

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: CS/CS/SB 266

INTRODUCER: Appropriations Committee on Transportation, Tourism, and Economic Development;
Transportation Committee; and Senator Hooper

SUBJECT: Transportation

DATE: February 21, 2024

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Johnson	Vickers	TR	Fav/CS
2. Nortelus	Jerrett	ATD	Fav/CS
3. Nortelus	Sadberry	AP	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 266 contains various provisions relating to transportation. Specifically, the bill:

- Prohibits the Florida Department of Transportation (FDOT), with specified exceptions, from annually committing more than 20 percent of the revenues derived from state motor fuel taxes and motor vehicle license-related fees to public transit projects.
- Amends provisions relating to the FDOT’s authority regarding public-private partnerships to:
 - Replace the term “public-private partnership agreement” with the term “comprehensive agreement.”
 - Require an “independent,” instead of an “investment grade,” traffic and revenue study prepared by a traffic and revenue expert.
 - Revise the timeframe, based on the project’s complexity, during which the FDOT will accept other proposals for the same project as it received an unsolicited public-private partnership proposal.
 - Authorize the FDOT to enter into an interim agreement with a private entity proposing the development or operation of a qualifying project.
 - Limit the FDOT secretary’s power, upon written findings that a comprehensive agreement requires a term in excess of 50 years, to authorize a term of up to 75 years to projects partially or completely funded from project user fees.
 - Requires the FDOT to notify the Division of Bond Finance prior to entering into interim or comprehensive agreements.
 - Confirms other statutory provisions referencing to public-private partnership agreements.

- Clarifies that a local governmental entity may not deem reclaimed asphalt pavement as solid waste.
- Authorizes FDOT to allow the issuance of multiple contract performance and payment bonds for phased design-build contracts.
- Provides that a claimant must institute an action against a contractor or surety within 365 days after the performance of the labor or completion of delivery of the materials or supplies.
- Revises a presumption of sole proximate cause on the part of a driver of a vehicle involved in a crash within a construction zone to exclude low-THC cannabis.
- Defines terms and expands contractor limits of liability for personal injury, property damage, or death arising from specified performance of work on a transportation facility or from specified acts or omissions of a third party.
- Revises the application of immunity when the proximate cause of the injury, damage, or death is a latent condition, defect, error, or omission created by the contractor and in the contract documents, or when the proximate cause was the contractor's failure to perform, update, or comply with the maintenance of traffic control plans, instead of with the traffic safety plan. Provides that such provision does not amend workers compensation law or preclude liability due to a contractor's negligence.
- Removes current law providing that in any civil action against the FDOT or its agents, consultants, engineers, or contractors for work performed, if the FDOT and others specified are immune from liability or are not parties to the litigation, they may not be named on the verdict form or be found to be at fault or responsible for the personal injury, property damage, or death.
- Codifies the FDOT's existing local agency program into Florida law and provides statutory requirements for the program.

The bill has a potential negative fiscal impact on state and local governmental entities. See Section V., Fiscal Impact Statement.

The bill takes effect July 1, 2024.

II. Present Situation:

For ease of organization and readability, the present situation is discussed below with the effect of proposed changes.

III. Effect of Proposed Changes:

Public Transit Funding from the State Transportation Trust Fund (Section 1)

Present Situation

State Transportation Trust Fund

Section 206.46(1), F.S., creates the State Transportation Trust Fund (STTF) within the Florida Department of Transportation (FDOT). The FDOT, as provided by law, must use all moneys in the STTF for transportation purposes.

Florida law identifies specific funding from moneys in the STTF for certain transportation systems and projects, as well as specific funding programs aimed at transportation projects in rural communities. Section 206.46(3), F.S., requires that the FDOT commit annually a minimum of 15 percent of all state revenues deposited into the STTF annually for public transportation projects.¹

State Fuel Taxes

Under Florida law, the sale of motor fuel, diesel fuel, and aviation fuel is subject to state taxes. State taxes on fuel include the Highway Fuel Sales Tax, the Off-Highway Fuel Sales Tax, the State Comprehensive Enhanced Transportation System (SCETS) Tax, the Constitutional Fuel Tax, County Fuel Tax, Municipal Fuel Tax, and the Aviation Fuel Tax. Florida law annually indexes the Highway Fuel Sales Tax and the SCETS Tax to the consumer price index.² Revenues deposited into the STTF include the Highway Fuel Sales Tax on both motor fuel and diesel fuel, the SCETS Tax on both on motor fuel and diesel fuel, and the Aviation Fuel Tax on aviation fuel.³

Motor Vehicle License-Related Fees

The STTF also receives specified revenues from motor-vehicle license fees administered by the Department of Highway Safety and Motor Vehicles. Motor vehicle license-related fees deposited into the STTF include motor vehicle-title related fees,⁴ the initial motor vehicle registration fee,⁵ an additional surcharge on certain commercial vehicles,⁶ a license tax surcharge,⁷ and various dispositions of proceeds from motor vehicle license taxes.⁸

Effect of Proposed Changes

The bill creates s. 206.46(6), F.S., prohibiting the FDOT from annually committing to public transit⁹ projects in accordance with ch. 341, F.S., more than 20 percent of the revenues derived from state fuel taxes and motor vehicle license-related fees deposited into the STTF. The bill provides the following exceptions:

- A public transit project that uses revenues derived from state fuel taxes and motor vehicle-license related fees to match funds made available by the federal government.

