

**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.)

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Prepared By: The Professional Staff of the Committee on Transportation

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BILL: SB 266

INTRODUCER: Senator Hooper

SUBJECT: Department of Transportation

DATE: January 16, 2024

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Vickers	TR	<b>Pre-meeting</b>
2.			ATD	
3.			AP	

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**I. Summary:**

SB 266 contains various provisions relating to the Florida Department of Transportation (FDOT). The bill:

- Prohibits 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 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 FDOT will accept other proposals for the same project as it received an unsolicited P3 proposal.
  - Authorize 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 FDOT to pay interest, at the statutory judgement interest rate, to a contractor on any unpaid amounts 75 days after the completion of the added work or the elimination of a project delay.
- 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 include that if driver was under the influence of medical marijuana, excluding low-THC cannabis.

- Defines terms and expands contractor immunity from 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 not a defect, error, or omission in the traffic control plans, instead of 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.
- Revises a presumption in all cases involving personal injury, property damage, or death of care and skill relating to engineering plans preparation to apply to a design engineer, rather than to a “person or entity who contracts to prepare or provide engineering plans” for FDOT.
- Removes current law providing that in any civil action against FDOT or its agents, consultants, engineers, or contractors for work performed, if 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.
- Prohibits the designation of additional metropolitan planning organizations (MPOs) after July 1, 2024, except for urbanized areas where the urbanized boundary is not contiguous to an urbanized area designated before the 2020 decennial census.
- Codifies 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* “Fiscal Impact Statement” for details.

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). 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 FDOT commit annually a minimum of

15 percent of all state revenues deposited into the STTF annually for public transportation projects.<sup>1</sup>

### *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.<sup>2</sup> 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.<sup>3</sup>

### *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,<sup>4</sup> the initial motor vehicle registration fee,<sup>5</sup> an additional surcharge on certain commercial vehicles,<sup>6</sup> a license tax surcharge,<sup>7</sup> and various dispositions of proceeds from motor vehicle license taxes.<sup>8</sup>

### *Effect of Proposed Changes*

The bill creates s. 206.46(6), F.S., prohibiting FDOT from annually committing to public transit<sup>9</sup> 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.
- A public transit project included in the transportation improvement program<sup>10</sup> and approved by a supermajority vote of the board of county commissioners where the project is located.

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

<sup>2</sup> Florida Department of Transportation (FDOT), *Florida Transportation Tax Sources: A Primer 2023*, p 3. <https://fdotwp1.dot.state.fl.us/FMSupportApps/Documents/pr/Primer.pdf> (last visited January 3, 2024).

<sup>3</sup> *Id.* at 20.

<sup>4</sup> *See* s. 319.32(5), F.S.

<sup>5</sup> *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.

<sup>6</sup> *See* s. 320.0801(2), F.S.

<sup>7</sup> *See* s. 320.0804, F.S.

<sup>8</sup> *See* s. 320.20, F.S.

<sup>9</sup> 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.”

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

## Public-Private Partnerships (Section 2)

### *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.<sup>11</sup>

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

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

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. 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, FDOT may use state resources to participate in funding and financing the project as provided for under its enabling legislation.<sup>14</sup>

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 that a negotiated portion of revenues from tolls or fares are returned to FDOT

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

<sup>12</sup> 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](https://fdotwww.blob.core.windows.net/sitefinity/docs/default-source/comptroller/pfo/p3-summary_8-7-2023.pdf) (last visited January 3, 2024).

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

<sup>14</sup> Section 334.30(1), F.S.

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.<sup>15</sup>

FDOT may request proposals for P3 projects from private entities. However, if 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 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. FDOT must mail a copy of the notice to each local government in the affected area.<sup>16</sup>

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, 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. 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.<sup>17</sup>

### *Effect of Proposed Changes*

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

- Authorizes 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.
- 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 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 FDOT has received the proposal and will accept, for between 30 and 120 days after the initial date of publication as determined by FDOT based on the complexity of the project, other proposals for the same project purpose.

The bill authorizes 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 FDOT to enter into

<sup>15</sup> Section 334.30(2), F.S.

<sup>16</sup> Section 334.30(6)(a), F.S.

<sup>17</sup> Section 334.30(11), F.S.

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 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.

