

The Florida Senate
PROFESSIONAL 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 Operations Committee

BILL: CS/CS/SB 2376

INTRODUCER: Governmental Operations Committee, Regulated Industries Committee, and Senator Saunders

SUBJECT: Public Project Construction Bonds

DATE: April 24, 2007 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Fav/CS
2.	McKay	Wilson	GO	Fav/CS
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill provides requirements for the performance and payment bonds that are required for formal contracts with the state or any county, city, or political subdivision thereof, or other public authority for the construction of a public building, the prosecution and completion of a public work, or repairs of a public building or public work. The bill permits a public owner to set the amount of a payment and performance bond at the largest amount reasonably available if the contract exceeds \$250 million and a bond in the amount of the contract price is not reasonably available.

The bill provides that, if a public owner does not include the amount of the cost of design or other nonconstruction services in a construction-management or design-build contract, the bond may not be conditioned on performance of such services or payment to persons furnishing such services. It also provides that such a bond may exclude persons furnishing such services from the classes of persons protected by the bond.

The bill provides that a county, municipality, special district as defined in ch. 189, or other political subdivision of the state, may use a construction management entity or program management entity. The bill amends s. 287.055(9)(c), F.S., to clarify that specified local government entities must award design-build contracts by use of a competitive process whereby the selected firm will, *subsequent to competitive negotiations*, establish a guaranteed maximum price and guaranteed completion date.

This bill substantially amends sections 255.05 and 287.055, and creates section 255.103, of the Florida Statutes.

II. Present Situation:

Surety

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

Unlike a customary insurance agreement in which there is a two-party relationship, i.e., the insurer and the insured, a surety³ is a tripartite agreement consisting of:

1. 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;
2. A principal, e.g., the contractor; and
3. 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

Payment and performance bonds for public construction projects

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. A “payment bond” is a bond that 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 A “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:

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 often 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 See United States Small Business Administration, *What is a Surety Bond?* at http://www.sba.gov/smallbusinessplanner/start/financestartup/BOND_PROG.html (last visited April 11, 2007).

⁶ *Id.*

⁷ Section 255.05(1)(a), F.S.

1. 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;
2. The contract number assigned by the contracting public entity; and
3. 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 description of the improvement.⁸

No payment and performance bond is required for work for the state in which the contract is for \$100,000 or less.

A contract for \$200,000 or less for work done for any county, city, political subdivision, or public authority may be exempted from executing the payment and performance bond at the discretion of the official or board awarding the contract.

The Secretary of the Department of Management Services may delegate to state agencies the authority to exempt any person entering into such a contract amounting to more than \$100,000 but less than \$200,000 from executing the payment and performance bond when the work is done for the state.

According to proponents of the bill, currently, a program manager executes and delivers a payment and performance bond for the entire amount of a specified project for the guaranteed maximum price. The program manager also requires their construction subcontractors to purchase payment and performance bonds. According to proponents, this requirement results in the entities purchasing two levels of payment and performance bonds covering the same contracted work.

The Consultants' Competitive Negotiation Act

The Consultants' Competitive Negotiation Act (CCNA) in s. 287.055, F.S., provides a competitive negotiation process for state and local government agencies when procuring the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper. The CCNA requires that state agencies publicly announce, in a consistent and uniform manner, each occasion when professional services must be purchased for the following:

- a project when the basic construction cost is estimated by the agency to exceed \$250,000;⁹ or
- a planning or study activity when the fee for professional services exceeds \$25,000.

⁸ *Id.*

⁹The CCNA references the purchasing categories in s. 287.017(1), F.S., which establishes the following purchasing categories for state agencies:

- Category One: \$15,000.
- Category Two: \$25,000.
- Category Three: \$50,000.
- Category Four: \$150,000.
- Category Five: \$250,000.

The public notice must provide a general description of the project and describe how the interested consultants may apply for consideration.

The CCNA provides a two-phase selection process.¹⁰ In the first phase, the agency evaluates the qualifications and past performance of the bidders. In the second phase, the agency selects the three bidders, ranked in order of preference, it considers most highly qualified to perform the required services. The CCNA requires consideration of several factors in determining the three most highly qualified bidders, including willingness to meet time and budget requirements, past performance, location, recent, current, and projected firm workloads, volume of work previously awarded to the firm, and whether the firm is certified as a minority business.¹¹

The CCNA prohibits the agency from requesting, accepting, and considering, during the selection process, proposals for the compensation to be paid. Section 287.055(2)(d), F.S., defines the term “compensation” to mean “the amount paid by the agency for professional services,” regardless of whether stated as compensation or as other types of rates.

The agency then negotiates compensation with the most qualified of the three selected firms. If a satisfactory contract cannot be negotiated, the agency may then negotiate with the second most qualified firm. The agency may negotiate with the third most qualified firm if that negotiation fails to produce a satisfactory contract. If a satisfactory contract cannot be negotiated with any of the three selected, the agency must begin the selection process again.

Section 287.055(9)(c), F.S., provides that DMS must promulgate rules, except for design build contracts undertaken by DOT, for the award of design-build contracts to be followed by state agencies. Each other agency must adopt rules or ordinances for the award of design-build contracts. Municipalities, political subdivisions, school districts, and school boards shall award design-build contracts by the use of a competitive proposal selection process as described in the subsection, or by the use of a qualifications-based selection process pursuant to subsections (3), (4), and (5) for entering into a contract whereby the selected firm will subsequently establish a guaranteed maximum price and guaranteed completion date.

