



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |   |                             |   |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government?                | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/>            |
| 2. Lower taxes?                      | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | 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. EFFECT OF PROPOSED CHANGES:

In Florida, “surety insurance” is defined to include payment and performance bonds.<sup>1</sup> Such bonds are contracts in which a surety company, which is paid a premium by a principal (e.g., a general contractor), agrees to stand in the place of the principal in the event the principal defaults either as to performance of the contract or as to payment of its subcontractors/suppliers.<sup>2, 3</sup>

Unlike a normal insurance situation in which there is a two-party relationship (*i.e.*, the insurer and the insured), the nature of surety is a tri-party relationship, which consists of: (a) the obligee, which may be either the person purchasing the performance from the contractor in the case of a performance bond or the subcontractor/supplier expecting payment from the contractor in the case of a payment bond; (b) a principal (e.g., the contractor); and (c) the surety that provides the bond to protect against the principal’s default. A second difference between a normal insurance relationship and a surety relationship is that the surety requires a principal to indemnify the surety against losses sustained by the carrier if the surety must perform or pay under the bonds. In this instance, the principal is referred to as the indemnitor to the surety.<sup>4</sup>

Section 255.05(1)(a), F.S., provides that any person who enters into a formal contract with the state or any county, city, or political subdivision thereof, 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 is required to deliver to the public owner a payment and performance bond with a state authorized surety insurer. The bond is to be conditioned on the contractor’s timely and satisfactory performance of the contract and on the prompt payment of all persons defined in s. 713.01, F.S., (the Construction Lien Law) who furnish labor, services, or materials for the prosecution of the work provided in the contract. The payment and performance bond must state on its front page: (a) the name, principal business address, and phone number of the contractor, the surety, the owner of the property being improved, and, if different from the owner, the contracting public entity; (b) the contract number assigned by the contracting public entity; (c) a description of the project sufficient to identify it, such as a legal description or the street address of the property being improved; and (d) a general description of the improvement.

Section 255.05(3), F.S., further provides that this bond may be in substantially the same form as a model form public construction bond that is provided in the subsection, and s. 255.05(6), F.S., provides that that

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<sup>1</sup> Section 624.606, F.S.

<sup>2</sup> Daniel Toomey and Tamara McNulty, “Surety Bonds: A Basic User’s Guide for Payment Bond Claimants and Obligees,” *Construction Lawyer*, Winter 2002.

<sup>3</sup> Although surety is often times referred to in law as “surety insurance,” legal commentators have explained that this is somewhat of a misnomer, as it does not insure the purchaser of the surety (*i.e.*, the general contractor) against claims such as poor workmanship; rather, the surety insurance protects the obligee against the general contractor’s default. *Id.*

<sup>4</sup> *Id.*

all bonds executed pursuant to the section must make reference to the section number and must contain a reference to the notice and time limitation provisions of this section.

The section's notice and time limitations require: (a) a claimant, who is not a laborer, who is not in contractual privity with the contractor, and who has not received payment, to furnish, either before commencing or no later than 45 days after commencing to furnish labor, materials or supplies for the prosecution of the work, the contractor with a notice that he or she intends to look to the bond for protection; and (b) a claimant, who is not in privity with the contractor and who has not received payment for his or her labor, materials, or supplies, to deliver, either 45 or more days into the progress of the work, but no more than 90 days after the completion of the work, to the contractor and to the surety written notice of the performance of labor or delivery of the materials or supplies and of the nonpayment.<sup>5</sup>

Section 255.05(4), F.S., states that the payment provisions of all bonds furnished for public work contracts must, regardless of form, be construed as statutory bond provisions, subject to all notice and time limitations in the section. Nevertheless, courts have construed a bond, even though furnished pursuant to a public works contract, which is written on a more expanded basis than that required by statute as a common-law bond.<sup>6</sup> In this event, the statutory notice and time limitations do not apply; instead, claims against the bond may be brought within the general statute of limitations for suits on written contracts, which, pursuant to s. 95.11, F.S., is five years.

This bill amends s. 255.05(3), F.S., to provide that the performance and payment bonds required by government entities for public buildings and works projects must be the same as the model public construction bond form contained in the subsection and to specify that any deviation from the form that is required by the public owner or furnished by the contractor is to be disregarded. This amendment should have the effect of requiring courts to construe all such performance and payment bonds as statutory, rather than common law, bonds.

This bill also amends the model form contained in subsection (3) to require the bond to contain the following: (a) the bond number; (b) the name, principal business address, and telephone number of the contractor, surety, and public owner; (c) the amount of bond; (d) a description of the project; (e) a statement indicating that s. 255.05, F.S., controls the rights and obligations of the parties; and (f) the dates of the contract and bond.

Further, this bill strikes s. 255.05(6), F.S., which requires that all bonds executed pursuant to the section make reference to s. 255.05, F.S., and contain a reference to the notice and time limitation provisions of this section. This subsection is no longer necessary given that the bill requires that the mandatory bond form contain a statement that the section controls the parties' rights and obligations.

#### C. SECTION DIRECTORY:

Section 1: Amends 255.05 (3) and (6), F.S., relating to the form for public construction bonds.

Section 2: Provides that the bill is effective upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues: None

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<sup>5</sup> Section 255.05(2), F.S.

<sup>6</sup> See *Southwest Florida Water Management Dist., for Use and Benefit of Thermol Acoustic Corp. v. Miller Const. Co., Inc. of Leesburg*, 355 So.2d 1258 (Fla. Dist. Ct. App. 2d Dist. 1978).

2. Expenditures: None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None

2. Expenditures: None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill requires use of a uniform public construction bond form and provides that any deviation from the form is to be disregarded. Thus, the bill removes the discretion currently provided in law for parties to alter the terms of the bond form. This change should result in all public construction bonds being construed as statutory bonds subject to the statutory notice and time limitations for claims against the bonds.

The 90-day notice requirement for statutory bond claims is significantly shorter than the five-year requirement claims associated with common-law bonds. Accordingly, this bill should assist a contractor in receiving more timely notice of claims, which will allow the contractor to timely require its subcontractors/suppliers to pay their subcontractors/suppliers.

The Department of Management Services has indicated that the bill's mandatory bond form requirement will benefit vendors doing business with the government by clarifying the rights and obligations of the parties.

FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The legislation does not require expenditure of funds by local governments, does not reduce the authority to raise revenue, nor reduce the percentage of state tax shared with local governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On April 11, 2003, the Transportation & Economic Development, Subcommittee on Appropriations adopted two amendments by Rep. Murzin:

- Amendment 1 – Provides a space on the model form established by this bill for a bond number to be listed which would assist with the identification and tracking of documents associated with a bond.
- Amendment 2 – Amends the model form established by this bill to contemplate more than one surety sharing the risk of a large project.