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DATE: July 15, 1999

****FINAL ACTION****

****SEE FINAL ACTION STATUS SECTION****

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
TRANSPORTATION
FINAL ANALYSIS**

BILL #: CS/HBs 311 & 243

RELATING TO: Public Works Project Contracts/ Suits & Administration

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 YEAS 6 NAYS 0
- (4)
- (5)

I. FINAL ACTION STATUS:

6/11/99 Approved by the Governor; Chapter Law 99-345, Laws of Florida.

II. SUMMARY:

The bill specifies conditions under which suits may be brought by and against the Department of Transportation (DOT) and other public authorities on contract claims based on breach of an express provision or an implied covenant of a written agreement, or of a written directive issued pursuant to the written agreement. Both the public authority 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 written agreement or written directive. The bill does not waive the state's sovereign immunity from equitable claims or remedies.

The bill also repeals provisions authorizing DOT to use an Owner Controlled Insurance Plan (OCIP); and revises provisions to increase the number of claims that can be resolved by the State Arbitration Board in DOT.

The fiscal impact of the bill to DOT and other public authorities is indeterminate, see part III. Fiscal Analysis and Economic Impact Statement for more information.

III. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Suits on Public Works Project Contract Claims: 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 public authorities 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 public authority 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 public authorities 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.

DOT Contracts/State Arbitration Board: Section 337.185, F.S., provides for the State Arbitration Board to facilitate the prompt settlement of claims arising from construction contracts between DOT and its contractors. All claims in an amount up to \$100,000 per contract must go before the State Arbitration Board, and at the contractor's option, all claims up to \$250,000 per contract that cannot be resolved by negotiation may go before the board. The State Arbitration Board is composed of three members: one selected by DOT; one selected by the construction companies under contract with the department; and one chosen by agreement of those two selected members. Each member serves a 2-year term. Board members which are not employees of DOT may be compensated for their time not to exceed \$750 per day. Compensation to board members is paid for by fees paid to the board by the party requesting arbitration.

DOT Owner Controlled Insurance Plan: Section 337.11(16), F.S., provides authority for an owner controlled insurance plan (OCIP) on any DOT construction project. The OCIP provides insurance coverage for the DOT and for worker's compensation and employers liability and general liability and builders risk for contractors and subcontractors in conjunction with all work performed on DOT projects. The transportation contracting industry has raised concerns about the cost and administrative burden of using OCIPs on transportation projects.

B. EFFECT OF PROPOSED CHANGES:

Suits on Public Works Project Contract Claims: 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. By an express provision, the bill does not waive the state's sovereign immunity from equitable claims or remedies.

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. That 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.

The bill also 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, or breach of any written directive issued pursuant to the 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 regarding liability outside the express terms of a written contract or directive. By an express provision, the bill does not waive the state's sovereign immunity from equitable claims or remedies.

DOT Contracts/State Arbitration Board: Section 337.185, F.S., is amended to raise the contractual claim amount which must go to arbitration from \$100,000 to \$250,000 and the contractual claim amount which may go to arbitration at the claimant's option from \$250,000 to \$500,000. In addition, the bill allows claims of up to \$1 million to go to arbitration, if both DOT and the contractor agree. This change will allow the Department to settle more claims through the State Arbitration Board, thereby reducing litigation.

The bill also provides that the DOT secretary may select an alternate or substitute to serve as the DOT's member of the arbitration board, and clarifies that DOT's board member may not be compensated if the person is a current employee of DOT. Further, the bill provides a maximum hourly compensation for board members of \$125 per hour and raises the daily maximum pay from \$750 to \$1,000. The bill also raises the maximum arbitration fee that may be charged to cover administrative costs and compensation of the board from \$2,500 to \$5,000 per claim.

DOT Owner Controlled Insurance Plan: The bill repeals authority for the use of owner controlled insurance plans by DOT.

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?

With the deletion of authority for the DOT to use an Owner Controlled Insurance Plan, responsibility for obtaining various insurance coverage on projects which were candidates for OCIP will be shifted to private sector contractors. These costs will be passed on to DOT in the contractor's bid proposal.

- (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:

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:

N/A

D. STATUTE(S) AFFECTED:

Sections 337.11, 337.185, 337.19, and 255.05, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 337.11, F.S., to repeal provisions establishing the Owner Controlled Insurance Program (OCIP) in the Florida Department of Transportation.

Section 2. Amends s. 337.185, F.S., to revise provisions related to the State Arbitration Board.

Section 3. Amends s. 337.19, F.S., to specify conditions under which suits may be brought by and against the Department of Transportation (DOT) on contract claims.

Section 4. Amends s. 255.05, F.S., to specify conditions under which suits may be brought by and against other public authorities on contract claims.

Section 5. Effective Date: Upon becoming law, except section 4 which becomes effective July 1, 1999.

IV. 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 and other public authorities that undertake public works projects. If additional claims are made, DOT and these authorities would incur the legal costs of litigating the claims, and the costs of payments to contractors for additional damages if the suits are successful. If contractors are successful in bringing more claims, they will benefit from payments for additional damages. The effect of the bill's changes on the amount and scope of litigation over public project contracts is unknown and largely depends on how these changes are interpreted by the courts.

V. 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

VI. COMMENTS:

None.

VII. 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.

On April 9, 1999, the Transportation & Economic Development Appropriations Committee adopted two amendments which were approved by the House:

Amendment #1 allows claims up to \$1 million to be heard by the State Arbitration Board. Currently claims over \$250,000 must go to court.

Amendment #2 repeals law establishing the Owner Controlled Insurance Program (OCIP) for the Florida Department of Transportation.

VIII. SIGNATURES:

COMMITTEE ON TRANSPORTATION:

Prepared by:

Phillip B. Miller

Staff Director:

John R. Johnston

AS REVISED BY THE COMMITTEE ON JUDICIARY:

Prepared by:

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AS FURTHER REVISED BY THE COMMITTEE ON TRANSPORTATION & ECONOMIC DEVELOPMENT APPROPRIATIONS:

Prepared by:

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FINAL ANALYSIS PREPARED BY THE COMMITTEE ON TRANSPORTATION:

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