According to FDOT, the interim agreement provision may be most useful for projects without an existing corridor and/or on undeveloped land, which FDOT has not already performed the project development and environmental (PD&E), design, environmental, and survey. On established corridors, 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, FDOT risks having to pay the entity for the work performed.<sup>18</sup>

### **FDOT Contractor Interest Payments (Section 3)**

#### ***Present Situation***

##### *FDOT Contracting Authority*

Section 337.11, F.S., authorizes FDOT to enter into contracts for the construction and maintenance of all roads designated as part of the State Highway System or the State Park Road System or of any roads placed under its supervision. FDOT also has the authority to enter into contracts for the construction and maintenance of rest areas, weigh stations, and other structures, including roads, parking areas, supporting facilities and associated buildings used in connection with such facilities.<sup>19</sup>

Under Florida law, FDOT has the unilateral authority to pay the contractor the amounts it determines to be due to the contractor for work performed on a project. FDOT's unilateral authority does not preclude or limit the rights of FDOT and the contractor to negotiate and agree to the amounts paid to the contractor. By acceptance of any such unilateral payment, the contractor does not waive any rights it may have against FDOT for payment of any additional sums the contractor claims are due for the work.<sup>20</sup>

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<sup>18</sup> *Supra* note 1 at 9.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> Section 337.11(12), F.S.

### *Statutory Judgement Interest Rate*

Section 55.03(1), F.S., requires the Chief Financial Officer (CFO), on December 1, March 1, June 1, and September 1 of each year, to set the interest rate that is payable on judgments or decrees for the calendar quarters beginning January 1, April 1, July 1, and October 1. The CFO does this by averaging the discount rate of the Federal Reserve Bank of New York for the preceding 12 months, then adding 400 basis points to the averaged federal discount rate. The statutory judgement interest rate takes effect on the first day of each following calendar quarter. Effective January 1, 2024, the statutory judgement interest rate is 9.09 percent per annum.<sup>21</sup>

### *Effect of Proposed Changes*

The bill amends s. 337.11(12), F.S., requiring FDOT to pay interest to the contractor, at statutory judgement interest rate, on any unpaid amounts that remain 75 days after the completion of the added work or the elimination of a project delay.

## **FDOT Contractor Motor Vehicle Registration (Section 3)**

### *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.<sup>22</sup>

Section 337.11(13), F.S., requires each contract let by 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., requiring that any motor vehicle used in the performance of road or bridge construction or maintenance work for FDOT to be registered in compliance with ch. 320, F.S. Therefore, 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 for FDOT Construction and Maintenance Contracts (Section 4)**

### *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, FDOT may withhold up to ten percent retainage on completed work when the contractor either fails to timely

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<sup>21</sup> Florida Department of Financial Services, Accounting and Auditing, *Current Judgement Interest Rates*, available at <https://www.myfloridacfo.com/division/aa/local-governments/judgement-interest-rates> (last visited January 4, 2024).

<sup>22</sup> Section 320.02(1), F.S.

commence work or falls behind in work progress at any point prior to completion of the contract.<sup>23</sup> Retainage is the portion of monies kept aside until a project is completed in all aspects according to the contract.<sup>24</sup>

Section 337.175, F.S., provides, in part, that 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.”<sup>25</sup>

Section 337.11(11)(a), F.S., authorizes a *prime contractor*, as opposed to FDOT, to withhold amounts from progress payments made by 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 FDOT.

According to FDOT, s. 337.18(1)(d), F.S., requires claimants to institute an action against a contractor or surety within 365 days after 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.<sup>26</sup>

### **Medical Marijuana/Cause of Impairment (Section 5)**

#### ***Present Situation***

Florida law provides a presumption that a driver of a motor vehicle under the influence of specified 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 FDOT, or of its agents, consultants, or contractors, was a proximate cause of the driver’s injury, damage, or death.<sup>27</sup>

Section 381.986, F.S., authorizes the medical use of marijuana. For purposes of s. 381.986, F.S., the term “low-THC cannabis” is defined to mean a plant of the genus *Cannabis*, the dried flowers of which contain 0.8 percent or less of tetrahydrocannabinol and more than 10 percent of cannabidiol weight for weight; the seeds thereof; the resin extracted from any part of such plant;

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<sup>23</sup> Section 337.015(5), F.S.

<sup>24</sup> Black’s Law Dictionary, 2<sup>nd</sup> Edition.

<sup>25</sup> *Supra* note 1 at 3.

