

**STORAGE NAME:** h0615s2.sgc.doc  
**DATE:** April 19, 2001

**HOUSE OF REPRESENTATIVES**  
**COUNCIL FOR SMARTER GOVERNMENT**  
**ANALYSIS**

**BILL #:** CS/CS/HB 615  
**RELATING TO:** Payment or Performance Bonds  
**SPONSOR(S):** Committee on State Administration, Representative(s) Kallinger and others  
**TIED BILL(S):** None

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

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
  - (2) CRIME PREVENTION, CORRECTIONS & SAFETY (W/D)
  - (3) COUNCIL FOR SMARTER GOVERNMENT YEAS 10 NAYS 0
  - (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 claimant<sup>1</sup> 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.

CS/CS/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.

The bill does not appear to have a fiscal impact on state or local government.

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<sup>1</sup>Section 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:

Section 235.32, F.S., deals with educational facilities and the substance of contracts relating to such facilities. The section provides that each school board must develop contracts consistent with Chapter 235, F.S., and other sections of statute governing public facilities. The contract must contain the drawings and specifications of the work to be done and the material to be furnished, the time limit in which the construction is to be completed, the time and method by which payments are to be made upon the contract, and the penalty to be paid by the contractor for any failure to comply with the terms of the contract. The school board may require the contractor to pay a penalty for any failure to comply with the terms of the contract and may provide an incentive for early completion. Upon accepting a satisfactory bid, the school board enters into a contract with the party or parties whose bid has been accepted. The contractor is required to furnish the school board with a performance and payment bond as set forth in s. 255.05, F.S.

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 bond<sup>2</sup> with a surety insurer authorized to do business in this state as surety<sup>3</sup>. 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.,<sup>4</sup> 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

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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup>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.

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 privity<sup>5</sup> with the contractor, and who has not received payment for services,<sup>6</sup> 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 Act<sup>7</sup>. 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 surety<sup>8</sup>. 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."<sup>9</sup>

#### C. EFFECT OF PROPOSED CHANGES:

CS/CS/HB 615 amends s. 235.32, F.S., regarding contracts entered into for the construction of public educational facilities. This bill prohibits a school board or other public entity from requiring that a contractor secure a surety bond from a specific agent or bonding company.

Additionally, CS/CS/HB 615 amends s. 255.05, F.S., to conform to the changes made in s. 235.32, F.S. The amended language provides that a public entity may not require a contractor to secure a surety bond under s. 255.05, F.S., from a specific agent or bonding company.

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.

#### D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

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<sup>5</sup>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.

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

<sup>7</sup>The Miller Act, 40 U.S.C. Section 270a to 270f, Surety Information Office, [www.sio.org](http://www.sio.org).

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

<sup>9</sup>31 U.S.C. Section 9304

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:

None.

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.<sup>10</sup>

The National Association of Surety Bond Producers (NASBP) supports HB 615.<sup>11</sup> 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."<sup>12</sup>

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.<sup>13</sup>

HB 615 has the additional support of the following associations: The Florida Associated General Contractors<sup>14</sup> and the Underground Utility Contractors of Florida.<sup>15</sup>

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<sup>10</sup> Pursuant to summary sheet written by the Florida Surety Association and received from Rick Watson, representing the Florida Surety Association, on March 6, 2001.

<sup>11</sup> Pursuant to position paper written 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 6, 2001.

<sup>12</sup> Resolution of the Board of Directors approved on November 12, 1993, National Association of Surety Bond Producers.

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

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

<sup>15</sup> 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.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 15, 2001, the Committee on State Administration heard HB 615 and adopted one amendment. This amendment removed the provision regarding criminal penalties. The bill, as amended, was reported favorably as a committee substitute.

On April 17, 2001, the Council for Smarter Government heard CS/HB 615 and adopted one strike-all amendment. This amendment conforms the bill to the Senate version, which amends ss. 235.32 and 255.05, F.S., by prohibiting school boards and any other public entity from requiring that a contractor secure a surety bond from a specific agent or bonding company. The bill, as amended, was reported favorably as a council substitute.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Lauren Cyran

Staff Director:

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

AS FURTHER REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

Prepared by:

Lauren Cyran

Staff Director:

Don Rubottom