

STORAGE NAME: h0243s1a.jud

DATE: March 23, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: CS/HB 243

RELATING TO: Public Works Projects/Suits

SPONSOR(S): Committee on Governmental Operations, Representative Trovillion and others

COMPANION BILL(S): SB 810(i)

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

- (1) GOVERNMENTAL OPERATIONS YEAS 4 NAYS 0
 - (2) JUDICIARY
 - (3) TRANSPORTATION & ECONOMIC DEVELOPMENT APPROPRIATIONS
 - (4)
 - (5)
-

I. SUMMARY:

The bill specifies conditions under which suits may be brought by and against public authorities on any contract claim arising from breach of an express provision or an implied covenant of a written agreement. In any such suit, both the public authority and the contractor shall have the same rights, obligations, remedies and defenses as a private person, except for liability based on an oral modification.

The bill does not prohibit the public authority from limiting its liability or damages through the contract itself.

The Judiciary Committee tabled HB 243 and adopted a Committee Substitute to HB 311 which consolidates the changes proposed to Section 255.05 and 337.19, F.S., in HB 243 and HB 311. Please see the analysis of CS/HB 311 for further information.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Sovereign Immunity

Sovereign Immunity is the judicial doctrine which precludes bringing suit against a governmental entity without its consent. The doctrine prevents holding a governmental entity liable for the actions of its officers or agents unless such immunity is expressly waived by law, or by necessary inference. This doctrine protects the financial interests of a governmental entity, and therefore protects public tax dollars. Sovereign immunity applies to all subdivisions of the state, including counties and school boards.

The Florida Constitution addresses sovereign immunity in Article X, Section 13. This provision allows the Legislature to waive immunity for governmental entities through an enactment of general law. Pursuant to this provision, the Legislature has, in limited circumstances, partially waived sovereign immunity. In 1973, the Legislature enacted s. 768.28, F.S., which allows individuals in tort cases to sue state government, subdivisions of the state, and municipalities. According to subsection (1), individuals in tort cases may sue the government under circumstances where a private person "would be liable to the claimant, in accordance with the general laws of this state" With a partial waiver under s.768.28, F.S., certain elements of sovereign immunity remain in effect:

- (1) **Monetary Limits on Recovery** - Section 768.28(5), F.S., imposes a \$100,000 limit on the government's liability to a single person in tort cases. Furthermore, it imposes a \$200,000 limit on the government's liability for tort claims arising out of a single incident. These limits do not preclude plaintiffs from obtaining judgments in excess of the recovery cap. However, plaintiffs cannot force the government to pay damages which exceed the recovery cap.
- (2) **Discretionary Functions** - Where the state is involved in a discretionary or planning-level function, no liability is imposed. See e.g., *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979); *Leonard v. Wakulla County*, 688 So.2d 440 (Fla. 1st DCA 1997); *Collazos v. City of West Miami*, 683 So.2d 1161 (Fla. 3d DCA 1996). Discretionary functions include areas such as licensing, legislating, judicial decision-making, permitting, inspecting, designing public improvements, and other types of high-level planning. The courts use a four-part test to determine whether an activity should be classified as discretionary. Courts ask: (a) does the challenged government activity involve a basic government policy, program, or objective, (b) is the challenged activity central to the accomplishment of the policy, program, or objective, (c) does the challenged activity require the government to make policy evaluations, exercise judgement, or use expertise, and (d) does the government agency possess proper legal authority to engage in the challenged activity? *Department of Health and Rehabilitative Services v. Yamuni*, 529 So.2d 258 (Fla. 1988).
- (3) **Public Duty Doctrine** - Where the government owes a general duty to all citizens, but no particular duty to the injured party, sovereign immunity remains in effect. This exception to waiver is known as the "public duty doctrine." See e.g., *Trianon Park Condominium Association v. City of Hialeah*, 468 So.2d 912 (Fla. 1985); *Layton v. Florida Department of Highway Safety & Motor Vehicles*, 676 So.2d 1038 (Fla. 1st DCA 1996), *rehearing denied* (Aug. 7, 1996); *First American Title Insurance Co. of St. Lucie County, Inc. v. Dixon*, 603 So.2d 562 (Fla. 4th DCA 1992) *rehearing, rehearing en banc, and cert. denied* (Sept. 10, 1992); *Bovio v. City of Miami Springs*, 523 So.2d 1247 (Fla. 3d DCA 1988).

Waiver of Sovereign Immunity in contractual disputes

In *Pan-Am Tobacco Corp. v. Florida Dept. of Corrections*, 471 So.2d 4 (Fla. 1984), the Florida Supreme Court held that "Where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract." The court based its holding on the belief that since the legislature authorized state entities to enter into contracts, it must have intended such contracts to be valid and binding on both parties, and therefore, mutually enforceable by both. The court emphasized its holding was "applicable only to suits on express, written contracts into which the state has statutory authority to enter."

In a recent Florida Supreme Court case, the court reviewed an argument that a claim for extra work on a public construction project was barred by sovereign immunity because it was outside the terms of the written construction contract and no written change orders had been issued. *County of Brevard v. Miorelli Engineering, Inc.*, 703 So.2d 1049 (Fla. 1997). In its analysis, the Court reviewed and approved the rationale of two district court of appeal cases. In the first of these decisions, the Second District Court of Appeal held that sovereign immunity 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. *Southern Roadbuilders, Inc. v. Lee County*, 495 So.2d 189 (Fla. 2d DCA 1986). In the second case, the Fourth District Court of Appeal held that a contractor was not precluded from recovering additional expenses based on a claim of breach of implied covenants or conditions contained within the scope of an express written contract. *Champagne-Webber, Inc. v. City of Fort Lauderdale*, 519 So.2d 696 (Fla. 4th DCA 1988). 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, to not obstruct performance by the other party, or to not provide false information.