<sup>26</sup> *Id.* at 11

<sup>27</sup> Section 337.195(1), F.S.



or any compound, manufacture, salt, derivative, mixture, or preparation of such plant or its seeds or resin that is dispensed from a medical marijuana treatment center.<sup>28</sup>

For purposes of s. 381.986, F.S., the term “medical use” is defined to mean the acquisition, possession, use, delivery, transfer, or administration of marijuana authorized by a physician certification.<sup>29</sup> Among other enumerated items, the term “medical use” does *not* include use or administration of marijuana in a school bus, *a vehicle*, an aircraft, or a motorboat, except for low-THC cannabis not in a form for smoking.<sup>30</sup>

### ***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 include that the driver was under the influence of medical marijuana, excluding low-THC cannabis.

### **FDOT Contractor Limits on Liability (Section 5)**

#### ***Present Situation***

Section 337.195, F.S., limits the liability of FDOT’s construction and maintenance contractors performing services to FDOT under certain circumstances and limits the liability of a person or entity contracting with 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 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 is 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 be 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

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<sup>28</sup> Section 381.986(f), F.S.

<sup>29</sup> Section 381.986(k), F.S.

<sup>30</sup> Section 318.986(k)5.f., F.S.

regard for acceptable engineering standards and principles if the engineering plans conformed to 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 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 FDOT's roads or other transportation facilities.

Regarding civil actions against 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 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 FDOT while acting within the scope of the firm's contract with FDOT to ensure that the project is constructed in conformity with the project's plans, specifications, and contract provisions.<sup>31</sup>

Any contract between the professional firm and the state, to the extent permitted by law, must provide for the indemnification of 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.<sup>32</sup>

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 FDOT for the design or construction of a state roadway, bridge, or other transportation facility construction project or to its employees, agents, or subcontractors.<sup>33</sup>

#### *FDOT Contract Documents*

While the term "contract documents" is not defined in statute, 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 Concerning Solicitation

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<sup>31</sup> *Supra* note 1 at 4.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

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.”<sup>34</sup>

### *Maintenance of Traffic Plans*

Section 337.11(14), F.S., requires that each 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.”<sup>35</sup> 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 section 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 FDOT and the contractor. According to FDOT, this definition does not appear to contemplate that contracts can be amended during a project or to include specifications that are applicable to FDOT maintenance contracts.<sup>36</sup>

The bill defines the term “contractor” to mean a person, 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 FDOT or in connection with a FDOT project.

According to FDOT, this definition of “contractor” only refers to a person. FDOT typically enters into a contract with a legal entity and not a person, and the term may need to include “entity, firm, and company.” Additionally, this definition does not clearly define “contractor” as the entity having a contract with FDOT.<sup>37</sup>

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<sup>34</sup> 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](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.

<sup>35</sup> See section 102-1 of FDOT’s Standard Specs

<sup>36</sup> *Supra* note 1 at 11.

<sup>37</sup> *Id.*

Additionally, FDOT's 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 Contractor. FDOT pays the Contractor to supervise its subcontractors which is shown by the mark-up for extra work.<sup>38</sup>

The bill defines the term "design engineer" to mean a person, 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 FDOT transportation facility for the FDOT or in connection with a FDOT project.

Similar to the definition of "contractor" the definition of "design engineer" only references a "person" and FDOT typically enters into a contract with a legal entity and not a person.<sup>39</sup>

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 FDOT.

The bill provides that a contractor is immune from liability 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 traffic control plan material to the personal injury, property damage, or death.
- Acts or omissions of a third party that furnishes or contracts 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 FDOT, FDOT there may be instances where the trespassing was unintentional, such as a motor vehicle accident or a third party's vehicle breaking down.<sup>40</sup>
- 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 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.<sup>41</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 12.

<sup>41</sup> *Id.*

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 maintenance of traffic control plans as required by contract documents.

For all cases involving personal injury, property damage, or death, in existing section 337.195(3), F.S., the bill replaces the term "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 with "design engineer" throughout s. 337.195, F.S. The bill also deletes reference to "engineer" or "engineering firm" and replaces these terms with "design engineer" regarding any claim that is associated with such entity's facilities on or in FDOT roads or other transportation facilities. According to FDOT, this change appears to shift any potential liability to the design engineer and not the firm or company that employs the design engineer.<sup>42</sup>

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

## **Metropolitan Planning Organizations (Section 6)**

### ***Present Situation***

A metropolitan planning organization (MPO) is the policy board created and designated to carry out the metropolitan transportation planning process.<sup>43</sup> MPOs are required to represent localities in all urbanized areas with populations over 50,000, as determined by the U.S. Census.<sup>44</sup> Currently, Florida has 27 MPOs, the largest number of MPOs in the nation.

