

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 357 w/CS Construction Engineering and Inspection Services
SPONSOR(S): Kilmer; Davis, M.
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	18 Y, 0 N w/CS	Birtman	Havlicak
2) State Administration		Bond	Everhart
3) Appropriations			
4)			
5)			

SUMMARY ANALYSIS

This bill provides that professional firms that have contractually agreed to provide construction engineering and inspection services to the Department of Transportation will be considered agents of the state for the purposes of limiting liability under Florida's sovereign immunity and the limited waiver of that immunity, but will not be considered agents of the state for purposes of worker's compensation laws. Contracts between such professional firms and the Department of Transportation must provide for indemnification of the state for any liability incurred as a result of negligence by the contractor.

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

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0357c.sa.doc
DATE: March 24, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" 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 checked="" type="checkbox"/> | N/A <input 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:

This bill limits the responsibility of professional firms that contract with the Department of Transportation for construction engineering and inspection services.

B. EFFECT OF PROPOSED CHANGES:

Background

The standard practice in the design and construction of roads and bridges is generally as follows: the Department of Transportation (DOT) contracts with design engineers in accordance with applicable codes and DOT specifications. The design engineer develops the plans and specifications and has control over interpretation of the plans and specifications. The contractor has control of the construction site, site personnel, and traffic management. During the construction period, DOT provides employees to observe and report on the contractor's activities. Typically, an engineering firm provides these services (known as construction engineering and inspection or 'CEI') pursuant to contract. The CEI engineer has no control over the design engineer, the contractor, or the contractor's means or methods of construction or traffic maintenance; it is the duty of the CEI engineer, by contract, to observe and report the contractor's activities and notify the DOT of compliance or non-compliance with all contractual requirements.¹ It is reported that CEI engineers are named in negligence suits as third party defendants when traffic accidents occur at road construction sites.²

Currently, governmental agencies are immune from liability, and not required to pay any claim which exceeds \$100,000 per person or \$200,000 per incident.³ Corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities are defined as 'governmental agencies' for purposes of the waiver of sovereign immunity and the limits on liability.⁴ Agents of the state and its subdivisions shall not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his or her employment or function, unless such officer, employee or agent acted in bad faith or with malicious purpose in a manner exhibiting wanton and willful disregard of human rights, safety, or property.⁵

¹ Conversation with lobbyist for the Florida Association of the American Institute of Architects on February 28, 2003.

² See *Agner v. APAC-Florida, Inc.*, 821 So.2d 336 (Fla. 1st DCA 2002) (the court held that the issue of whether the engineering company was a state agency with sovereign immunity was not ripe for adjudication on motion to dismiss.)

³ See Article 10, Section 13 of the State Constitution (the state may waive its immunity through an enactment of general law); and s. 768.28(5), F.S., (state and local government entities are liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, subject to the \$100,000/\$200,000 limitation on liability.)

⁴ See s. 768.28(2), F.S.

⁵ See s. 768.28(9)(a), F.S.

Various bodies have been afforded agency status for the purposes of sovereign immunity: health care providers who provide services pursuant to the "Access to Health Care Act";⁶ any member of the Florida Health Services Corporation who provides uncompensated care to medically indigent persons referred by the Department of Health;⁷ public defenders;⁸ health care providers or vendors that have contractually agreed to act as agents of the Department of Corrections to provide health care services to inmates;⁹ operators, dispatchers, and providers of security for rail services who perform services under contract with and on behalf of the Tri-County Rail Commuter Rail Authority or the Department of Transportation;¹⁰ and providers or vendors that have contractually agreed to act on behalf of the state as agents of the Department of Juvenile Justice to provide services to children in need of services, families in need of services, or juvenile offenders.¹¹

The courts have enumerated several factors required to establish an agency relationship: 1) acknowledgment by the principal that the agent will act for him; 2) the agent's acceptance of the undertaking; and 3) control by the principal over the actions of the agent.¹² Recently, the Florida Supreme Court has held that immunity should be granted to physician consultants who contract with the (then) Department of Health and Rehabilitative Services, Division of Children's Medical Services.¹³ In two cases, the Fourth District Court of Appeals has reversed the trial court's finding that an agency relationship existed by contract, thus entitling the private provider to limited liability pursuant to the waiver of sovereign immunity.¹⁴ Should the Court find that immunity has been provided absent a true agency relationship, access to court issues might be raised (see Constitutional Issues).

