THE SUNRISE CITY
FORT PIERCE
CITY ATTORNEY'S OFFICE Florida

TO: DONNELLA CLARKE, GRANTS ADMINISTRATION MANAGER

FROM: SARA HEDGES, CITY ATTORNEY *SH*

RE: 2024 FEMA SUBAWARD AND GRANT AGREEMENT - 2024 HURRICANE MILTON

CAO RLS FILE: RLS 25-98

DATE: APRIL 25, 2025

I have reviewed the above Request for Legal Services (RLS) related to a Grant Agreement with the Florida Division of Emergency Management (FDEM) for damage from Hurricane Milton. Please note the following concerns with the Grant Agreement:

1. Two (2) Representatives are listed on page 2. This should be reviewed for one (1) Representative.

2. Generally, this Office does not recommend the City enter into agreements requiring indemnification. Section 17 – Liability, on page 7, of this Grant Agreement does not actually use the word "indemnification", the language used appears to be a requirement that the City indemnify FDEM without specifically using the word. The language states the City "agrees to be fully responsible for its negligent or tortious acts or omissions which result in claims or suits against the Agency [FDEM] **and agrees to be liable for any damages proximately caused by the acts or omissions** to the extent set forth in section 768.28, Florida Statutes" (emphasis added). While attempts have been made with the language to limit this responsibility to what is permitted under the City's sovereign immunity protections, Courts can and have found entities to have waived sovereign immunity. Additionally, indemnification is disfavored by the Courts. Further, indemnification language is advised against by the Florida Attorney General's Office due to the language of Section 768.28, Florida Statutes. I have included Attorney General Opinions with this Memorandum in support of and to explain this Office's position that terms requiring the City to indemnify another should not be entered into by the City. The Florida Supreme Court, in a matter of first impression, has found, however, that "government entities are only prohibited from entering into agreements to indemnify another government entity for the other entity's negligence, or to assume any liability for the other entity's negligence". Fla. Dep't of Nat. Res. v. Garcia, 753 So. 2d 72, 77 (Fla.

2000). While such may now be permitted by this one ruling by the Florida Supreme Court, such does not mean it is required or recommended. Therefore, it is recommended the Grants Division attempt to have Section 17 removed by FDEM from this Grant Agreement.

If FDEM refuses to remove Section 17, the Grant Agreement may legally be entered into as written, with the understanding that the City could be found to have waived sovereign immunity by signing the Grant Agreement. This would mean the City could be found to have no immunity protections from a lawsuit and no cap on the amount awarded to a Plaintiff. Additionally, the City may have to pay additional financial awards against FDEM in a lawsuit. Finally, the City's insurance company may refuse to defend or cover the lawsuit or any monetary judgment if there is found to be a waiver of sovereign immunity.

3. The Systems Access Form, Attachment B on page 12, includes the Mayor's direct City email address. This should be reviewed, and you should consult with the City Clerk, as she has directed a different general City email address to be used previously on Grant Agreements for the Mayor. Additionally, the signatures for the other individuals do not appear to be actual signatures but computer text generated signatures. This should be reviewed for actual signatures.

4. You are responsible for ensuring all of the certifications in Attachment C on page 14 and Attachment E on page 36 are correct and accurate before the Mayor reviews and signs them.

With the above issues corrected (except for as explained in point 2), the Grant Agreement is approved as to form and correctness.

If you have any questions, please do not hesitate to contact this Office via phone or e-mail.

Thank you.
SH

Interlocal agreement, indemnification provisions

Number: INFORMAL

Date: November 19, 1996

Mr. Leonard G. Rubin
Assistant City Attorney of Coral Springs
9551 West Sample Road
Coral Springs, Florida 33065

Dear Mr. Rubin:

According to your letter, the City of Coral Springs wishes to enter into an interlocal agreement with the Broward County School Board. The agreement would set forth the duties and obligations of the city and the school board with regard to "the implementation of municipal school concurrency review." As part of this cooperative effort, the school board and the city will jointly review proposed development to ensure that school concurrency requirements are met.

You have provided a copy of a draft of the interlocal agreement. In two separate provisions the city agrees to bear the responsibility for the defense of and cost incurred in defending the school board from any and all liability resulting from the city's own actions. You have asked for this office's comment on the validity of these indemnification provisions.

While this office will not pass on the validity of particular contractual provisions,[1] the following informal comments may be of assistance in resolving this matter.

