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DATE: April 8, 1999

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
TRANSPORTATION & ECONOMIC DEVELOPMENT APPROPRIATIONS
ANALYSIS**

BILL #: CS/HBs 311 & 243

RELATING TO: Suits By and Against DOT

SPONSOR(S): Committee on Judiciary, Rep. Fuller, Rep. Trovillion, and others

COMPANION BILL(S): SB 240(s) & HB 1147(c)

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

- (1) TRANSPORTATION YEAS 10 NAYS 0
- (2) JUDICIARY YEAS 9 NAYS 0
- (3) TRANSPORTATION & ECONOMIC DEVELOPMENT APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

The bill specifies conditions under which suits may be brought by and against the Department of Transportation (DOT) on contract claims based on breach of an express provision or an implied covenant of a written agreement. Both DOT and the contractor would have the same rights, remedies and defenses as a private person in such suits, except that liability could not be based on oral modifications of the contract. The bill does not prohibit DOT from limiting its liability or damages through contractual provisions.

The fiscal impact of the bill to the State Transportation Trust Fund (STTF) is indeterminate, see part III. Fiscal Analysis and Economic Impact Statement for more information.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Article X, Section 13 of the Florida Constitution provides: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." The courts have interpreted this language as providing sovereign immunity to state agencies from actions for breach of contract in the absence of a legislative or constitutional waiver.

In s. 337.19, F.S., the legislature has waived sovereign immunity for suits against DOT based on contract. This section provides that suits against DOT may be brought on any claim under contract for work done. This section specifically prohibits lawsuits against DOT when the suit is based on a tort.

To the extent there is no express waiver of sovereign immunity for contract claims, the courts have ruled that there is an implied waiver of sovereign immunity in contract claims. This ruling is based on the premise that because the Legislature authorized state entities to enter into contracts, it must have intended such contracts to be valid and binding on both parties. The courts have limited this implied waiver by only allowing such suits when based on express, written contracts which the state agency has statutory authority to enter. See *County of Brevard, v. Miorelli Engineering, Inc.*, 703 So.2d 1049 (Fla. 1997).

In addition, case law authorizes suits against agencies based on breach of implied covenants or conditions contained within the scope of an express, written contract. For example, every contract includes an implied covenant that the parties will perform in good faith. In construction contract law, an owner has implied obligations: not to do anything to hinder or obstruct performance by the other person; not to knowingly delay unreasonably the performance of duties assumed under the contract; and to furnish information which would not mislead prospective bidders.

B. EFFECT OF PROPOSED CHANGES:

The bill modifies s. 337.19, F.S., to provide that suits may be brought by and against DOT on any claim based on a breach of an express provision or implied covenant of a written agreement. This codifies the case law in the *Miorelli* opinion. In addition, the bill allows suits to be maintained on any written directive issued by DOT pursuant to the written agreement. Written directives are modifications of an existing contract which facilitate a prompt response to unanticipated changes in circumstances as work on a project progresses. Such modifications are provided for in DOT contract documents.

In contractual claims suits, DOT and the contractor would have the same rights, obligations, remedies and defenses as a private person in a similar contractual dispute. The bill also specifies that liability may not be based on an oral modification of a written contract or written directive, and that DOT is not otherwise prohibited from limiting its liability through contractual provisions.

Finally, the bill provides 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. This section provides that no state employee or agent of may be held personally liable in tort or named as a party defendant in any action based on any act or omission while acting in the scope of their employment or function. This protection from personal liability is not applicable if the employee or agent acted in bad faith or with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

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?

N/A

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

N/A

(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 337.19, F.S.

E. SECTION-BY-SECTION ANALYSIS:

N/A

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

Indeterminate, see D. Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

Indeterminate, see D. Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

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:

Indeterminate, see D. Fiscal Comments.

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

N/A

D. FISCAL COMMENTS:

This bill could allow additional contractual claims to be made against DOT. If additional claims are made, DOT would incur the legal costs of litigating the claims, and the costs of payments to contractors for additional damages if the suits are successful. These costs would be paid from the STTF. If contractors are successful in bringing more claims against DOT, they will benefit from payments for additional damages. The effect of the bill's changes on the amount and scope of litigation against DOT is unknown and largely depends on how these changes are interpreted by the courts.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

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

N/A

V. COMMENTS:

A related bill (CS/HB 243) also being considered this session provides for similar changes to laws relating to contractual suits with state and local authorities other than DOT.

Judiciary Committee staff comments:

The language on page 1, lines 24 through page 2, line 1, 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 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:

The Judiciary Committee adopted a Committee Substitute to HB 311 which consolidates the changes proposed to Sections 255.05 and 337.19, F.S. in HB 311 and HB 243. It clarifies the language in the original bills and : (1) limits the application of the bill to contract claims arising from breach of an express provision or an implied covenant of a written agreement or directive; (2) provides the governmental entity and the contractor with similar private person rights and obligations under a contract, but provides that no liability may be based upon oral modifications to written contracts or written directives; and (3) specifically provides that the sovereign immunity of the state and its political subdivisions is not waived from equitable claims and equitable remedies.

VII. SIGNATURES:

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