SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 2284

SPONSOR: Senator Bennett

SUBJECT: Insurance Construction Contracts

DATE: April 13, 2003 REVISED: 04/23/03

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Deffenbaugh	BI	Fav /1 amendment
2.			JU	
3.				
4.				
5.				
6.				

I. Summary:

The bill states that insurance indemnification agreements between the parties to a construction contract are void if the indemnitor promises to indemnify the indemnitee against damages caused by the indemnitee. However, an indemnification agreement is permissible if it provides coverage against damages caused by the indemnitor or the indemnitor's contractors, subcontractors, sub-contractors, materialmen, agents or employees. The bill also provides that indemnification provided to a 3rd party to a construction contract can only protect the 3rd party against imputed or vicarious liability that results from the 3rd party's actions.

The bill mandates that a general contractor or subcontractor cannot withhold payment to a subcontractor, sub-subcontractor, or materialman for work that has been completed for failure to obtain an insurance policy that extends certain coverage rights to an additional insured for liability caused by the named insured. The bill also eliminates the provision of s. 725.06(4), F.S., stating that section 725.06, F.S., does not apply to renewals of construction contracts entered into before the effective date of the law.

The act will take effect upon becoming a law.

This bill substantially amends section 725.06 of the Florida Statutes.

II. Present Situation:

Unenforceable Contracts

Chapter 725, F.S., deals with contracts that are unenforceable under Florida law. Generally, a contract is declared unenforceable when it contains certain provisions that are contrary to public

policy. For instance, a contract whereby X agrees to marry Y in exchange for consideration (perhaps money or land) is unenforceable at law in Florida because it is contrary to public policy. (s. 725.01, F.S.)

Construction Contracts and Indemnification

Section 725.06, F.S., contains provisions detailing when a “construction contract” that contains certain types of indemnification provisions is void and unenforceable. By “construction contract,” the statute includes any agreement made in connection with the construction, alteration, repair, or demolition of a building, structure, appurtenance or appliance and includes excavation or moving associated with these activities. (s. 725.06(1), F.S.) Indemnification involves an assurance by which one person secures another against an anticipated loss or liability due to the act or omissions of one of the two parties, or a third party. (Black’s Law Dictionary, 4th ed.)

In Florida, the owner of real property may require certain parties to a property contract (architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman) to indemnify the real property owner for liability for damages to persons or property caused by the indemnitee (property owner) that arises from the contract so long as the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents. (s. 725.06(1), F.S.) However, the statute also mandates a minimum indemnification amount of $1 million dollars unless the parties agree otherwise. Such an indemnification contract may only cover damages caused by:

- The indemnitor;
- The indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees; or
- The indemnitee or its officers, directors, agents, or employees.

The indemnification contract cannot cover damages caused by the property owner’s gross negligence, willful, wanton, or intentional misconduct of the indemnitee or its officers, directors, agents or employees, or for statutory violation or punitive damages.

Indemnification agreements are also permissible in a construction contract involving a public agency. (s. 725.06(2), F.S.) The contract may require the indemnitor indemnify and hold harmless the other party to the contract from liabilities, damages, losses and costs, to the extent such liability is caused by the negligence, recklessness, or intentional wrongful misconduct of the indemnifying party and persons employed or utilized by the indemnifying party in the performance of the construction contract. However, any indemnification agreement in a public agency construction contract that requires any other types of indemnification is void. (s. 725.06(3), F.S.)

A general contractor or subcontractor may require that a certificate of insurance or insurance policy be submitted by a subcontractor, sub-subcontractor or materialman as a condition of work. If an insurance policy or certificate is not submitted, or if it does not meet the standards of the general contractor or subcontractor requiring the policy, that contractor may prohibit the other

party from working on the project, or may withhold payment for work already done until the proper insurance is submitted.

III. Effect of Proposed Changes:

Section 1 amends s. 725.06, F.S., to limit the types of indemnification agreements that are allowable. The prohibition applies to contracts dealing with construction, alteration, demolition, repair or excavation between the any of the following potential parties: the owner of real property, architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman. The bill re-states current law that certain contracts whereby one party promises to insure, indemnify, or hold harmless the other party to the agreement for damages caused by the indemnitee, are void because they are against public policy. However, indemnification agreements would be allowed whereby the indemnitor indemnifies the indemnitee for damages caused by the indemnitor, its subcontractors, sub-subcontractors, materialmen, agents or their employees if the indemnitor is also at fault. Thus, for example, ABC Corp. may be required to indemnify XYZ Corp. for damages caused by ABC Corp., or for damages caused by subcontractors of ABC Corp. if ABC Corp. is also at fault.