¹ Florida Department of Transportation (FDOT), Agency Analysis of 2024 Senate Bill 266, p.2. January 3, 2024. (On file with Senate Committee on Transportation)

² Florida Department of Transportation (FDOT), *Florida Transportation Tax Sources: A Primer 2023*, p 3. <https://fdotewp1.dot.state.fl.us/FMSupportApps/Documents/primer/Primer.pdf> (last visited January 3, 2024).

³ *Id.* at 20.

⁴ *See* s. 319.32(5), F.S.

⁵ *See* s. 320.072(4), F.S. That statute allocates 3.4 percent of the proceeds from the initial motor vehicle registration fee to the New Starts Transit Program.

⁶ *See* s. 320.0801(2), F.S.

⁷ *See* s. 320.0804, F.S.

⁸ *See* s. 320.20, F.S.

⁹ Section 341.031(6), F.S., defines the term “public transit” to mean the transporting of people by conveyances, or systems of conveyances, traveling on land or water, local or regional in nature, and available for use by the public. Public transit systems may be either governmentally owned or privately owned. Public transit specifically includes those forms of transportation commonly known as “paratransit.”

- A public transit project included in the transportation improvement program¹⁰ and approved by a supermajority vote of the board of county commissioners where the project is located.

Public-Private Partnerships (Sections 2, 3, and 9)

Present Situation

Public-private partnerships (P3s) are contractual agreements between a public agency and a private entity that allow for greater private participation in the delivery of projects. For transportation projects, this participation typically involves the private sector taking on additional project risks such as design, construction, finance, long-term operation, and traffic revenue.¹¹

Section 334.30, F.S., authorizes the FDOT to enter into P3 agreements for the building, operation, ownership or financing of transportation facilities. The FDOT's P3 transportation facilities include the I-4 Ultimate in Orange and Seminole Counties and the PortMiami tunnel in Miami-Dade County.¹²

Under s. 334.30, F.S., the FDOT may receive or solicit proposals and, with legislative approval evidenced by the project's approval in the FDOT's work program, enter into P3 agreements with private entities, or consortia thereof, for the building, operation, ownership, or financing of transportation facilities. The FDOT, by rule, must establish an application fee for submitting an unsolicited P3 proposal, which must be sufficient to pay the FDOT's costs to evaluate the proposals.¹³ Before approving a P3, the FDOT must determine that the proposed project:

- Is in the public's best interest;
- Would not require state funds to be used unless the project is on the State Highway System;
- Would have adequate safeguards in place to ensure that no additional costs or service disruptions would be realized in the event of default or cancellation of the agreement;
- Would have adequate safeguards in place to ensure that the FDOT or the private entity has the opportunity to add capacity to the proposed project and other transportation facilities serving similar origins and destinations; and
- Would be owned by the FDOT upon completion or termination of the agreement.

The FDOT must ensure that all reasonable costs to the state, related to transportation facilities that are not part of the State Highway System, are borne by the private entity. The FDOT must also ensure that all reasonable costs to the state and substantially affected local governments and utilities, related to the private transportation facility, are borne by the private entity for privately owned transportation facilities. For projects on the State Highway System, the FDOT may use state resources to participate in funding and financing the project as provided for under its enabling legislation.¹⁴

¹⁰ Metropolitan planning organizations develop transportation improvement programs pursuant to s. 339.135(8), F.S.

¹¹ U.S. Department of Transportation, Public Private-Partnerships (P3), Overview, <https://www.transportation.gov/buildamerica/p3> (last visited January 4, 2024).

¹² FDOT, *Public-Private Partnership Projects*, last updated Aug. 7, 2023, https://fdotwww.blob.core.windows.net/sitefinity/docs/default-source/comptroller/pfo/p3-summary_8-7-2023.pdf (last visited January 3, 2024).

¹³ Rule 14-107.0011, F.S., sets the initial fee for an unsolicited P3 proposal at \$50,000.

¹⁴ Section 334.30(1), F.S.

