SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 240

SPONSOR: Senator Sebesta

SUBJECT: Suits By or Against Department of Transportation

DATE: February 25, 1999 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McAuliffe	Meyer	TR	Favorable
2.	Rhea	Wilson	GO	Favorable
3.			FP	
4.				
5.				

I. Summary:

The bill authorizes suits in contract by or against the Department of Transportation (DOT) that arise from breach of: (a) an express contract provision; (b) an implied covenant of a written agreement; or (c) a written directive issued by the department pursuant to the written agreement. The bill expressly provides that in such suits, the DOT and the contractor have the same rights, obligations, remedies, and defenses that a private person has under a like contract except that no liability may be based on an oral modification of either the written contract or a written directive.

This bill amends section 337.19, Florida Statutes.

II. Present Situation:

Section 337.19(1), F.S., provides that suits at law and in equity may be brought by and against the Department of Transportation (DOT) on any claim under contract for work done. The section expressly prohibits any suit in tort against the department.

The section requires such suits to be commenced within 820 days of the final acceptance of the work. The suit must be brought in the county or counties where the cause of action accrued, in the county of the DOT's district headquarters, or in Leon County.

Historically, under the doctrine of sovereign immunity, a suit may not be brought against the state if the state does not give its consent to be sued. One of the purposes of this doctrine is to protect state finances, which in turn ultimately protects the public by safeguarding tax dollars. In Florida, as in most states, the application of the doctrine of sovereign immunity has been limited by statutory and case law.

Article X, s. 13 of the State Constitution, authorizes the Legislature to provide by general law for suits against the state. The Legislature, in s. 768.28, F.S., provided a limited waiver of sovereign immunity for torts by the state, its agencies and subdivisions. Under that section, actions may be

brought against the state, its agencies, or subdivisions to recover money damages for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any governmental employee while acting within the scope of the employee's office or employment under circumstances in which a private person would be liable to the claimant.

While governmental entities in Florida are liable for tort claims in the same manner and to the same extent as private individuals under like circumstances, there are some differences between the two. For governmental entities, neither punitive damages nor interest for the period before judgment is included in the liability. Another important distinction between governmental entities and private persons is that there is a $100,000 limit on a governmental entity's liability to a single person in tort cases. The law also establishes a $200,000 limit on a governmental entity's liability for tort claims arising out of a single incident.

While there are monetary limits established in law that a governmental entity may be required to pay for actions in tort, this limitation does not preclude a judgment for a higher amount. If a judgment is rendered in excess of the statutory monetary limitations, however, any amount in excess of those limitations must be reported to the Legislature for its consideration prior to payment.

Although no express legislative waiver of sovereign immunity has been granted for contract claims, the Florida Supreme Court in *Pan-Am Tobacco Corp. v. Department of Corrections*,[1] determined that there is an implied waiver of sovereign immunity in contract in Florida because the Legislature has explicitly empowered state agencies to enter into contracts and a contract that is not mutually enforceable is an illusory contract. "Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound."[2] The Court in *Pan-Am*, however, finished its opinion with a caveat, stating that the holding of the case was applicable ". . . only to suits on express, written contracts into which the state agency has statutory authority to enter." This opinion left open the question as to whether the waiver of sovereign immunity would extend to implied conditions of written contracts.

Subsequent to *Pan-Am*, the Second District Court of Appeal held in *Southern Roadbuilders, Inc. v. Lee County*,[3] that sovereign immunity under the *Pan-Am* standard barred a contractor's claim for payment for additional work where that work was not included in the original contract or any subsequent *written* instrument. Later, in *Champagne-Weber, Inc. v. City of Fort Lauderdale*,[4] the Fourth District Court of Appeal reasoned that *Pan-Am* did not preclude a contractor from

[1]471 So.2d 4 (Fla. 1984).

[2]*Pan-Am Tobacco* at 5.

[3]495 So.2d 189 (Fla. 2d DCA 1986).

[4]519 So.2d 696 (Fla. 4th DCA 1988).

recovering additional expenses based on a claim of breach of *implied* covenants or conditions *contained within the scope of an express written contract*.[5]

In the case *County of Brevard v. Miorelli Engineering, Inc.*,[6] Miorelli Engineering, Inc. (MEI) contracted with Brevard County to construct a spring training facility for the Florida Marlins. It was agreed the project would be built within a specified time period. After MEI began developing the facility, a dispute arose between MEI and the county and the county terminated MEI as contractor and withheld the remaining amounts due under the contract. MEI filed suit against the county seeking to recover the withheld amounts, as well as payment for *extra* work.

