

STORAGE NAME: h1185a.tr.doc
DATE: April 11, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
TRANSPORTATION
ANALYSIS**

BILL #: HB 1185
RELATING TO: Construction contracts
SPONSOR(S): Representative(s) Mahon

TIED BILL(S):

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

- (1) TRANSPORTATION YEAS 7 NAYS 4
 - (2) STATE ADMINISTRATION
 - (3) COUNCIL FOR READY INFRASTRUCTURE
 - (4)
 - (5)
-

I. SUMMARY:

During the 2000 legislative session, CS/SB 220 (chapter 2000-372, L.O.F.) amended s. 725.06, F.S., to specify that no construction contract can require the contractor to indemnify a public or private entity against that entity's own negligence.

HB 1185 recreates the ability for private entities, under two specific conditions, to include indemnification clauses in contracts with architects, engineers, general contractors, subcontractors, sub-subcontractors, materialmen, or any combination thereof, whereby the private entities would not be held liable for any damages to persons or property caused by actions arising from the contract. These conditions are: the contract must contain either a monetary limitation on the extent of the indemnification, or the private entity indemnified by the contract must pay the contractor (the "indemnitor") a specific sum or other consideration for the indemnification. These conditions must be part of the project specifications or bid package.

Under the bill, public agencies still would be unable to award construction contracts with indemnification clauses that shield these agencies from liability if they, their employees, or their agents were responsible. Public agencies may include indemnification clauses in construction contracts that protect them from liability from personal or property damages caused by the actions of the contractor or his employees or agents.

HB 1185 has no direct fiscal impact on state agencies.

The bill would take effect upon becoming a law.

(The Transportation Committee on April 11, 2001, adopted five amendments to HB 1185, then passed the bill. The amendments are traveling with the bill, and are explained in the "VI. Amendment or Committee Substitute Changes:" section below.)

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 type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" 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:

Chapter 725, F.S., deals with unenforceable contracts. One example of an unenforceable contract, as described in the current s. 725.06, F.S., is a construction contract that requires the general contractor, his employees, or agents to assume legal responsibility for personal or property damage that they did not cause through their own negligence, recklessness, or intentional wrongful misconduct. Section 725.08, F.S., includes nearly identical language concerning contracts for professional services from architects, engineers, and design professionals.

Prior to the 2000 legislative session, s. 725.06, F.S., did allow, under narrow contract conditions, a public or private entity or owner to be indemnified against all liability, even if they shared responsibility for the damages caused. The only conditions under which such contracts, at the time, could be legal and valid, were if the contract contained either a monetary limitation on the extent of the indemnification, or the public or private entity indemnified by the contract agreed to pay the contractor a specific sum or other consideration for the indemnification. These conditions had to be part of the project specifications or bid package, so that bidders would know in advance that indemnification would be expected of them.

CS/HB 1083 (chapter 2000-162, L.O.F.) created s. 725.08, F.S., to protect design professionals from contracts that required them to indemnify public agencies at fault, and CS/SB 220 (chapter 2000-372, L.O.F.) rewrote s. 725.06, F.S., to provide the same protections for construction contractors doing work for both public agencies and private owners. Both bills allowed indemnification clauses in contracts that protect the entity from liability caused, in whole or in part, by the contractor, his employees or agents, and by design professionals or persons employed by them.

C. EFFECT OF PROPOSED CHANGES:

HB 1185 basically reinserts a portion of the statutory provisions deleted last year from s. 725.06, F.S.

The bill allows owners of real property (presumably private-sector) to include indemnification clauses in contracts, if two conditions are met, with design professionals, general contractors, subcontractors, sub-subcontractors, materialmen, or any combination thereof, whereby the private entities would not be held liable for any damages to persons or property caused by actions arising

from the contract. This would be the case even if the private entity is partially or wholly responsible for the damages. The two conditions are the same as in the law prior to 2000:

- The contract must contain a monetary limitation on the extent of the indemnification, and is a part of the project specifications or bid documents, if any; or
- The private entity indemnified by the contract must pay the indemnitor a specific consideration for the indemnification. Again, this must be included in the project specifications or bid package, if any.

In addition, HB 1185 slightly rewrites the current language in s. 725.06, F.S., prohibiting public agencies from being able to bid construction contracts with clauses that would indemnify them from liability, even if they were in whole or in part, responsible. Public agencies can continue to bid contracts that protect them from liability in cases where a contractor or his employees or agents are responsible for the personal or property damage.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Substantially rewrites s. 725,06, F.S. Generally declares that contracts between real property owners and architects, engineers, general contractors or related professions that indemnify either party from the liability caused to persons or property by the party are null and void except in two circumstances. Specifies that a public agency may require in its construction contracts that the contractor indemnify the agency, its employees, consultants and design professionals from liability caused by the negligence, recklessness or intentional wrongful conduct by the contractor or other persons employed or utilized by him. Specifies that except as previously provided, no construction contract may require a contractor to indemnify a public agency, its employees, or agents from liability.

Section 2. Specifies that this act shall take effect upon becoming a law.

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:

If HB 1185 becomes law, private property owners – either individuals or businesses – will once again be able to require indemnification clauses in contracts, under certain conditions, with engineers, architects, general contractors and other related employees. These clauses will protect the private property owners from all liability, even that which they may have caused.

However, the bill may have an adverse economic impact on some construction contractors and design professionals and their agents, if they are unable to obtain sufficient liability insurance to indemnify their private-sector clients, regardless of the consideration paid under the terms of the their contracts.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The mandates provision is not applicable to an analysis of HB 1185 because the bill does not require cities or counties to expend funds, or to take actions requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

HB 1185 does not reduce the revenue-raising authority of counties or municipalities.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

HB 1185 does not reduce the state tax revenues shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

HB 1185 raises no constitutional issues.

B. RULE-MAKING AUTHORITY:

It is likely that state agencies affected by HB 1185 already have sufficient rulemaking authority to address the bill's contracting issues.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 11, 2001, the Transportation Committee adopted five amendments to HB 1185. The amendments were as follows:

- #1 amends s. 725.06, F.S., to add architects and engineers to the list of construction-related professionals who may be required in a contract with a public agency to hold the agency

harmless from liability caused by the negligence, recklessness, or intentional wrongful misconduct of the construction professional or their employees or agents.

- #2 amends s. 725.06, F.S., to re-emphasize and clarify that except as otherwise provided, construction contracts entered into with a public agency may NOT require contractors to indemnify the agency against its, or its employees,' negligence, recklessness or intentional wrongful misconduct.
- #3 amends s. 725.08, F.S., to re-emphasize and clarify that except as otherwise provided, contracts that architects, engineers and other design professionals enter into with a public agency may NOT require the design professionals to indemnify the agency against its, or its employees' negligence, recklessness or intentional wrongful misconduct.
- #4 specifies that if a construction contract with a private entity does include a "hold-harmless" clause, the contract must include monetary limitation on the indemnification, and that it only covers damages caused by the contractor; any of the contractor's subcontractors, sub-subcontractors, materialmen, or agents; and the private entity.
- #5 specifies that changes to s. 715. 06, F.S., do not affect any contracts, agreements or guarantees entered into before the effective date of this act, or any renewals of the aforementioned.

The committee then passed the bill by a vote of 7-4. The amendments are traveling with the bill.

VII. SIGNATURES:

COMMITTEE ON TRANSPORTATION:

Prepared by:

Staff Director:

Joyce Pugh

Phillip B. Miller