P3 agreements may authorize the private entity to impose tolls or fares on the transportation facility. Various conditions apply to P3s imposing tolls or fares, including that the P3 agreement must provide that a negotiated portion of revenues from tolls or fares are returned to the FDOT over the life of the agreement. Additionally, the private entity must provide an investment grade traffic and revenue study prepared by an internationally recognized traffic and revenue expert that is accepted by the national bond rating agencies. The private entity must also provide a finance plan identifying the project cost, revenues by source, financing, major assumptions, internal rate of return on private investments, and whether any government funds are required to deliver a cost-feasible project, and a total cash flow analysis beginning with implementation of the project and extending for the term of the agreement.¹⁵

The FDOT may request proposals for P3 projects from private entities. However, if the FDOT receives an unsolicited P3 proposal, it must publish a notice in the Florida Administrative Register and a newspaper of general circulation at least once a week for two weeks. The notice must state that the FDOT has received an unsolicited P3 proposal and will accept, for 120 days after the initial date of publication, other proposals for the same project purpose. The FDOT must mail a copy of the notice to each local government in the affected area.¹⁶

P3 agreements are limited to a term of 50 years. Upon making written findings that a P3 agreement requires a term in excess of 50 years, the FDOT's secretary may authorize an agreement for up to 75 years. P3 agreements may not exceed 75 years unless specifically approved by the Legislature. The FDOT must identify each new P3 project with a term exceeding 75 years in the transmittal letter that accompanies the submittal of its tentative work program to the Governor and the Legislature.¹⁷

In connection with a proposal to finance or refinance a transportation facility using a P3, the FDOT must consult with the Division of Bond Finance.¹⁸ The FDOT must provide the division with the information necessary to provide timely consultation and recommendations. The division may make an independent recommendation to the Executive Office of the Governor.¹⁹

Effect of Proposed Changes

The bill amends s. 334.30, F.S., regarding P3 transportation facilities. Specifically, the bill:

- Authorizes the FDOT to enter into comprehensive agreements for projects approved by the Legislature as evidenced by approval of the FDOT work program.
- Replaces reference to “public-private partnership agreement with “comprehensive” agreement, effectively deleting the term “public-private partnership agreement” from s. 334.30, F.S.
- Requires a private entity, as part of its proposal, to provide an independent, instead of investment grade, traffic and revenue study prepared by a traffic and revenue expert.

¹⁵ Section 334.30(2), F.S.

¹⁶ Section 334.30(6)(a), F.S.

¹⁷ Section 334.30(11), F.S.

¹⁸ The Division of Bond Finance is part of the State Board of Administration.

¹⁹ Section 330.30(13), F.S.

- Requires the independent traffic and revenue study to be accepted by national bond rating agencies before closing on financing that supports the comprehensive agreement for the P3 project.
- Requires the FDOT to publish a notice in the Florida Administrative Register and a newspaper of general circulation at least once a week for 2 weeks stating that the FDOT has received the proposal and will accept, for between 30 and 120 days after the initial date of publication as determined by the FDOT based on the complexity of the project, other proposals for the same project purpose.

The bill authorizes the FDOT before or in connection with the negotiation of a comprehensive agreement, to enter into an interim agreement with the private entity proposing the development or operation of a qualifying project. An interim agreement does not obligate the FDOT to enter into a comprehensive agreement. The interim agreement is discretionary with the parties and is not required on a project for which the parties may proceed directly to a comprehensive agreement without the need for an interim agreement. An interim agreement must be limited to any of the following provisions that:

- Authorize the private entity to commence activities for which it may be compensated related to the proposed qualifying project, including, but not limited to, project planning and development, designing, environmental analysis and mitigation, surveying, other activities concerning any part of the proposed qualifying project, and ascertaining the availability of financing for the proposed facility or facilities.
- Establish the process and timing for the negotiation of the comprehensive agreement.
- Contain such other provisions related to an aspect of the development or operation of a qualifying project which the FDOT and the private entity deem appropriate.

The bill requires that a comprehensive agreement with a term of more than 50 and no more than 75 years for projects that are partially or completely funded from project user fees.

The bill requires the FDOT to notify the Division of Bond Finance before entering into an interim agreement or comprehensive agreement regarding a P3.

According to the FDOT, the interim agreement provision may be most useful for projects without an existing corridor and/or on undeveloped land, which the FDOT has not already performed the project development and environmental (PD&E), design, environmental, and survey. On established corridors, the FDOT typically has significant information and analysis which it has made available as part of other P3 procurements. If the project does not move forward, the FDOT risks having to pay the entity for the work performed.²⁰

The bill amends ss. 288.9606 and 339.2825, F.S., making conforming changes regarding P3 agreements.

²⁰ *Supra* note 1 at 9.

Use of Recyclable Materials in Construction (Section 4)

Present Situation

Under Florida law, a local governmental entity²¹ may not adopt standards or specifications that are contrary to the FDOT's standards or specifications for permissible use of reclaimed asphalt pavement material in construction. For this purpose, such material may not be considered solid waste.²²

Effect of Proposed Changes

The bill amends s. 336.044(5), F.S., to prohibit a local governmental entity from deeming reclaimed asphalt pavement as solid waste.