The county filed a motion for summary judgment based in part on the sovereign immunity defense. The county asserted it was sovereignly immune from MEI's claims for the extra work because the extra work was not expressly included in the terms of the written agreement. MEI asserted that, although the written contract indicated that the project was not to be modified without written change orders, the county had waived the requirement by directing changes to the project without following its own formalities with regard to preparing written change orders. The trial court concluded that the contract claims to recover damages for extra work was not barred by the doctrine of sovereign immunity. The county appealed to the Fifth District Court of Appeal. The district court, relying heavily on *Champagne-Weber*, found that contract claims based on breach of the implied covenants of good faith and fair dealing should not be barred by sovereign immunity.

On appeal, the Florida Supreme Court[7] refused to hold that the doctrines of waiver and estoppel could be used to defeat the express terms of the contract.[8] The Court distinguished *Miorelli* from *Champagne-Weber* because in the latter case the city had represented to the contractor that the soil at a construction site was sand only. Once work commenced, the contractor discovered that the soil contained both sand and rock. The Court described the key issue in *Champagne-Weber* to be whether the city had misrepresented the soil conditions and whether the contractor had justifiably relied on the misrepresentation. In *Miorelli*, however, the Florida Supreme Court found that the extra work claims were for work totally *outside the terms* of the contract. The court stated that "[b]inding the sovereign to the implied covenants of an express contract is quite different from requiring a sovereign to pay for work not contemplated by that contract." The Court found that without a written change order, the doctrine of sovereign immunity did in fact preclude recovery of the cost of the extra work.

The court addressed one final point in *Miorelli*. In that case, MEI asserted that the County had waived a written change order requirement by directing work changes without following its own formalities. On this point, the Florida Supreme Court stated:

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[5]An implied covenant is an agreement or promise which may reasonably be inferred from a written contract or from the circumstances surrounding its execution. Virtually every contract contains implied covenants and conditions, such as dealing in good faith, not to obstruct performance by the other party, and not to provide false information.

[6]677 So.2d 32 (Fla. 5th DCA 1996).

[7]703 So.2d 1049 (Fla. 1997).

[8]*Miorelli* at 1051.

> We decline to hold that the doctrines of waiver and estoppel can be used to defeat the express terms of the contract. Otherwise, the requirement of *Pan Am* that there first be an express written contract before there can be a waiver of sovereign immunity would be an empty one. An unscrupulous or careless government employee could alter or waive the terms of the written agreement, thereby leaving the sovereign with potentially unlimited liability.[9]

III. Effect of Proposed Changes:

Section 337.19(1), F.S., is amended to codify the existing case law found in *Miorelli* by authorizing suits at law and in equity to be brought and maintained by and against the department on any contract claim arising from breach of an express provision or implied covenant of a written agreement. In addition, s. 337.19(1), F.S. is amended to allow suits to be maintained on any written directive issued by the department pursuant to the written agreement. In any such suit, the department and contractor shall have all the same rights, obligations, remedies and defenses as a private person under a like contract, except no liability may be based on an oral modification of the written contract or written directive. The section is further amended to provide that no employee or agent of the department may be held personally liable to an extent greater than described under s. 768.28, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminable.

[9] *Miorelli*, 703 So.2d at 1051.

C. Government Sector Impact:

The department reports that the fiscal impact, if any, is indeterminable. If the bill results in the use of the doctrines of waiver and estoppel to defeat the express terms of state agency written contracts, governmental litigation over contractual matters could increase, and costs could increase.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill codifies portions of the Florida Supreme Court decision in *County of Brevard v. Miorelli Engineering, Inc.*[10] In that case, the Court reiterated that sovereign immunity barred a contractor's claim against a governmental entity for work that was not included in the original contract or any subsequent written instrument. The Court also agreed that claims for breach of implied covenants or conditions contained within the scope of an express written contract were not barred. Additionally, however, the Court in *Miorelli* rejected the argument that the doctrines of waiver or estoppel could be used against the state to defeat the express terms of a contract. The bill, however, provides that the public authority and the contractor have ". . . all of the same rights, obligations, remedies, and defenses as a private person. . . ," which includes waiver and estoppel. Even though this provision of the bill is limited by the clause, ". . . except no liability may be based on an *oral* modification. . . .," it could be argued that action or nonaction of a governmental authority, or its agents or employees, could result in a modification of the terms of the contract and that liability should be imposed.

VIII. Amendments:

None.

[10]703 So.2d 1049 (Fla. 1997).