

STORAGE NAME: h1009.go
DATE: April 14, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: HB 1009
RELATING TO: Contracts with Federal Government
SPONSOR(S): Representative Wiles and others
COMPANION BILL(S): SB 2568 (similar)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIARY YEAS 8 NAYS 0
- (2) GOVERNMENTAL OPERATIONS
- (3) GENERAL APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

The bill authorizes the State of Florida and its political subdivisions to enter into cooperative agreements and contracts with the federal government which include indemnification and hold harmless clauses when required by federal law in order to obtain federal funds or federal benefits.

The fiscal impact of this bill has not yet been determined.

The bill will become effective upon becoming law.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Pursuant to the Intergovernmental Cooperation Act, 31 U.S.C. ss. 6505 and 6506, the President is authorized to direct the head of an executive agency to provide services to state or local government when: (1) the state or local government makes written request; and (2) the state or local government provides to the executive agency the identifiable costs of providing the services required.

The development assistance provided by the Act is intended to promote economic and social development of the United States and to achieve satisfactory living conditions which depend upon sound and orderly development of urban and rural areas. In accord, the President is authorized to prescribe regulations in the review of United States Government programs and projects having a significant impact in these areas. Prescribed regulations provide consideration for:

- (1) appropriate land uses for housing, commercial, industrial, governmental, institutional, and other purposes.
- (2) wise development and conservation of all natural resources.
- (3) balanced transportation systems, including highway, air, water, pedestrian, mass transit, and other means to move people and goods.
- (4) adequate outdoor recreation and open space.
- (5) protection of areas of unique natural beauty and historic and scientific interest.
- (6) properly planned community facilities (including utilities for supplying power, water and communications) for safely disposing of wastes, and for other purposes.
- (7) concern for high standards of design.

Under the authority of 10 U.S.C. s. 3036, the Secretary of the Army may direct the Chief of Engineers to accept orders to provide services to a state or political subdivision thereof, and may provide any part of those services by contract. The provision of services to state and local government are contingent upon whether:

- (1) Federal assistance is being provided and the head of the department or agency providing the assistance for the work does not object to the provision of services by the Chief of Engineers; and
- (2) the services are reimbursable.

Limitation of Liability

Pursuant to 42 U.S.C. 1962d-15, the United States Government is protected from liability regarding any water resources development project under the jurisdiction of the Secretary of the Army, held by a non-federal interest, including damages for construction, operation, and maintenance of the project. This does not include damages due to fault or negligence on the part of the United States or its contractors.

St. Johns County currently seeks to enter into a contract with the U.S. Army Corps of Engineers to upgrade the Palm Valley Bridge design from two lanes to four. The preferred option is for the Corps to design and construct the four lane structure. This bridge is critical in the evacuation of residents near the intracoastal waterway. St. Johns River Water Management District entered into a similar contract with the Army Corps of Engineers in 1987 to construct the Upper St. Johns River Basin Flood Control Project. In a contract dated December 17, 1987, the contract provisions between the St. Johns River Water Management District and U.S. Army Corps of Engineers incorporated the following language with regard to immunity and indemnification:

“...The Local Sponsor shall hold and save the Government free from all damages arising from the construction, operation, and maintenance of the project, except for damages due to the fault or negligence of the Government, or its contractors...”

B. EFFECT OF PROPOSED CHANGES:

This bill will authorize state and local governments, entering into cooperative agreements or contracts with the Federal Government, to hold harmless and indemnify the Federal Government or agencies thereof, when required by federal law in order to obtain federal funds or the benefits from such funds. This bill will take effect upon becoming law.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No. The state currently waives sovereign immunity for tort and in certain contract matters; the state would remain liable for the actions of its agents or employees and the federal government would remain liable for the actions of its agents or employees.

(3) any entitlement to a government service or benefit?

Yes. State agencies and entities could have available to them federal assistance which would not be available but for the indemnification.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Costs may be paid by the federal government, or the federal government may furnish services to the state, its agencies, and political subdivisions.

(2) what is the cost of such responsibility at the new level/agency?

Not yet determined.

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

The bill does not purport to provide services to families or children.

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

The bill does not create or change a program providing services to families or children.

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

The bill creates s. 215.245, F.S.

E. SECTION-BY-SECTION ANALYSIS:

None.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Not yet determined.

2. Recurring Effects:

Agencies may be eligible for additional federal services or funds; agencies may have additional liability exposure because of the indemnification..

3. Long Run Effects Other Than Normal Growth:

Not yet determined.

4. Total Revenues and Expenditures:

Not yet determined.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

Not yet determined.

2. Recurring Effects:

Local governments may be eligible for additional federal services or funds; local governments may have additional liability exposure because of the indemnification.

3. Long Run Effects Other Than Normal Growth:

Not yet determined.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Not yet determined.

2. Direct Private Sector Benefits:

Not yet determined.

3. Effects on Competition, Private Enterprise and Employment Markets:

Not yet determined.

D. FISCAL COMMENTS:

Not yet determined.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Constitutional Issues

Sovereign Immunity

Article X, s. 13 of the Florida Constitution, provides that the Legislature may, by general law, make provision for the bringing of suit as to all liabilities. The state has waived its sovereign immunity for liability for torts, but only to the extent specified in s. 768.28 (1), F.S. The types of actions at law that may be prosecuted to recover damages in tort for money damages against the state or its agencies or subdivisions are for: (1) injury or loss of property, (2) personal injury, and (3) death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision if the employee was acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant. The law authorizes that any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

State agencies or subdivisions are defined under s. 768.28(2), F.S., to include:

...the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Spaceport Florida Authority.

This waiver of sovereign immunity is limited, however. The state and its agencies and subdivisions are liable for tort claims in the same manner and to the same extent as private individuals under like circumstances, but liability cannot include punitive damages or interest for the period before judgment. The liability of the state is authorized up to a certain dollar amount. Neither the state nor its agencies or subdivisions are liable to pay a claim or a judgment by any one person which exceeds the sum of \$100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$200,000.

Nothing precludes a judgment or judgments to be claimed and rendered in excess of the \$100,000 or \$200,000 amounts. Cases may be settled and paid pursuant to s. 768.28(5), F.S., up to \$100,000 or \$200,000, as the case may be. Any portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature through the passage of "claims bills."

Limitations on Funds withdrawn from the Treasury and requisite Appropriations

The bill does not limit the indemnification in any way. This raises both constitutional and statutory issues. Article VII, Section 1 (c), Florida Constitution, requires that no moneys be withdrawn from the Treasury except in pursuance of appropriation made by law. This language requires state liabilities to be limited to appropriated amounts, and the current bill contains no such limitation.

Section 45.062, F.S., pertains to civil actions in which an agency of the executive branch is a party. It requires that when an agency of the executive branch is a party in any civil action, any settlement, condition, or order requiring the expenditure of or the obligation to expend state funds or other state resources, or the establishment of any new program must: (1) be provided for by an existing appropriation or program established by law; and (2) provide written notification to the President of the Senate, the Speaker of the House of Representatives, the Senate and House minority leaders, and the Attorney General within 5 business days of the date of the settlement or presettlement agreement or order is made final.

The bill should include a reference to the provisions of s. 45.062, F.S.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

One amendment was adopted which specifically authorizes the state and its political subdivisions to enter into indemnification agreements with the Federal Government with respect to **water resources development projects**. The amendment also limits the indemnity to the extent currently required by federal law and subjects the indemnification to available appropriations.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Jo Ann Levin

Staff Director:

Don Rubottom

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

Jen Girgen

Staff Director:

Jimmy O. Helms