Design-Build Contracts (Section 5)

Present Situation

Section 337.11(7), F.S., authorizes the FDOT, if it determines that it is in the public's best interest to enter into design-build contracts by combining the design and construction phase of a project into a single contract, known as a design-build contract.²³

If the FDOT determines that it is in the public's best interests, it may combine the design and construction phases of a project fully funded in its work program into a single contract, known as a phased design build contract. With such a contract, the FDOT selects the design-build firm in the early stages of a project to ensure that the design-build firm is part of the collaboration and development of the design as part of a step-by-step progression through construction. For phased design-build contracts, selection and award is a two-phase process. For phase one, the FDOT competitively awards the contract to a design-build firm based upon qualifications. For phase two, the design-build firm competitively bids construction trade subcontractor packages and, based upon these bids, negotiates with the FDOT a fixed firm price or guaranteed maximum price that meets the project budget and scope as advertised in the request for qualifications.²⁴

Under current law, the FDOT must receive at least three letters of interest in order to proceed with a request for proposals. The FDOT must request proposals from no fewer than three of the design-build firms submitting letters of interest. If a design-build firm withdraws from consideration after the FDOT requests proposals, it may continue if it receives least two proposals.²⁵

²¹ Section 334.03(13), F.S. defines the term "local governmental entity" to mean a unit of government with less than statewide jurisdiction, or any officially designated public agency or authority of such a unit of government, that has the responsibility for planning, construction, operation, or maintenance of, or jurisdiction over, a transportation facility; the term includes, but is not limited to, a county, an incorporated municipality, a metropolitan planning organization, an expressway or transportation authority, a road and bridge district, a special road and bridge district, and a regional governmental unit.

²² Section 336.044(5), F.S.

²³ Section 337.11(7)(a), F.S.

²⁴ Section 337.11(7)(b), F.S.

²⁵ Section 337.11(7)(e), F.S.

Effect of Proposed Changes

The bill amends s. 337.11(7)(e), F.S., clarifying that for design-build contracts and phased design-build contracts, the FDOT must receive requests for proposals from no fewer than three of the firms submitting letters of interest. As is current law, if a firm withdraws from consideration after the FDOT requests proposals, the FDOT may continue if it receives least two proposals.

FDOT Contractor Motor Vehicle Registration (Section 5)***Present Situation***

Under Ch. 320, F.S., relating to motor vehicle licenses, except as otherwise provided, every owner or person in charge of a motor vehicle that is operated or driven on Florida's roads must register the motor vehicle in Florida.²⁶

Section 337.11(13), F.S., requires each contract let by the FDOT for the performance of road or bridge construction or maintenance work to require all motor vehicles that the contractor operates or causes to be operated in Florida to be registered in compliance with ch. 320, F.S.

Section 337.141(2), F.S., prohibits any payment to a construction or maintenance contractor until FDOT receives a notarized affidavit from the contractor that he or she has registered all motor vehicles that he or she operates in Florida in compliance with ch. 320, F.S.

Effect of Proposed Changes

The bill amends s. 337.11(13), F.S., to require that any motor vehicle used in the performance of road or bridge construction or maintenance work for the FDOT to be registered in compliance with ch. 320, F.S. Therefore, the FDOT contracts would no longer require a provision regarding motor vehicle registration. However, the affidavit provision in s. 337.141(2), F.S., remains in law.

Surety Bonds – Phased Design Build Contracts (Section 6)***Present Situation***

Under Florida law, if the FDOT determines that it is in the best interests of the public, the FDOT may enter into phased design-build contracts.²⁷

Under Florida law, a surety bond is required of the successful bidder of an FDOT construction or maintenance contract in an amount equal to the awarded contract price. However, the FDOT may choose, in its discretion and applicable only to multi-year maintenance contracts, to allow for incremental annual contract bonds that cumulatively total the full, awarded, multiyear contract price.²⁸

²⁶ Section 320.02(1), F.S.

²⁷ Section 337.11(7)(b) F.S.

²⁸ Section 337.18(1)(a), F.S.

Effect of Proposed Changes

The bill amends s. 337.18(1), F.S., authorizing FDOT, in its discretion and applicable only to phased design-build construction contracts, to allow the issuance of multiple contract performance and payment bonds in succession to align with each phase of the contract to meet the bonding requirements.