Educational facilities contracting and construction techniques

Section 1013.45, F.S., provides that certain school boards may use any of the following procedures to construct new facilities or add to existing ones: competitive bids, design-build pursuant to s. 287.055, F.S., a construction management process, or a program management process. The construction and program management processes reference selection pursuant to s. 287.055, F.S.

¹⁰ See s. 287.055(4), F.S.

¹¹ The following is a full listing of the factors that s. 287.055(4)(b), F.S., requires that the agency consider: the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the firms; and the volume of work previously awarded to each firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms.

Florida Attorney General Advisory Legal Opinion 2007-12

Subsequent to an operational audit by the Auditor General¹² that, in part, questioned whether a city project complied with the Consultants' Competitive Negotiation Act, the City of Cape Coral asked the Attorney General whether the use of a construction manager at risk or program manager at risk contract for the design and construction of a multi-phase project complies 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 "separately negotiating each phase of a multi-phase project that has been awarded to a construction manager at risk or program manager at risk does not comply with the plain language or intent" of s. 287.055(9)(c), .S, and that the procedures of that section "clearly indicate that compensation will be negotiated prior to the selected firm beginning work under the contract."

III. Effect of Proposed Changes:

Section 1 of the bill amends s. 255.05(1)(a), F.S., to specify requirements for performance and payment bonds.

Bonds Exceeding \$250 Million

The bill permits the state, counties, municipalities, political subdivisions, or other public entities (public owners) to set the amount of the payment and performance bond at the largest amount reasonably available if the contract exceeds \$250 million and a bond in the amount of the contract price is not reasonably available. The amount may not be less than \$250 million.

The bill does not define when a bond is not "reasonably available." This provision is permissive and does not require that the public owners accept a bond for less than the contract price, unless it determines that a bond for the amount of the contract is not reasonable available.

Design and Non-Construction Services

The bill provides that, if a public owner does not include in the bond amount the cost of design or other nonconstruction services in a construction-management or design-build contract, the bond may not be conditioned on performance of such services or payment to persons furnishing such services.

The bill also provides that such a bond may exclude persons furnishing such services from the classes of persons protected by the bond. For example, if the bond excludes the architect providing design services, the architect would not be protected by the bond.

It is not clear whether the bill would protect local officers and officials from personal liability if they opt to exempt design or non-construction services from the bond requirement pursuant to the provisions of the bill. Section 255.05(1)(a), F.S., provides liability protection to local officers and officials from persons suffering a loss due to such an exemption if they choose to exempt contracts that amount to more than \$100,000 but less than \$200,000.

The bill provides that this exception is notwithstanding s. 255.05(1)(a), F.S., which provides that payment bond which restricts the classes of persons defined in s. 713.01, F.S., is unenforceable.

¹² Auditor General Report No. 2006-182, May 2006.

Section 713.01, defines the terms “architect,” “contractor,” “engineer,” “laborer,” “lender,” “owner,” “subcontractor,” and “subcontractor.”

Section 2 creates s. 255.103, F.S., providing that a local government, which means a county, municipality, special district as defined in ch. 189, or other political subdivision of the state, may use a construction management entity or program management entity. The entities must be selected pursuant to the CCNA in s. 287.055, F.S., and may be required to offer a guaranteed maximum price and completion date or lump-sum price and guaranteed completion date. The section does not prohibit a local government from procuring construction management services pursuant to s. 255.20, F.S.

The substance of this new section is largely derived from s. 1013.45, F.S., which provides that certain school boards may use a construction management process or a program management process for constructing new facilities or adding to existing ones.

Section 3 amends s. 287.055(9)(c), F.S., to clarify that specified local governments, school districts, and school boards must award design-build contracts by use of a competitive process whereby the selected firm will, *subsequent to competitive negotiations*, establish a guaranteed maximum price and guaranteed completion date.

The bill has an effective date of July 1, 2007.

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:

The bill allows a public entity to set a bond at the largest amount “reasonably available” above \$250 million. The power to make law is vested in the Legislature, and that power may not be delegated.¹³ In determining whether a statute amounts to an unlawful delegation of legislative power, the test is whether the statute provides sufficient standards and guidelines to ensure the agency is carrying out the legislature’s intent.¹⁴ On the other hand, if the Legislature establishes adequate standards and guidelines, subordinate functions may be transferred, so that the Legislature is not forced to remain

¹³ *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 264 (Fla. 1991).

¹⁴ *Department of Insurance v. Southeast Volusia Hospital District*, 438 So.2d 815, 819 (1983).

in perpetual session devoting time to regulation.¹⁵ The “reasonably available” standard appears to be a sufficient guideline such that it is not an unconstitutional delegation of legislative power.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill would permit a contractor to obtain a payment and performance bond for less than the contract amount for contracts exceeding \$250 million, if the state, county, municipality, political subdivision, or other public entity (public owner) agrees to a lesser bond because a bond in the amount of the contract price is not reasonably available.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

¹⁵ *Microtel, Inc. v. Florida Public Service Commission*, 464 So.2d 1189, 1191 (Fla. 1985), citing *State, Department of Citrus v. Griffin*, 239 So.2d 577 (Fla. 1970)

VIII. Summary of Amendments:

None.

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