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DATE: February 6, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 1095
RELATING TO: Bonds & Liens
SPONSOR(S): Representative Smith
TIED BILL(S): none

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

- (1) JUDICIAL OVERSIGHT
 - (2) COUNCIL FOR SMARTER GOVERNMENT
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

Current law requires wholesalers and distributors of tobacco products to post a bond with the Department of Business and Professional Regulation's Division of Alcoholic Beverages and Tobacco ("the Division") as surety for the payment of tobacco taxes.

This bill allows wholesalers and distributors of tobacco products to provide the Division with a certificate of deposit or an irrevocable letter of credit, rather than a bond, as surety for the payment of tobacco taxes.

Current law also requires that a local agency which issues building permits must be provided with either a certified copy of the recorded notice of commencement, or a notarized statement that the notice of commencement has been filed for recording, before the agency may conduct building inspections of any construction or improvements the direct contract price of which exceeds \$2,500.

This bill raises from \$2,500 to \$5,000 the maximum direct contract price of construction or building improvements that do not require notice of a recorded or pending notice of commencement to be filed with the local agency issuing building permits.

There are constitutional and other concerns regarding this bill. See Section V. Comments herein.

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

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input 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:

See Section-by-Section Analysis.

C. EFFECT OF PROPOSED CHANGES:

See Section-by-Section Analysis.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. amending s. 210.08, F.S., relating to surety for payment of tobacco taxes

Present Situation. Surety insurance is a form of risk protection that guarantees the performance of an obligation or the payment of a debt. For a premium, an insurer (referred to as a "surety") accepts the risk that either a debtor will not pay, or an obligor will not perform a task. The most common forms of surety insurance are contractor bonds (bid, payment, maintenance, and performance bonds), indemnity bonds, contract performance bonds, and bail bonds.

Section 210.08, F.S., requires wholesale dealers and distributors of tobacco products to post a surety bond with the Department of Business and Professional Regulation's Division of Alcoholic Beverages and Tobacco ("the Division"). This bond serves as surety for payment of the tobacco taxes imposed by s. 210.02, F.S. The presumptive surety bond is usually \$10,000, but the Division may, in its discretion, reduce the amount of bond required to as little as \$1,000 if the Division regards a lesser amount as adequate to secure all the tobacco tax payments by a particular taxpayer.¹

Effect of Proposed Changes. This bill amends s. 210.08, F.S., to add that tobacco wholesalers and distributors may provide the Division with a certificate of deposit or an irrevocable letter of credit as surety for the payment of tobacco taxes.

Section 2. amending s. 713.135, F.S., relating to notice of commencement and construction liens

Present Situation. The Construction Lien Law, ss. 713.001-713.37, F.S., provides that certain persons may impose a lien against real property to secure payment to that person for construction

¹ See s. 210.08, F.S.

of, or improvements or repair to, that real property. Property owners may exempt themselves from this effect with respect to subcontractors by requiring a general contractor to deliver to the owner a surety bond (called a "payment bond") for at least the amount of the original contract price before commencing construction.² Any subcontractor's liens filed subsequent to delivery of a payment bond are imposed against the payment bond rather than the real property.³ Delivery of a payment bond does not, however, exempt a property owner from any liens imposed by the general contractor itself.⁴

In addition, before commencing construction, a property owner or the property owner's agent must record a notice of commencement, "[e]xcept for an improvement that is exempt pursuant to s. 713.02(5)[.]"⁵ Section 713.02(5), F.S., exempts improvements whose total direct contract price does not exceed \$2,500. "The notice of commencement gives constructive notice that claims of lien may be recorded and may take priority, in that, the lien will attach and take priority as of the time of recordation of the notice of commencement[.]"⁶ A copy of any payment bond must be attached to a notice of commencement, or the exemption from subcontractor construction liens that the payment bond provides is negated.⁷

If the direct contract price of construction is greater than \$2,500, the owner or agent must file either a certified copy of the recorded notice of commencement, or a notarized statement that the notice of commencement has been filed for recording, with the local agency issuing the building permit before that agency can begin conducting building inspections.⁸

Effect of Proposed Changes. This bill amends s. 713.135(1)(d), F.S., to raise from \$2,500 to \$5,000 the maximum direct contract price of construction or building improvements that do not require notice of a recorded or pending notice of commencement to be filed with the local agency issuing building permits.