Surety Bonds for the FDOT Construction and Maintenance Contracts (Section 6)***Present Situation***

Under Florida law, when the commencement of work is not essential to the public health, safety, or welfare and flexible start and finish times are used in a given contract, the FDOT may withhold up to ten percent retainage on completed work when the contractor either fails to timely commence work or falls behind in work progress at any point prior to completion of the contract.²⁹ Retainage is the portion of monies kept aside until a project is completed in all aspects according to the contract.³⁰

Section 337.175, F.S., provides, in part, that the FDOT “may provide in its construction contracts for retaining a portion of the amount due a contractor for work that the contractor has completed, until completion and final acceptance of the project by the department.”³¹

Section 337.11(11)(a), F.S., authorizes a *prime contractor*, as opposed to the FDOT, to withhold amounts from progress payments made by the FDOT to a prime contractor pursuant to a prime contractor’s agreement with a subcontractor for work completed and materials furnished.

Effect of Proposed Changes

The bill revises certain time frames specified in s. 337.18(1)(d), F.S. The bill provides that an action, except for an action for recovery of retainage, must be instituted by a claimant, against the contractor or the surety on the payment bond or the payment provisions of a combined payment and performance bond within 365 days after the performance of the labor or completion of delivery of the materials or supplies. An action for recovery of retainage must be instituted against the contractor or the surety within 365 days after final acceptance of the contract work by the FDOT.

According to the FDOT, s. 337.18(1)(d), F.S., requires claimants to institute an action against a contractor or surety within 365 days after the FDOT’s final acceptable. While the bill retains this timeline as to an action to recover retainage, it shortens the time to institute an action for payment for labor or materials/supplies by beginning the 365-day timeframe at the time of performance or delivery rather than final acceptance.³²

²⁹ Section 337.015(5), F.S.

³⁰ Black’s Law Dictionary, 2nd Edition.

³¹ *Supra* note 1 at 3.

³² *Id.* at 11

Medical Marijuana/Cause of Impairment (Section 7)

Present Situation

Florida law provides a presumption that a driver of a motor vehicle under the influence of specified substances, including alcohol and certain controlled substances, while involved in a crash in a construction zone is the sole proximate cause of his or her own personal injury, property damage, or death. This presumption can be overcome only if the gross negligence or intentional misconduct of the FDOT, or of its agents, consultants, or contractors, was a proximate cause of the driver's injury, damage, or death.³³

Effect of Proposed Changes

The bill revises the presumption of impairment in s. 337.195(1), F.S., providing that the sole proximate cause on the part of an under-the-influence driver of a vehicle involved in a crash within a construction zone to exclude low-THC cannabis from the list of controlled substances.

FDOT Contractor Limits on Liability (Section 7)

Present Situation

Section 337.195, F.S., limits the liability of the FDOT's construction and maintenance contractors performing services to the FDOT under certain circumstances and limits the liability of a person or entity contracting with the FDOT to provide engineering plans for construction or repair of highway, road, street, bridge, or other transportation facility under certain circumstances.

Section 337.195(2), F.S., provides that a contractor who constructs, maintains, or repairs a highway, road, street, bridge, or other transportation facility for the FDOT is not liable to a claimant for personal injury, property damage, or death arising from the performance of the construction, maintenance, or repair if, at the time of the personal injury, property damage, or death, the contractor was in compliance with contract documents material to the condition that was the proximate cause of the personal injury, property damage, or death.

Section 337.195(2)(a), F.S., provides that a limitation on liability does not apply when the proximate cause of the personal injury, property damage, or death is a latent condition, defect, error, or omission that was created by the contractor and not a defect, error, or omission in the contract documents; or when the proximate cause of the personal injury, property damage, or death was the contractor's failure to perform, update, or comply with the maintenance of the traffic safety plan as required by the contract documents.

For a person or entity who contracts with FDOT to prepare or provide engineering plans, s. 337.195(3), F.S., provides that in all cases involving personal injury, property damage, or death, a person or entity who contracts to prepare or provide engineering plans for the construction or repair of a highway, road, street, bridge, or other transportation facility for FDOT is presumed to have prepared such engineering plans using the degree of care and skill ordinarily exercised by other engineers in the field under similar conditions and in similar localities and with due

³³ Section 337.195(1), F.S.

regard for acceptable engineering standards and principles if the engineering plans conformed to the FDOT's design standards material to the condition or defect that was the proximate cause of the personal injury, property damage, or death. This presumption can be overcome only upon a showing of the person's or entity's gross negligence in the preparation of the engineering plans and may not be interpreted or construed to alter or affect any claim of the FDOT against such person or entity. This limitation on liability does not apply to any hidden or undiscoverable condition created by the engineer. This does not affect any claim of any entity against such engineer or engineering firm, which claim is associated with such entity's facilities on or in the FDOT's roads or other transportation facilities.

Regarding civil actions against the FDOT or its agents, consultants, engineers, or contractors, section 337.195(4), F.S., provides that in any civil action for death, injury, or damages against the FDOT or its agents, consultants, engineers, or contractors for work performed on a highway, road, street, bridge, or other transportation facility, if the department, its agents, consultants, engineers, or contractors are immune from liability pursuant to s. 337.195, F.S., or are not parties to the litigation, they may not be named on the jury verdict form or be found to be at fault or responsible for the injury, death, or damage that gave rise to the damages.

