

2005 LEGISLATIVE REPORT

House Bill 1681 -- Transportation Package

Effective Date: June 20, 2005

The bill contains a number of changes in the law related to transportation. Major provisions in the bill are:

- Limits the liability of FDOT contractors and design engineers under certain circumstances for personal injury, property damage, or death if their work was in conformance with the terms of their contracts. Specifies that a reckless, drunken, or impaired driver is the sole proximate cause of his or her own death, injury, or property damage occurring in a transportation construction zone. Specifies that this limited immunity does not affect any claim FDOT may file against a contractor or engineer. Specifies that if FDOT, its contractors, engineers, or agents are either immune from liability pursuant to this section or found not to be at fault, then their names cannot be on the jury verdict form
- Clarifies current law to conform to FDOT practice on work-order changes, supplemental agreements, and surety bonds. Any surety issuing a bond under s.337.18 shall be fully liable under such surety bond to the full extent of any modified contract amount up to and including 25 percent over the original contract amount and without regard to the fact that the surety was not aware of or did not approve such modifications. However, if modifications of the original contract amount cumulatively result in modifications of the contract amount in excess of 25 percent of the original contract amount, the surety's approval shall be required to bind the surety under the bond on that portion in excess of 25 percent of the original contract amount.

Other provisions include:

- Creates the Northwest Florida Transportation Corridor Authority, giving local citizens the ability to plan their transportation futures and pay for their identified needs with new toll roads.
- Requires major metropolitan planning organization plans, and changes to those plans affecting the first three years of the FDOT Work Program, to be adopted by a recorded, roll-call vote.
- Gives FDOT specific rulemaking authority to implement the existing statutory provisions related to public-private partnerships to develop state right-of-way.
- Establishes a percentage cap on the repayment amounts of State Infrastructure Bank loans the FDOT has loaned itself for Work Program projects. The cap will be .75 percent of the revenues on deposit in the State Transportation Trust Fund.
- Amends and updates provisions related to environmental mitigation accounts for FDOT projects to delete Department of Environmental Protection from the approval and decision-making process. The water management districts will continue as the lead agencies in determining the environmental mitigation for state transportation projects.
- Creates state/local matching grant program within Florida Seaport Transportation and Economic Development Council to finance dredging of ports in counties of less than 300,000 population.

FTBA TORT REFORM LANGUAGE CONTAINED IN HB 1681:

Section 4. Section 337.195, Florida Statutes, is created to read:

337.195 Limits on liability.--

(1) In a civil action for the death of or injury to a person, or for damage to property, against the Department of Transportation or its agents, consultants, or contractors for work performed on a highway, road, street, bridge, or other transportation facility when the death, injury, or damage resulted from a motor vehicle crash within a construction zone in which the driver of one of the vehicles was under the influence of alcoholic beverages as set forth in s. 316.193, under the influence of any chemical substance as set forth in s. 877.111, or illegally under the influence of any substance controlled under chapter 893 to the extent that her or his normal faculties were impaired or that she or he operated a vehicle recklessly as defined in s. 316.192, it is presumed that the driver's operation of the vehicle was the sole proximate cause of his or her own death, injury, or damage. This presumption can be overcome if the gross negligence or intentional misconduct of the Department of Transportation, or of its agents, consultants, or contractors, was a proximate cause of the driver's death, injury, or damage.

(2) A contractor who constructs, maintains, or repairs a highway, road, street, bridge, or other transportation facility for the Department of Transportation is not liable to a claimant for personal injury, property damage, or death arising from the performance of the construction, maintenance, or repair if, at the time of the personal injury, property damage, or death, the contractor was in compliance with contract documents material to the condition that was the proximate cause of the personal injury, property damage, or death.

(a) The limitation on liability contained in this subsection does not apply when the proximate cause of the personal injury, property damage, or death is a latent condition, defect, error, or omission that was created by the contractor and not a defect, error, or omission in the contract documents; or when the proximate cause of the personal injury, property damage or death was the contractor's failure to perform, update or comply with the maintenance of traffic safety plan as required by the contract documents.

(b) Nothing in this subsection shall be interpreted or construed as relieving the contractor of any obligation to provide the Department of Transportation with written notice of any apparent error or omission in the contract documents.

(c) Nothing in this subsection shall be interpreted or construed to alter or affect any claim of the Department of Transportation against such contractor.

(d) This subsection does not affect any claim of any entity against such contractor, which claim is associated with such entity's facilities on or in Department of Transportation roads or other transportation facilities.

(3) In all cases involving personal injury, property damage, or death, a person or entity who contracts to prepare or provide engineering plans for the construction or repair of a highway, road, street, bridge, or other transportation facility for the Department of Transportation shall be presumed to have prepared such engineering plans using the degree of care and skill ordinarily exercised by other engineers in the field under similar conditions and in similar localities and with due regard for acceptable engineering standards and principles if the engineering plans conformed to the Department of Transportation's design standards material to the condition or defect that was the proximate cause of the person injury, property damage, or death. This presumption can be overcome only upon a showing of the person's or entity's gross negligence in the preparation of the engineering plans and shall not be interpreted or construed

to alter or affect any claim of the Department of Transportation against such person or entity. The limitation on liability contained in this subsection shall not apply to any hidden or undiscoverable condition created by the engineer. This subsection does not affect any claim of any entity against such engineer or engineering firm, which claim is associated with such entity's facilities on or in Department of Transportation roads or other transportation facilities.

