

STORAGE NAME: h0615.sa.doc
DATE: March 12, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: HB 615
RELATING TO: Payment or Performance Bonds
SPONSOR(S): Representative(s) Kallinger and others
TIED BILL(S): None

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

- (1) STATE ADMINISTRATION
- (2) CRIME PREVENTION, CORRECTIONS & SAFETY
- (3) COUNCIL FOR SMARTER GOVERNMENT
- (4)
- (5)

I. SUMMARY:

The law requires a contractor to obtain a payment or performance bond from a surety or insurance company before commencing work on any public project. The surety insurer must be authorized to do business in the state as surety. By obtaining a surety insurer, the contractor is deemed qualified to submit a reasonable bid and is viewed as having the necessary financial resources and expertise to perform the project.

A claimant¹ on the public project must submit a notice to the contractor stating that the bond will be looked to for payment protection. Accordingly, if a claimant submits a notice of nonpayment to both the contractor and the surety, the public authority has no financial involvement in the dispute as a result of the bond.

HB 615 prohibits a person or entity from requiring a contractor to utilize a specific surety or insurance company for the procurement of a payment or performance bond. Any person or entity that violates these provisions commits a felony of the third degree.

The bill does not appear to have a fiscal impact on state or local government. See "Fiscal Comments" for additional information.

¹Section 713.01, F.S., defines claimants as the following persons: a contractor; a subcontractor; a sub-subcontractor; a laborer; a materialman who contracts with the owner, contractor, subcontractor, or a sub-subcontractor; and a professional lienor.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Public Works Contracts

Section 255.05, F.S., states that any person entering into a formal contract with the state or any county, city, or political subdivision, or other public authority, for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work must deliver to the public owner, and record in the public records, a payment and performance bond² with a surety insurer authorized to do business in this state as surety³. This bond requires the contractor to perform the contract in the time and manner prescribed in the contract, and that the contractor make prompt payments to all persons defined in s. 713.01, F.S.,⁴ whose claims derive directly or indirectly from the prosecution of the work provided for in the contract. Any claimant has a right to apply to the governmental entity having charge of the work for copies of the contract and bond. A payment or performance bond is only required on a public project that costs more than \$100,000; if the project costs between \$100,000 and \$200,000, the Department of Management Services may delegate the authority to the particular state agency awarding the contract to exempt the person from procuring a payment or performance bond.

Due to the fact that the state requires the contractor to obtain the services of a surety insurer, the public authority is not involved financially in any disputes between the claimant and the contractor and surety. A claimant, who is not in privity⁵ with the contractor, and who has not received payment

² The Surety Information Office states, "The performance bond protects the owner from financial loss should the contractor fail to perform the contract in accordance with its terms and conditions. The payment bond guarantees that the contractor will pay certain contractors, laborers, and material suppliers associated with the project." www.sio.org.

³ The concept of suretyship means that a surety "stands behind its Principal (contractor) and acts as a silent partner in presenting to an owner that, prior to the bid letting, the contractor is qualified to submit a reasonable bid. Being deemed qualified by the surety through the prequalification process means that a contractor has the expertise, organization, financial resources, and fixed assets to complete the work according to the plans and specifications at the price bid and within the time allotted." Pursuant to materials distributed by the National Association of Surety Bond Producers entitled "Laws Prohibiting Directed Surety Are Good Public Policies." Received from Rick Watson, representing the Florida Surety Association and the Associated Builders and Contractors, on March 7, 2001.

⁴ Section 713.01, F.S., defines the following persons: a contractor; a subcontractor; a sub-subcontractor; a laborer; a materialman who contracts with the owner, contractor, subcontractor, or a sub-subcontractor; and a professional lienor.

⁵ In this context, parties that are in privity with one another are parties who have a contractual relationship with one another. Parties not in privity do not have a contractual relationship with one another.

for services,⁶ must deliver to the contractor and the surety written notice of the performance of services and of the nonpayment within a particular time period. The claimant then has a right of action against the contractor and surety for the amount due him or her, including finance charges due under the claimant's contract. Any such action must be instituted against the contractor or the surety within one year after the performance of the labor or completion of the delivery of the materials or supplies.

The requirement of a surety insurer exists at the federal level. The law requiring contract surety bonds on federal construction projects is known as the Miller Act⁷. This particular law requires a contractor on a federal project to post two bonds, a performance bond and a labor and material payment bond. The surety company issuing these bonds must be listed as qualified surety on the Treasury List, which the U.S. Department of the Treasury issues each year. In addition to Florida, many states in the United States have adopted legislation that mirrors the Miller Act.