Change orders and written directives are modifications of an existing contract which facilitate a prompt response to the unanticipated changes in circumstances as the work progresses. Written directives are usually issued at the job site, change orders require more formal authorization. In *Miorelli*, the contractor argued that the county had waived its express requirement for a written change order for authorizing work changes to the contract. The court refused to hold that the doctrines of waiver and estoppel could be used to defeat the express term of the contract. *Miorelli* at 1051. The doctrines of waiver and estoppel are frequently used by courts where equity and justice require its application, usually when one party acts contrary to its contractual rights and the other party relies on the relinquishment of that right. Under *Miorelli*, in a dispute over the modification of a written contract, private parties but not public parties are subject to the doctrines of waiver and estoppel.

B. EFFECT OF PROPOSED CHANGES:

The bill would codify much of the *Miorelli* opinion regarding the conditions when a suit may be brought against a public entity arising from breach of written contract, including breach of implied covenants and written directives. It provides for the mutuality of the rights, obligations, remedies and defenses of parties to a public works contract.

The bill amends s. 255.05, F.S. (1998 Supp.), to provide that on any public works project on which a performance bond is required, suits may be brought at law or in equity by and against public authorities on any contract claim arising from breach of an express provision or an implied covenant of a written agreement. In any such suit, both the public authority and the contractor shall have the same rights, obligations, remedies and defenses as a private person, except for liability based on an oral modification of the written contract or a written directive. The exception for liability based on an oral modification retains the protection of sovereign immunity that governmental entities have under *Pan-Am* and *Miorelli* regarding liability outside the express terms of a written contract or directive. The reciprocal nature of the exception would also protect private contractors from similar claims.

The bill does not prohibit the public authority from limiting its liability or damages through the contract itself. The bill provides that the changes will affect those contracts entered into after July 1, 1999, rather than affect existing contracts.

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?

Yes. The bill would prevent public entities from invoking sovereign immunity in certain contractual disputes, thereby encouraging such entities either to resolve the dispute prior to litigation or at a trial on the merits of the case.

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

Yes. The bill would hold public entities to the same level of legal obligations as private parties to a lawsuit in certain contractual disputes.

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

N/A

- 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?

N/A

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

N/A

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

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

N/A

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

N/A

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

N/A

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

N/A

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

N/A

3. Personal Responsibility:

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

N/A

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

N/A

4. Individual Freedom:

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

N/A

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

N/A

5. Family Empowerment:

- a. If the bill purports 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?

N/A

- 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:

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 255.05, F.S. (1998 Supp.).

E. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

By preventing the invocation of sovereign immunity in certain contractual disputes, state agencies would then be subject to more contractual disputes with fewer legal advantages. State agencies would have to pay the costs of addressing the merits of the claims against them, just as private parties do, rather than win dismissal of the claims regardless of fault. This cost may be offset by the increased competition of private contractors when bidding on public works contracts.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

By preventing the invocation of sovereign immunity in certain contractual disputes, local governments would then be subject to more contractual disputes with fewer legal advantages. Local governments would have to pay the costs of addressing the merits of the claims against them, just as private parties do, rather than win dismissal of the claims regardless of fault. This cost may be offset by the increased competition of private contractors when bidding on public works contracts.

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

By preventing the invocation of sovereign immunity in certain contractual disputes, private sector contractors can anticipate public entities to behave more like private entities when dealing with change orders and resolving disputes. The private sector will be able to pursue claims against public entities on a more level playing field.

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

By preventing the invocation of sovereign immunity in certain contractual disputes, private sector contractors may feel more secure in their dealings with public entities, which would create more interest in bidding on public works contracts.

D. FISCAL COMMENTS:

N/A

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require the counties or municipalities to spend funds or 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 revenue 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:

A similar bill (HB 311 by Rep. Fuller) would provide for nearly identical changes, but only to s. 337.19, F.S., when contracting with the Florida Dept. of Transportation. In a letter dated January 6, 1999, the Legislative Affairs Administrator of DOT stated that the bill would codify *Miorelli*, that it would allow for suits for breaches of a written directive, that the fiscal impact is impossible to determine, and concluded by stating that "the Department is in agreement with the provisions of the bill."

Judiciary Committee staff comments:

The language on page 1 lines 25 to 30 is intended to address breaches of a written contract which is alleged to have been modified orally by the parties. Miorelli held that the equitable remedies of waiver and estoppel could not be applied against the State to permit an oral modification of a written contract which required all modifications to be in writing. It is not clear if the language "have all the same rights, obligations, remedies and defenses as a private person" is intended to alter the result in Miorelli by making waiver and estoppel equally unavailable to the state and the contractor in all actions for breach of a written contract, including those actions in which the contract requires written modification. Yet the language "no liability may be based on an oral modification" suggests that regardless of waiver or estoppel, no liability

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for breach of a written contract will attach to oral modifications. The proposed bill, with its ambiguity, may serve to increase confusion (and litigation) rather than eliminate it.

Proposed amendments are pending before the Committee which attempt to clarify the matter.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On February 1, 1999, the Committee on Governmental Operations adopted two amendments which clarified two sections of the bill. The first deleted a reference to the personal liability of a public employee under s. 768.28, F.S., in order to eliminate possible confusion over personal liability. The second provides that the changes will affect those contracts entered into after July 1, 1999, rather than affect existing contracts.

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

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