(4) In any civil action for death, injury, or damages against the Department of Transportation or its agents, consultants, engineers or contractors for work performed on a highway, road, street, bridge, or other transportation facility, if the department, its agents, consultants, engineers, or contractors are immune from liability pursuant to this section or are not parties to the litigation, they may not be named on the jury verdict form or be found to be at fault or responsible for the injury, death, or damage that gave rise to the damages.

SB 360 – Growth Management

Effective Date: July 1, 2005

One of the more complex issues addressed this session was growth management. Infrastructure, including roads, schools, and water resources, are often not available concurrent with a new development and local governments do not have access to adequate funding to serve existing or new development. With a backlog of needs, the major effort was to address concurrency in three areas: Transportation, Schools and Water.

Concurrency

Transportation – Requires transportation facilities be in place or under actual construction within 3 years of the approval of a building permit.

Proportionate Share for Transportation – Otherwise known as pay and go, this provision allow for a development to satisfy concurrency requirements by allowing developers and other entities having an impact to pay for that impact or payments or donation of land.

Schools – Requires by December 1, 2008, local governments must adopt a public school facilities element and updated interlocal agreement to implement school concurrency. Local government may not deny site plan or subdivision approval on the basis of school concurrency if capacity is available in a contiguous area, or where capacity will be available or under actual construction within 3 years after the issuance of final subdivision or site plan approval, or where the developer commits to pay proportionate share mitigation.

Water – The bill requires within 18 months of the update to the water management district's regional water supply plan, local governments must adopt a 10-year water supply plan to meet the need of the existing and planned population growth.

Funding

The legislature appropriated \$1.5 billion for infrastructure, \$750 million of which is to be recurring. For FY 2005-06 the legislature allocated \$1.117 billion for transportation, \$177 million for education, \$200 million for alternative water supply and \$6.7 million for DCA technical assistance. Annually thereafter the funding will be \$542 million for transportation, \$105 million for education, \$100 million for water and \$3.35 million for DCA technical assistance.

Legal Reform

Two asbestos related bills passed this legislative session. SB 2228 limits the liability of a successor corporation's asbestos-related liabilities incurred as a result of a merger or consolidation with another company. The second asbestos bill is a more comprehensive piece of legislation. HB 1019, relating to Asbestos and Silica Compensation Act, is a sweeping reform which will insure that funds are available to those who are truly impaired by exposure to asbestos and silica. It will bar claims from those who are not impaired. The bill sets up strict medical criteria to determine those who are truly impaired.

HB 135 related to Street Lights. This bill provides that a streetlight provider will receive protection from liability if it has designated procedures in place to respond to a notice that its streetlight is not working and informed its customers and the general public of those procedures.

SB 2070 -- Communications Tax Repeal

Effective Date: July 1, 2005

This bill retroactively repeals the communications tax on internally provided substitute communication systems. Without repeal, not only would Florida have been the only state in the country with this technology tax, but businesses and homeowners could have been required to pay a tax on networked computers, phone systems, paging systems or even two-way radios.

HB 401 – Southwest Florida Transportation

The bill creates the Southwest Florida Expressway Authority (the Authority) in a new Part X of Chapter 348, F.S. The Authority will have the general powers and duties of all the existing expressway authorities, such as the ability to enter into contracts, acquire land, set tolls, and hire staff. Bonds for the Authority's projects can either be issued on its behalf by the state Division of Bond Finance or by the Authority itself.

The Authority will have an eight-member governing board.

The Authority's projects are limited to tolled expressway lanes and support facilities on Interstate 75 in Collier and Lee Counties. The Authority contemplates entering into a lease-purchase agreement with FDOT, whereby FDOT would operate and maintain the tolled facilities and at some point would own the system and make it part of the state road system.

The act creating the Authority will "sunset" in 12 years after its effective date if the Authority has no outstanding indebtedness, no studies or project designs underway, or no projects under construction, and if it is not operating or maintaining the system.

The effective date of this bill is upon passage of resolutions from the Lee and Collier County Commissions, but no earlier than July 1, 2005.

SB 652 – Public Construction Bonds

Effective Date: June 14, 2005

Language in SB 652 exempts surety from the provisions of bad faith in the insurance code. The language addresses the Dadeland case which is currently pending before the Florida Supreme Court.

This bill also amends the model bond form contained in s. 255.05(3), F.S., which is used for public construction projects, to add a space for entry of a bond number; and to include language on the face of the bond stating that any action instituted by a claimant under the bond for payment must be in accordance with the notice and time limitations provisions contained in s. 255.05(2), F.S. These provisions specify:

A claimant no longer furnishing labor, services, or materials on a project, and who is provided with a notice of contest of claim against a payment bond, has 60 days to file suit.