Effect of Bill

This bill adds professional firms that have contractually agreed to provide construction engineering and inspection services for the Department of Transportation (DOT) to the providers that are statutorily considered 'agents' for the purposes of the limitation of liability pursuant to the state's waiver of sovereign immunity. A contract between such a firm and the DOT must provide for the indemnification of the state for any liability incurred by the department as a result of the agent's actions.

C. SECTION DIRECTORY:

Section 1 amends s. 768.28(10), F.S., to add subsection (e) which provides that professional firms that have contractually agreed with the DOT for construction engineering and inspection services are agents of the state with respect to sovereign immunity.

Section 2 provides an effective date of upon becoming law.

⁶ See ss.766.1115 and 768.28(9)(b)2., F.S.

⁷ See ss. 381.0302 and 768.28(9)(b)2., F.S.

⁸ See s. 768.28(9)(b)2., F.S.

⁹ See s. 768.28(10)(a), F.S.

¹⁰ See s. 768.28(10)(d), F.S.

¹¹ See s. 768.28(11)(a), F.S.

¹² See *Goldschmidt v. Holman*, 571 So.2d 422 (Fla. 1990).

¹³ See *Stoll v. Noel*, 694 So.2d 701 (Fla. 1997) (The Court found that the following factors evidenced an agency relationship between the physicians and Children's Medical Services (CMS): 1) CMS required the physicians to abide by policies and rules in the HRS and CMS manuals; 2) all physician services rendered and paid for by CMS had to first be authorized by the CMS medical director; and 3) HRS policy made CMS responsible for supervising all personnel and medical care for CMS patients. Note also that there is a claim bill currently pending regarding Minouche Noel, the child injured in the Stoll v. Noel case. See HB 183.)

¹⁴ See *Theodore v. Graham*, 733 So.2d 538 (4th DCA 1999) (the court held that the department's provisions gave the private director, not the department, great control over the program and patient treatment, and that the director's contract specified that she would be liable for negligent acts) and *Robinson v. Linzer*, 758 So.2d 1163 (Fla. 4th DCA 2000) (in spite of contract language that specified the agency relationship, government control over the method and manner of services, and immunity, the court reversed the trial court's finding that a physician was a hospital agent because the private agency had control of hiring and paying physicians, and was responsible for the day-to-day physician supervision.)

II. 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:

It is anticipated that construction engineering and inspection firms may pay somewhat lower professional liability insurance premiums,¹⁵ and it is possible that these lower premiums may allow such firms to offer lower prices to the DOT for their services.

Extending sovereign immunity entitles the new agents to sovereign immunity, and also to liability coverage from the State Risk Management Trust Fund. This means that the Risk Management Trust Fund will pay damages up to the limits of sovereign immunity, and for defense legal fees and costs, as well as the cost of enforcing the indemnification clause. In addition, collection of any judgment or settlement agreement against a new agent, in excess of the sovereign immunity limits, would have to be addressed through the claim bill process

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: Not applicable.
2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

¹⁵ See Besler, Chris, "Florida Highway Engineering Services: The Fast Lane to Liability?", CNA/Schinnerer Risk Management Program, 2002. The study was conducted by Victor O. Schinnerer & Company, the managing underwriter for the National Society of Professional Engineers professional liability insurance, which found that the frequency and severity of CEI-related professional liability claims in Florida far exceeded that of other states.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 12, 2003, the Judiciary Committee adopted a strike-all amendment to HB 357 which does the following:

- Changes the terminology from 'construction contract administration' to 'construction engineering and inspection services' to mirror the language used in the contracts between DOT and the firms;
- Provides that the agency status is solely for the purposes of the waiver of sovereign immunity while acting within the scope of the contract;
- Provides that the agency status does not extend to worker's compensation laws, with a specified exception.