

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: Regulated Industries Committee

BILL: CS/SB 2376

INTRODUCER: Regulated Industries Committee and Senator Saunders

SUBJECT: Public Project Construction

DATE: April 17, 2007

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Oxamendi	Imhof	RI	Fav/CS
2.			GO	
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 (also known as (public owners”)) 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 has an effective date July 1, 2007.

This bill substantially amends section 255.05, 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 “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

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.*

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. 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 be 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.

III. Effect of Proposed Changes:

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.

⁷ Section 255.05(1)(a), F.S.

⁸ *Id.*

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

Effective Date

The bill has an effective date July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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 \$250,000, 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:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

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