### ***Federal Law***

Federal law and regulations give significant responsibility for transportation planning to metropolitan planning organizations (MPOs), in coordination with FDOT and others. Federal law requires MPOs to be designated for each urbanized area with a population of more than 50,000 individuals by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population, including the largest incorporated city; or in accordance with procedures established by applicable state or local law.<sup>45</sup>

### ***Florida Law***

Under Florida law, an MPO must be designated for each urbanized area. However, an individual MPO is not required to be designated for each urbanized area. MPO designation is accomplished by agreement between the Governor and units of general-purpose local government representing

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<sup>42</sup> *Id.* at 11-12.

<sup>43</sup> 23 C.F.R. § 450.104.

<sup>44</sup> Federal Transit Administration, *Metropolitan Planning Organization*, <https://www.transit.dot.gov/regulations-and-guidance/transportation-planning/metropolitan-planning-organization-mpo> (last visited January 4, 2024).

<sup>45</sup> 23 U.S.C., § 134(d)(1)

at least 75 percent of the population of the urbanized area. However, the unit of general-purpose local government representing the central city or cities within the MPO must be a party to such agreement.<sup>46</sup>

To the extent possible, only one MPO may be designated for each urbanized area or group of contiguous urbanized areas. More than one MPO may be designated within an existing urbanized area only if the Governor and the existing MPO determine that the size and complexity of the existing urbanized area makes the designation of more than one MPO for the area appropriate, in which case each MPO designated for the urbanized area must:

- Consult with every other MPO designated for the urbanized area and the state to coordinate plans and transportation improvement programs.
- Ensure, to the maximum extent practicable, the consistency of data used in the planning process, including data used in forecasting travel demand within the urbanized area.<sup>47</sup>

Each MPO is created and operated pursuant to an interlocal agreement,<sup>48</sup> between FDOT and the governmental entities designated by the Governor for MPO membership. Each MPO is separate from the state or the governing body of a local government represented on the MPO's governing board or that is a signatory to the interlocal agreement creating the MPO.<sup>49</sup>

An MPO's boundaries are determined by agreement between the Governor and the applicable MPO. The boundaries must include at least the metropolitan planning area, which is the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period, and may encompass the entire metropolitan statistical area or the consolidated metropolitan statistical area.<sup>50</sup>

An MPO's jurisdictional boundaries are determined by agreement between the Governor and the applicable MPO. Such boundaries must include at least the metropolitan planning area, which, under s. 339.175(2)(c), F.S., is the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period, and may encompass the entire metropolitan statistical area or the consolidated metropolitan statistical area. In those cases where two or more MPOs serve the same urbanized area, the MPOs must establish official, written agreements that clearly identify areas of coordination and the division of transportation planning responsibilities among the MPOs.<sup>51</sup>

### *Effect of Proposed Changes*

The bill amends s. 339.175(2), F.S., prohibiting after July 1, 2024, Florida from designating additional MPOs except for urbanized areas, as defined by the United States Census Bureau, where the urbanized area boundary is not contiguous to an urbanized area designed before the 2020 decennial census.

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<sup>46</sup> Section 339.175(2)(a)1., F.S.

<sup>47</sup> Section 339.175(2)(a)2., F.S.

<sup>48</sup> Interlocal agreements are entered into pursuant to s. 163.01, F.S.

<sup>49</sup> Section 339.175(2)(b), F.S.

<sup>50</sup> Section 339.175(2)(c), F.S.

<sup>51</sup> Section 339.175(2)(d), F.S.

## Local Agency Program (Section 7)

### *Present Situation*

Under its Local Agency Program (LAP), FDOT provides sub-recipient towns, cities and counties develop, design, and construct transportation facilities with federal funds. 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.<sup>52</sup>

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 Inspection<sup>53</sup>

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 FDOT has established oversight policies and monitoring procedures in LAP that ensure that federal requirements are met throughout project delivery.<sup>54</sup>

FDOT and 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.<sup>55</sup>

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

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<sup>52</sup> Department of Transportation, Program Management/Local Programs, <https://www.fdot.gov/programmanagement/lp/lp> (last visited January 4, 2024).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

rules and regulations,<sup>56</sup> including the federal Uniform Act for right of way acquisition, the National Environmental Policy Act (NEPA), and Buy America.<sup>57</sup>

Federal regulations do not allow FDOT to delegate the certification of right of way or the determination of environmental class of action. 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 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.<sup>58</sup>

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

The bill creates s. 339.2820, F.S., establishing within FDOT a local agency program for the purpose of providing assistance to subrecipient counties, cities, and towns to develop, design, and construct transportation facilities with federal funds.