Section 3. Providing an effective date of upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

² See ss. 713.02(6) and 713.23(1)(a), F.S. See also *Latter Day Church of Jesus Christ v. Seymour Elec. Supply Co., Inc.*, 558 So.2d 88 (Fla. 1st DCA 1990); *Allied General Contractors v. Superior Asphalt Co.*, 397 So.2d 727 (Fla. 5th DCA 1981); *Goldberger v. United Plumbing & Heating, Inc.*, 358 So.2d 860 (Fla. 4th DCA 1978).

³ See *Allied General Contractors; Coordinated Constructors v. Florida Fill, Inc.*, 387 So.2d 1006 (Fla. 3d DCA 1980).

⁴ See s. 713.02(6), F.S. See also *Allied General Contractors; Bankers & Shippers Ins. Co. v. AIA Insulation Industries, Inc.*, 390 So.2d 734 (Fla. 4th DCA 1980);

⁵ Section 713.13(1)(a), F.S. Form notices of commencement are required to accompany county or municipal applications for building permits. See s. 713.135(d), F.S.

⁶ 36 Fla. Jur. 2d Mechanics' Liens § 57. See also authorities cited therein.

⁷ See s. 713.13(1)(e), F.S.

⁸ See s. 713.135(1)(d), F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

It is possible that this bill will reduce costs of doing business somewhat, both for tobacco wholesalers and building contractors, thereby also possibly reducing the overall prices of tobacco products and construction.

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 an action requiring expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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

Article III, s. 6, Fla. Const., provides that “[e]very law shall embrace but one subject and matter properly connected therewith.” It is possible that a court might find that this bill violates that provision.

The Supreme Court of Florida has ruled that provisions of a bill must have a “natural and logical connection” in order to survive single-subject scrutiny.⁹ It is possible a court might find that, because this bill’s provisions all relate to sureties to some degree, they have such a connection. Conversely, however, a court could also find that, because this bill addresses the disparate topics of tobacco taxes and construction liens, it lacks such a connection and thus violates the single-subject requirement. In that case, it is possible the court might then strike down the entire statute.

⁹ *Chenoweth v. Kemp*, 396 So.2d 1122, 1124 (Fla. 1981) (quoting *Board of Public Instruction v. Doran*, 224 So.2d 693, 699 (Fla. 1969)).

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

This bill is supported by the Florida Surety Association, the Florida Tobacco & Candy Association, the Florida Association of Plumbing, Heating and Cooling Contractors, and the Florida Association of Electrical Contractors.¹⁰

The Department of Business and Professional Regulation thinks this bill is “not a problem,” with respect to different forms of surety for payment of tobacco taxes.¹¹

Courts have noted that the purpose of the notice of commencement is to provide potential lienors against real property with the addresses of the property owner, general contractor, and payment bond surety, if any, so as to expedite any proceedings or settlement.¹² This bill creates a \$2,500 disparity between the minimum direct contract price of construction that requires recordation of a notice of commencement, and the minimum direct contract price that requires notice to the building permit-issuing agency that a notice of commencement has been recorded or filed for recording.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Staff Director:

David L. Jaroslav, J.D.

Nathan L. Bond, J.D.

¹⁰ Conversation with Richard Watson (representing the Florida Surety Assn.) and Beth Gosnell, BG & Associates (representing the Florida Tobacco & Candy Assn.), February 5, 2002.

¹¹ Telephone conversation with Michael Kooi, Legislative Analyst, Department of Business and Professional Regulation, February 5, 2002.

¹² See *Design Aluminum, Inc. v De Santi*, 521 So.2d 285 (Fla. 2d DCA 1988); *Symons Corp. v Tartan-Lavers Delray Beach, Inc.*, 456 So.2d 1254 (Fla. 4th DCA 1984).