Construction, Engineering and Inspection Firms under FDOT Contract

Section 768.28, F.S., governs waiver of sovereign immunity for tort actions for the state and for its agencies and subdivisions. Under s. 768.28(10)(e), F.S., a professional firm that provides monitoring and inspection services of work required for state roadway, bridge, or other transportation facility construction projects, or any of the firm's employees performing such services, are considered agents of the FDOT while acting within the scope of the firm's contract with the FDOT to ensure that the project is constructed in conformity with the project's plans, specifications, and contract provisions.³⁴

Any contract between the professional firm and the state, to the extent permitted by law, must provide for the indemnification of the FDOT for any liability, including reasonable attorney's fees, incurred up to the limits set out in ch. 768, F.S., to the extent caused by the negligence of the firm or its employees.³⁵

However, s. 768.28(10)(a), F.S., is not applicable to the professional firm or its employees if involved in an accident while operating a motor vehicle. Additionally, s. 768.28(10)(a), F.S., is not applicable to a firm engaged by the FDOT for the design or construction of a state roadway, bridge, or other transportation facility construction project or to its employees, agents, or subcontractors.³⁶

FDOT Contract Documents

While the term "contract documents" is not defined in statute, the FDOT's Standards Specifications for Road and Bridge Construction defines the term to include: the "Advertisement for Proposal, Proposal, Certification as to Publication and Notice of Advertisement for Proposal, Appointment of Agent by Nonresident Contractors, Noncollusion Affidavit, Warranty

³⁴ *Supra* note 1 at 4.

³⁵ *Id.*

³⁶ *Id.*

Concerning Solicitation of the Contract by Others, Resolution of Award of Contract, Executed Form of Contract, Performance Bond and Payment Bond, Specifications, Plans (including revisions thereto issued during construction), Estimated Quantities Report, Standard Plans, Addenda, or other information mailed or otherwise transmitted to the prospective bidders prior to the receipt of bids, work orders and supplemental agreements, all of which are to be treated as one instrument whether or not set forth at length in the form of contract.”³⁷

Maintenance of Traffic Plans

Section 337.11(14), F.S., requires that each the FDOT contract for road or bridge construction or maintenance work contain a traffic maintenance plan showing appropriate regulatory signs and traffic control devices for the work zone area. Traffic maintenance plans are, therefore, part of the contract documents.

Maintenance of traffic “includes all facilities, devices, and operations as required for safety and convenience of the public within the work zone.”³⁸ Maintenance of traffic involves activities such as constructing and maintaining detours; providing facilities for access to residences and businesses; furnishing, installing, and maintaining traffic control and safety devices during construction; and furnishing and installing work zone pavement markings in construction areas.

Effect of Proposed Changes

The bill amends s. 337.195, F.S., regarding limits on liability. The bill defines the term “contract documents” to have same meaning as in the FDOT’s Standard Specifications for Road and Bridge Construction applicable under the contract between the FDOT and the contractor. According to the FDOT, this definition does not appear to contemplate that contracts can be amended during a project or to include specifications that are applicable to the FDOT maintenance contracts.³⁹

The bill defines the term “contractor” to mean a person or an entity, at any contractual tier, including any member of a design-build team, who, pursuant to s. 337.11, F.S., constructs, maintains, or repairs a highway, road, street, bridge, or other transportation facility for the FDOT or in connection with a FDOT project.

According to the FDOT, its Standard Specification 8-1 states: “The Department recognizes a subcontractor only in the capacity of an employee or agent of the Contractor, and the Engineer may require the Contractor to remove the subcontractor as in the case of an employee.” The bill appears to separate the subcontractor from the supervision and general responsibility of the Contractor – inconsistent with the subcontractor being recognized as an employee of the

³⁷ See section 1-3 of the FDOT’s Standard Specifications for Road and Bridge Construction (Standard Specs) available at https://fdotwww.blob.core.windows.net/sitefinity/docs/default-source/programmanagement/implemented/specbooks/fy-2023-24/fy2023-24ebook.pdf?sfvrsn=6b69416d_24 (last visited January 4, 2024). Note that for purposes of certain provisions of the Standard Specs, the term does not include work orders and supplementary agreement, or Resolution of Award of Contract, Executed Form of Contract, and Performance and Payment Bond.

³⁸ See section 102-1 of FDOT’s Standard Specs

³⁹ *Supra* note 1 at 11.

Contractor. The FDOT pays the Contractor to supervise its subcontractors which is shown by the mark-up for extra work.⁴⁰

The bill defines the term “design engineer” to mean a person or an entity, including the design consultant of a design-build team, who contracts to prepare or provide engineering plans, including traffic control plans, for the construction or repair of a highway, road, street, bridge, or other the FDOT transportation facility for the FDOT or in connection with a FDOT project.