At present, 21 states prohibit directed surety⁸. With directed surety, a person or entity is allowed to require the contractor to utilize a specific surety or insurance company. Federal law prohibits directed surety on federal construction projects: "Each surety bond shall be approved by the official of the Government required to approve or accept the bond. The official may not require that the surety bond be given through a guaranty corporation or through any particular guaranty corporation."⁹

Felony Provisions

Felonies are classified, for the purpose of sentencing and other statutory purposes, in s. 775.082, F.S., into the following categories:

- Capital felony;
- Life felony;
- Felony of the first degree;
- Felony of the second degree; and
- Felony of the third degree.

Under s. 775.082(3)(d), F.S., a person who has been convicted of a felony of the third degree may be punished by a term of imprisonment not exceeding five years. Additionally, s. 775.083, F.S., provides that a person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine. A fine of \$5,000 is authorized when the conviction is a felony of the third degree.

C. EFFECT OF PROPOSED CHANGES:

HB 615 adds an additional subsection to s. 255.05, F.S., regarding a contractor's procurement of a payment or performance bond for the construction of a public building. This bill prohibits any person or entity from requiring that a contractor use any specific insurance or surety company when securing such bond. At present, there are no statutory requirements against a person or entity, acting as owner of a public building, from requiring the utilization of a specific company.

⁶ Services may include the furnishing of supplies, materials, labor, or actual services performed on property.

⁷The Miller Act, 40 U.S.C. Section 270a to 270f, Surety Information Office, www.sio.org.

⁸ Pursuant to information compiled by the National Association of Surety Bond Producers. Received from Rick Watson, representing the Florida Surety Association and the Associated Builders and Contractors, on March 7, 2001.

⁹ 31 U.S.C. Section 9304

Any person who violates these provisions commits a felony of the third degree.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

To the degree such offenses are tried and prosecuted, there is an indeterminate, but probably minimal, cost to the court system. Section 921.001(9)(b), F.S., provides that on or after January 1, 1994, any legislation which creates a felony offense must provide that it will result in a net zero sum impact in the overall prison population, as determined by the Criminal Justice Estimating Conference, unless the legislation contains a funding source sufficient in its base or rate to accommodate such change or a provision which specifically abrogates the application of the paragraph.

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 action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities 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:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The Florida Surety Association (FSA) supports HB 615. The membership of the FSA includes both bonding companies and agents. The FSA is opposed to owner-controlled, owner-directed, or directed surety for the following reasons: a long established practice in the construction industry is for contractors to exercise the freedom to choose subcontractors, materials, and services, including surety bonds; project specifications or bidding information that contain the name of a particular producer or bonding company as surety for contractors who are awarded public contracts violate a contractor's freedom to choose a surety; and a surety selected by the contractor is better aware of the contractor's qualifications and therefore provides better service to everyone involved on the project.¹⁰

The National Association of Surety Bond Producers (NASBP) support HB 615.¹¹ The NASBP is an organization comprised of over 5,000 personnel nationwide who work in insurance agencies and brokerage firms that specialize in surety bonding. In a Resolution of the Board of Directors, the NASBP stated, "[I]t is the policy of the National Association of the National Association of Surety Bond Producers (NASBP) to oppose the practice of construction project owners specifically designating named surety companies and/or surety producers from which contractors must procure required bonds as a condition of being awarded construction contracts."¹²

The American Subcontractors Association of Florida supports HB 615. The association believes that being required to purchase a payment or performance bond from a specific insurance or surety company interferes with the subcontractor's basic rights under the free enterprise system and should be prohibited. Many subcontractors have established relationships with their own insurance and surety companies and they want to continue having the benefit of those established relationships.¹³

¹⁰Pursuant to summary sheet written by the Florida Surety Association.

¹¹ Pursuant to position paper written by the National Association of Surety Bond Producers entitled "Laws Prohibiting Directed Surety Are Good Public Policies."

¹² Resolution of the Board of Directors, Approved November 12, 1993, National Association of Surety Bond Producers.

¹³ Pursuant to letter received via facsimile transmission on March 9, 2001, from Deborah Lawson representing the American Subcontractors Association of Florida.

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HB 615 has the additional support of the following associations: The Florida Associated General Contractors¹⁴ and the Underground Utility Contractors of Florida.¹⁵

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Staff Director:

Lauren Cyran

J. Marleen Ahearn, Ph.D., J.D.

¹⁴ Pursuant to telephone conversation with Allen Douglas, lobbyist for the Florida Associated General Contractors, on March 5, 2001.

¹⁵ Pursuant to discussion with Bruce Kershner, lobbyist for the Underground Utility Contractors of Florida, the Mechanical Contractors of South Florida, the Southeast Glass Association, and the Florida Solar Energy Industry on March 5, 2001; all of the above named associations are in support of HB 615.