also authorizes political subdivisions of the state to use construction management or program management entities and provides flexibility to decide when and if a guaranteed maximum price and a guaranteed completion date may be required.

The council reported HB 1489 favorably with a council substitute.