The bill defines the term “traffic control plans” to mean the maintenance of traffic plans designed by a professional engineer, or otherwise in accordance with the FDOT’s maintenance of traffic standards and approved by the FDOT.

The bill provides that a contractor is not liable for personal injury, property damage, or death arising from any of the following:

- The performance of the construction, maintenance, or repair of the transportation facility, if, at the time the personal injury, property damage, or death occurred, the contractor was in compliance with the contract documents material to the personal injury, property damage, or death.
- Acts or omissions of a third party that furnishes or contracts at any contractual level to furnish services or materials to the transportation facility, including any subcontractor; sub-subcontractor; laborer; materialman; owner, lessor, or driver of a motor vehicle, trailer, semitrailer, truck, heavy truck, truck tractor, or commercial motor vehicle; or any person who performs services as an architect, a landscape architect, an interior designer, an engineer, or a surveyor and mapper.
- Acts or omissions of a third party who trespasses within the limits of the transportation facility or otherwise is not authorized to enter the area of the transportation facility in which the personal injury, property damage, or death occurred. According to the FDOT, there may be instances where the trespassing was unintentional, such as a motor vehicle accident or a third party’s vehicle breaking down.⁴¹
- Acts or omissions of a third party who damages, modifies, moves, or removes any traffic control device, warning device, barrier, or other facility or device used for the public’s safety and convenience. According to the FDOT, there may be instances where the acts or omission of a third party were unintentional, such as a motor vehicle accident that resulted in damaging, modifying, or moving a traffic control device.⁴²

The bill provides that the limitations on liability do not apply when the proximate cause of the personal injury, property damage, or death is a latent condition, defect, error, or omission that was created by the contractor and not a defect, error, or omission in the traffic control plans, or when the proximate cause of the personal injury, property damage, or death was the contractor’s failure to comply with the traffic control plans as required by contract documents.

The bill provides that the limitation on liability may not be interpreted or construed as relieving the contractor of any obligation to provide the FDOT with written notice of any apparent error or

⁴⁰ *Id.*

⁴¹ *Id.* at 12.

⁴² *Id.*

omission in the contract documents, or as relieving the contractor of his or her contract responsibility to manage the work of others performing under the contract.

The bill provides that this limitation of liability may not be interpreted or construed to alter or amend any provision of the Workers' Compensation Law,⁴³ which takes precedence in the event of any conflict with provisions in this law.

The bill also provides that this limitation on liability does not preclude liability where the contractor's negligence is the proximate cause of the personal injury, property damage, or death.

The bill repeals existing s. 337.195(4), F.S., concerning civil actions for death, injury, or damages against the FDOT or its agents, consultants, engineers, or contractors for work performed on a highway, road, street, bridge, or other transportation facility.

Local Agency Program (Section 8)

Present Situation

Under its Local Agency Program (LAP), the FDOT administers several federal grant programs to provide sub-recipient towns, cities and counties funding to develop, design, and construct transportation facilities. The FDOT is the steward of the federal funds and is responsible for oversight of funded projects on behalf of the Federal Highway Administration (FHWA). Local agencies must be certified to deliver LAP projects.⁴⁴

A LAP may include a wide range of projects, from very simple enhancement projects to the development and construction of major transportation facilities. Federal funds may be authorized for the following project phases:

- Planning;
- Project development and engineering (PD&E) studies;
- Preliminary Engineering;
- Design;
- Right of Way;
- Construction; and
- Construction Engineering and Inspection⁴⁵

Certification and recertification is required for local agencies participating in LAP projects. This certification documents the local agency's capability and proficiency in delivering transportation projects under the program. LAP is the required project delivery mechanism for Federal-aid projects administered by local agencies because the FDOT has established oversight policies and monitoring procedures in LAP that ensure that federal requirements are met throughout project delivery.⁴⁶

⁴³ Chapter 440, F.S.

⁴⁴ Department of Transportation, Program Management/Local Programs, <https://www.fdot.gov/programmanagement/lp/lp> (last visited January 4, 2024).

⁴⁵ *Id.*

⁴⁶ *Id.*

The FDOT and the FHWA retain responsibility for the following:

- Project selection;
- Authorization of funds;
- Determination of National Environmental Policy Act (NEPA) environmental class of action;
- Right of way certification;
- Approval of final plans, specifications, and estimates for all projects;
- Final inspection;
- Equal Employment Opportunity Contract Compliance Program; and
- Disadvantaged Business Enterprise Program.⁴⁷

Receiving federal funds to deliver a LAP project, “federalizes” the project and requires that all phases of project development be completed or retrofitted to comply with applicable federal rules and regulations,⁴⁸ including the federal Uniform Act for right of way acquisition, the National Environmental Policy Act (NEPA), and Buy America.⁴⁹