FDOT is responsible for oversight of funded projects on behalf of the FHWA. Local agencies must prioritize and fund local projects that are eligible for reimbursement for the services provided to the traveling public through compliance with applicable federal statutes, rules, and regulations.

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

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 8)**

The bill takes effect July 1, 2024.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

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<sup>56</sup> *Id.*

<sup>57</sup> FDOT, *LAP Frequently Asked Questions*, available at <https://www.fdot.gov/programmanagement/LAP/FAQ.shtm> (last visited January 4, 2024).

<sup>58</sup> *Id.*



**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

Article I s. 21 of the Florida Constitution provides that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” The bill revises the limits the liability of FDOT contractors in specified situations to whether or not the contractor was in compliance with the traffic control plan. This is instead of the contract documents as in current law. To the extent that this change in the limitation on liability negatively affects the ability for a party to seek redress in the courts, the bill may negatively affect to one’s access to courts.

In *Kluger v. White*, the Florida Supreme Court held that to survive an access to courts challenge, a statute eliminating redress for an injury must satisfy at least one of two possible prongs: (1) either the statute must provide a reasonable alternative to redress the injury involved, or (2) the Legislature must show that there was "an overpowering public necessity for the abolishment" and that there was "no alternative method of meeting such public necessity."<sup>59</sup>

**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.<sup>60</sup>

The bill may increase revenue to the private sector by requiring FDOT to pay interest to the contractor for any unpaid amounts remaining 75 days after the completion of the added work or the elimination of a project delay.<sup>61</sup>

**C. Government Sector Impact:**

The bill provides that FDOT may not annually commit, with specified exceptions, more than 20 percent of the revenues derived from state fuel taxes and motor vehicle license-

<sup>59</sup> *Kluger v. White*, 281 So. 2d 1. (Fla. 1973).

<sup>60</sup> *Supra* Note 1 at 9.

<sup>61</sup> *Id.* at 10.

related fees deposited into the STTF to public transit projects. This funding cap limits the total amount of state discretionary funding FDOT can provide to local governments and transit agencies.<sup>62</sup> This may have an indeterminate negative fiscal impact on local governments and public transit agencies.

The bill's cap on public transit funding limits the total amount of state discretionary funding FDOT can provide to local governments and transit agencies for statutorily required state block grant funding. Although public transportation projects planned in FDOT's current 5-year work program are within the bill's thresholds; this may limit public transportation solutions as a future transportation option when conditions prevent road construction.<sup>63</sup>

The bill requires FDOT to pay interest to the contractor on any unpaid amounts that remain 75 days after completion of the added work or elimination of project delay. There is an indeterminate negative impact on FDOT's work program and cash forecast for additional interest payments.<sup>64</sup>

The bill may have an indeterminate positive fiscal impact on 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:

Other FDOT-related statutes that use the term "public-private partnership agreement" may need to be amended to conform to changes to the P3 statute referring to a comprehensive agreement.

## VII. Related Issues:

The revision to the MPO designation statute may violate federal law, and be in conflict with existing state law, by precluding designation of more than one MPO where an urbanized area boundary *is* contiguous to an urbanized area designated before the 2020 decennial census. *To the extent possible, both* federal and state law call for a single MPO designation for each urbanized area *or group of contiguous urbanized areas*. However, as indicated, more than one MPO may be designated within an existing urbanized area if the required agreement between the Governor and the relevant local governments is achieved. Because groups of contiguous urbanized areas are included in the designation provisions of both federal and state law, it appears that designation of more than one MPO is authorized for contiguous urbanized areas; that is, a *group of contiguous urbanized areas*, regardless of when designated, provided the required agreement is achieved.

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<sup>62</sup> *Id.* at 9.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 206.46, 334.30, 337.11, 337.18, 337.195, and 339.175.

This bill creates the following section of the Florida Statutes: 339.2820.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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

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