Indemnification agreements under s. 725.06(1), F.S., shall be limited under this bill to situations where the party at fault is: 1) the indemnitor, or 2) any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, agents or employees—if the indemnitor is also found to be at fault. Indemnification agreements can no longer cover situations where the indemnitee, its officers, directors, agents, or employees are at fault. The bill also eliminates the provision that the indemnitee cannot receive indemnification for its own gross negligence, willful or wanton misconduct, statutory violations, punitive damages or intentional misconduct. The exception was removed because it is unnecessary within the context of this bill. Under the bill, the indemnitee cannot receive indemnification from another person for the indemnitee's own misconduct for any reason. The bill also eliminates the provision that indemnification is available for damages caused by the indemnitor's gross negligence, willful or wanton misconduct, statutory violations, punitive damages or intentional misconduct.

The bill deletes the requirements of ss. 725.06(1)(a-b), F.S., that: 1) an indemnification agreement contain a monetary limitation that bears a reasonable relationship to the construction contract, and 2) that any indemnification agreement providing coverage to a real property owner must provide at least $1 million dollars worth of coverage per incident (unless the parties agree to a different amount). These two requirements serve as exceptions to the rule in s. 725.06(1), F.S., prohibiting indemnification agreements between a landowner and other parties to a construction contract. The elimination of these two exceptions, coupled with the new language contained in the bill, restricts the extent to which an indemnification agreement can provide protection to the indemnitee.

The first section of the bill also mandates that if a contract between the various parties involved in a construction project includes an insurance policy extending coverage to an additional insured, the policy shall only provide protection to the additional insured for its imputed or vicarious liability that results from the insured's negligence or omissions. Thus liability protection provided to a 3rd party to a construction contract can only protect the 3rd party against imputed or vicarious liability that results from the 3rd party's actions.

The bill substantially amends subsection (3) of the statute and mandates that a general contractor or subcontractor cannot withhold payment to a subcontractor, sub-subcontractor, or materialman for work that has been completed because of their failure to obtain an insurance policy that extends certain coverage rights to an additional insured for liability caused by the named insured. General contractors and subcontractors may still require proof of insurance to be turned in prior to work, and may refuse to allow a party to work without the insurance. However, once the subcontractor, sub-subcontractor, or materialman has begun work, the right to withhold payment for completed work is waived. The rights of new subsection (3) also apply to renewals of insurance certificates that are substantially similar or identical to the initial certificate.

The bill also eliminates the provision of s. 725.06(4), F.S., stating that section 725, F.S., does not apply to renewals of construction contracts entered into before the effective date of the law. Renewals will now be subject to the provisions of s. 725.06, F.S.

Section 2 states that the act will take effect upon becoming a law.

Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

IV. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill should have a positive financial impact on subcontractors, materialmen, and other laborers, but will result in higher costs for property owners and general contractors. The bill will lessen the burden on subcontractors and others to provide insurance that indemnifies a property owner, general contractor, or subcontractor. However, to the extent that such indemnification is desired, the property owner, general contractor or subcontractor will have to purchase the insurance themselves.

C. Government Sector Impact:

None.

V. Technical Deficiencies:

None.

VI. Related Issues:

None.

VII. Amendments:

#1 by Banking and Insurance:

The delete-all amendment states that insurance indemnification agreements between the parties to a construction contract are void if the indemnitor promises to indemnify the indemnitee against damages caused by the indemnitee. However, an indemnification agreement is permissible if it provides coverage against damages caused by the indemnitor or the indemnitor's contractors, subcontractors, sub-contractors, materialmen, agents or employees. An agreement may only indemnify a third party for the imputed or vicarious liability resulting from the negligent acts of the named insured. Thus, if A contracts with B to indemnify B against damages caused by A's negligence, A may only indemnify C against vicarious liability that results from A's actions.

The amendment allows a property owner to reach an indemnification agreement with a general contractor and provides that a landowner may be indemnified for his own negligence. However, such a contract must contain a monetary limitation that bears a reasonable commercial to the construction contract and provide at least $1 million in indemnification to the property owner per occurrence.

The amendment also specifies that a public utility may contract with a general contractor, subcontractor, architect, engineer, etc. to be indemnified against the utility's own negligence or the negligence of the indemnitor. Such a contract must contain a monetary limitation that bears a reasonable commercial to the construction contract and provide at least $1 million in indemnification to the property owner per occurrence.

A property owner or public utility cannot receive indemnification for damages resulting from its own gross negligence, willful, wanton or intentional misconduct, statutory violations or punitive damages. However, indemnification for a property owner or public utility is available if the statutory violation or punitive damages are caused by the indemnitor (i.e. general contractor) or a party employed by the GC (i.e. subcontractor, materialmen, employees; etc).

The amendment also states that if a written construction contract requires a subcontractor, sub-subcontractor, or materialman to provide a policy of insurance or certificate of insurance to a general contractor or subcontractor that extends specific coverage rights to an additional insured, the general contractor or subcontractor may reject the policy as being non-conforming prior to the party delivering material or commencing work. However, if the policy is not rejected, the general contractor or subcontractor is presumed to have accepted the policy and cannot use the lack of conforming insurance to withhold payment for work completed or materials delivered.

The amendment states that the section's provisions do not apply to contracts entered into before the effective date of the section, but it does eliminate the provision that the bill does not apply to renewals of such contracts.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.