Federal regulations do not allow the FDOT to delegate the certification of right of way or the determination of environmental class of action. The FDOT must prequalify local agencies on a project-by-project basis to acquire right of way or perform PD&E phases. The local agency must obtain the FDOT’s authorization to proceed with right of way activities after qualification and prior to beginning any right of way activities on the project. Any funds expended or costs incurred prior to authorization will not be reimbursed.⁵⁰

Effect of Proposed Changes

The bill creates s. 339.2820, F.S., creating within the FDOT a local agency program for providing assistance to subrecipient agencies, which include counties, municipalities, intergovernmental agencies and other eligible governmental entities, to develop, design, and construct transportation facilities using federal funds allocated to the FDOT from federal agencies which are awarded to local agencies. The FDOT must update the project cost estimate in the year the project is granted to the local agency and include a contingency amount as part of the project cost estimate.

The FDOT is authorized to oversee projects funded FHWA. Local agencies must prioritize budgeting local projects through their respective metropolitan planning organizations or governing boards so that those organizations or boards may receive reimbursement for the services they provide to the public which are in compliance with applicable federal statutes, rules, and regulations.

Federal-aid highway funds are available only to local agencies that are certified by the FDOT based on the agencies’ qualifications, experience, and ability to comply with federal requirements, and ability to undertake and satisfactorily complete the work.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ FDOT, *LAP Frequently Asked Questions*, available at <https://www.fdot.gov/programmanagement/LAP/FAQ.shtm> (last visited January 4, 2024).

⁵⁰ *Id.*

At a minimum, local agencies must include in their contracts to develop, design, or construct transportation facilities, the FDOT's Division I General Requirements and Covenants for local agencies and a contingency amount in the project cost to account for unforeseen conditions.

Effective Date (Section 10)

The bill takes effect July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Interim agreements on P3 projects may reduce costs associated with project risk because it allows the private entity to perform the necessary due diligence as the final contract is being negotiated.⁵¹

C. Government Sector Impact:

The bill provides that the FDOT may not annually commit, with specified exceptions, more than 20 percent of the revenues derived from state fuel taxes and motor vehicle license-related fees deposited into the STTF to public transit projects. This funding cap limits the total amount of state discretionary funding the FDOT can provide to local

⁵¹ *Supra* Note 1 at 9.

governments and transit agencies.⁵² This may have an indeterminate negative fiscal impact on local governments and public transit agencies.

The bill may have an indeterminate positive fiscal impact on the FDOT and its contractors to the extent that such contractors benefit from the affirmative defenses from liability for personal injury, property damage, or death that may occur due to a motor vehicle crash within a construction zone.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 206.46, 288.9606, 334.30, 337.11, 336.044, 337.18, 337.195, and 339.2825.

This bill creates section 339.2820 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Appropriations Committee on Transportation, Tourism, and Economic Development on February 8, 2024:

The committee substitute:

- Requires the FDOT to notify the Division of Bond Finance before entering into an interim agreement or comprehensive agreement under its P3 statute.
- Clarifies that a local government entity may not deem reclaimed asphalt pavement material as solid waste.
- Authorizes the FDOT to allow the issuance of multiple contract performance and payment bonds for phased design-build contracts.
- Provides that the bill's limitations of liability provisions may not be interpreted or construed to alter or amend any of the Worker's Compensation Law, and in the event of any conflict, the Workers' Compensation Law takes precedence.
- Provides that the limits of liability do not preclude liability where the contractor's negligence is the proximate cause of personal injury, property damage, or death.
- Removes provisions relating to utility relocation.

⁵² *Id.* at 9.

CS by Transportation on January 17, 2024:

Makes conforming changes regarding comprehensive agreements for public-private partnership agreements.

- Removes language requiring the FDOT to pay interest at the judgement interest rate for amounts that remain 75 days after the completion of added work or the eliminate of a project delay.
- Clarifies that for design-build and phased design-build contracts, the FDOT must receive at least three letters of interest in order to proceed with requests for proposals.
- Revises the definitions of “design engineer” as it relates to limitations of liability to include an entity.
- Changes the contractor’s immunity from liability to the contractor being in compliance with the contract documents, instead of the traffic control plan.
- Reiterates that contractors retain responsibility to manage the work of others performing under the contract.
- Requires utility relocation agreements with the FDOT to contain a reasonable relocation schedule to expedite the completion of the FDOT projects and specify a reasonable liquidated damages amount for work that is incomplete beyond the completion date.
- Requires utilities to provide a reasonable utility relocation schedule to expedite the completion of construction or maintenance project on a transportation facility.
- Requires utilities to pay authorities reasonable costs, including liquidated damages, from the utility’s failure or refusal to perform the work.
- Removes language limiting the designation of additional metropolitan planning organizations.
- Makes technical corrections to provisions relating to the Local Agency Program.
- Makes other technical and conforming changes.

B. Amendments:

None.