A claimant, except a laborer, must provide the contractor with a notice that he or she intends to use the bond either before commencing or no later than 45 days after commencing to provide services.

A claimant, who is not in privity with the contractor and who has not received payment for his or her services, must deliver to the contractor and the surety written notice of the performance of services and of nonpayment either 45 or more days into the progress of the work, or no more than 90 days after the completion of the work.

An action against the contractor or the surety on a payment and performance bond must be instituted within 1 year after the performance of services.

The bill provides that the statute of limitations is one year for filing a claim against any payment and performance bond for a public work. The bill specifies that, under no circumstances, may a statutory bond be converted into a common law bond.

House Bill 509 -- Construction Prompt Payment & Retainage

Effective Date: October 1, 2005

This legislation shall not apply to any state or local government construction projects advertised for bid or contracts entered into prior to October 1, 2005. The bill revises and renames Part VII of Chapter 218, F.S., as the Local Government Prompt Payment Act. It amends sections of Chapter 255 and creates new sections known as the Florida Prompt Payment Act (Sections 255.0705-255.078, F.S.).

HB 509 revises Florida's Local Government Prompt Payment Act pertaining to construction projects undertaken by local governments, creates a similar prompt payment act for state projects **(with the exception of DOT projects)**, and implements new procedures for all government projects for the withholding and release of retainage, creation and completion of a final punch list, and time periods within which final payment must be made. The bill provides interest penalties and prevailing party attorneys' fees. Specific provisions which apply to both state and local government public projects are as follows:

- Provides procedures for governmental entities to document receipt of the contractor's payment request, which must be processed and paid within specified time periods. Provides procedures for rejecting a payment request and requires the governmental entity to set forth in writing what is required to correct the payment request. Requires undisputed portions to be paid. Requires contractors to pay downstream within 10 days of receipt of payment and subcontractors to pay downstream within 7 days of receipt of

payment. These provisions are a reduction from the current 15 day time periods.

- If money is held, it must be held by the public owner, not the contractor.
- If a project consists of multiple phases or more than one building or structure, time periods for development of the punch list and payment shall occur for each phase or building and money shall not be held until completion of the final phase or building.
- Requires each contract to provide procedures for development of a final punch list and requires said list to be created within 30 days of substantial completion as defined in the contract, or if not defined in the contract, within 30 days of reaching beneficial occupancy or use. The time period may be extended by contract to a maximum of 60 days if the project has an estimated cost of over \$10 million. If the governmental entity does not provide the punch list within the specified time periods, the contractor can submit his or her final payment request and time periods for final payment begin to run.
- Requires the owner to pay for all properly completed work and to only withhold payment for items that are in dispute. Provides that although punch list items identified after the final punch list is developed will not delay final payment, it remains the obligation of the contractor to perform any corrective work required to satisfy its obligations under its contract.
- Retainage may not be held to secure warranty work, and may not be held to secure payment of insurance premiums under an OCIP or CCIP. Final payment cannot be delayed pending a final audit on one of these wrap up policies.
- Reduces the retainage that is held on local government and state projects: Caps retainage at the traditional 10% (currently there is no statutory cap), and provides that the bill does not prevent a governmental entity from adopting procedures for withholding less than 10% retainage, or incrementally reducing the retainage that is held, or releasing all or any portion of retainage.
- Provides that the contractor can request release of one-half the retainage that has been held when a project reaches 50% completion and if retainage is released, it must be paid downstream to the subcontractors and suppliers to whom it is owed.
- Limits retainage on the last half of the project to 5% unless good cause is given by the contractor, in writing, to a specific subcontractor on a case-by-case basis.
- Allows the governmental entity to withhold amounts that are the subject of a good-faith dispute or a claim brought pursuant to s. 255.05, or are the subject of a claim by the owner or contractor.
- Requires retainage to be separately set forth in notices of nonpayment, and provides that claimants will not file suit for retainage until one of the following has occurred:
 - (a) The public entity has released the Claimant's retainage to the contractor and the applicable time periods for payment downstream have tolled;
 - (b) The claimant has completed all work required under the contract and 70 days have passed since the contractor sent the owner its final payment request;

- (c) At least 160 days have passed since the project reached substantial completion as defined in the contract, or if not defined, since beneficial occupancy or use has occurred; OR
 - (d) The claimant has made a written request to the contractor for any of the information set forth in (a)-(c) above and has not responded within 10 days of receipt of the request.
- The provisions for early release of retainage do not apply to the following:
 - Construction services that are paid for in whole or in part with federal funds and are subject to federal grantor laws and regulations or requirements that conflict.
 - Construction services where the total project cost is \$200,000 or less.
 - Construction services to small cities (a population of 25,000 or less) or to small counties (a population of 100,000 or less).
 - Community Colleges and State Universities who have adopted their own official guidelines for release of retainage on a line item basis. A subcontractor can apply for release of its retainage 45 days after completing its work.
 - **Contracts or work performed for the Florida Department of Transportation** (these projects are governed by Chapter 337, Florida Statutes, and DOT regulations, and are not affected by these new retainage provisions).