Section 768.28, Florida Statutes (1996 Supp.), serves to waive the sovereign immunity of the state and its agencies and subdivisions to the extent specified in that section. Monetary limitations are specified allowing payment of a judgment against the state or its agencies or subdivisions by any one person not to exceed $100,000 for any claim or judgment which, when totaled with all other claims paid by the state arising out of the same incident or occurrence, does not exceed $200,000.[2] Punitive damages are excluded.[3]

State agencies or subdivisions within the scope of section 768.28, Florida Statutes, are defined to include "counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities . . . ."[4] This office has consistently advised governmental entities that it is impermissible for them to become a party to a contract that includes an indemnification or hold harmless provision in the absence of legislative authorization.[5]

For example, this office, in Attorney General's Opinion 80-77, concluded that the Governor, in the absence of a statute, was not authorized to waive the sovereign immunity of the state by agreeing that the state would waive certain defenses and would hold the United States harmless from any violations of the regulations prescribed by the United States Department of the Interior that the state or its employees may commit. More recently, this office determined that the Department of Corrections could not by contract agree to indemnify and hold a private company

harmless for any damage, loss, or injury caused by the department, its employees of agents.[6] Similarly, in Attorney General's Opinion 95-12, this office advised the Department of Health and Rehabilitative Services that it could not contractually indemnify and hold harmless the Board of County Commissioners of Collier County for any damage, loss, or injury arising out of the negligent provision of services by HRS or its employees at a county health unit.

A limited waiver of the state's immunity in tort has already been accomplished by section 768.28, Florida Statutes (1996 Supp.). Subsection (1) of section 768.28 provides in part:

"In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies . . . to recover damages in tort for money damages against the state or its agencies . . . for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency . . . while acting within the scope of his office or employment under circumstances in which the state or such agency . . . if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act."

Subsection (18) of the statute, however, expressly provides:

"Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence. This does not preclude a party from requiring a nongovernmental entity to provide such indemnification or insurance."

In Attorney General's Opinion 95-12 this office considered the argument that subsection (18), above, only prohibits a clause in which one agency would indemnify another or would assume liability for the other agency's negligence. The opinion concludes that "[w]hile the second sentence of section 768.28(18), Florida Statutes (1994 Supp.), does prohibit such a clause, the first sentence of the statute clearly provides that a state agency may not waive any defense of sovereign immunity or increase the limits of its liability when entering into a contract with a political subdivision of the state."

Thus, it is the position of this office that the City of Coral Springs is not authorized to waive any defense of sovereign immunity or increase the limits of its liability by contract. This conclusion would not preclude a contractual provision in the interlocal agreement which would clearly provide that each party will be liable for any losses or damages for which that party may be found legally responsible, however, it would appear to preclude any indemnity or hold harmless provisions in this contract.

I trust that these informal comments will assist you in resolving this matter.

Sincerely,

Gerry Hammond
Assistant Attorney General

GH/tgk

Enclosure

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[1] *See* Department of Legal Affairs Statement of Policy Concerning Attorney General Opinions (copy enclosed).

[2] Section 768.28(5), Fla. Stat. (1996 Supp.).

[3] *Id.*

[4] Section 768.28(2), Fla. Stat. (1996 Supp.).

[5] *See, e.g.,* Ops. Att'y Gen. Fla. 95-61 (1995), 93-24 (1993), 90-21 (1990), 89-61 (1989), and 85-66 (1985).

[6] *See* Op. Att'y Gen. Fla. 90-21 (1990).

Indemnity or assumption of risk clauses

Number: INFORMAL

Date: October 27, 2000

The Honorable Everett A. Kelly
Representative, District 42
123 North St. Clair Abrams Avenue
Tavares, Florida 32778

Dear Representative Kelly:

The Department of Business and Professional Regulation has forwarded your letter on behalf of a constituent to this office. The constituent has expressed his concern about assumption of risk and indemnification language contained on the ticket of the local golf club.

The determination of the validity of an indemnity or assumption of risk provision must be made by a court of competent jurisdiction in an appropriate judicial proceeding. In an effort to be of assistance, however, the following general comments are offered.

While certain types of indemnification or hold harmless agreements are impermissible, there is no prohibition against all such agreements.[1] Such contracts, however, are subject to the general rules governing the formation, validity, and construction of all contracts.[2]

Generally, an indemnity agreement is one in which the promisor agrees to protect the promisee against loss or damages by reason of liability to a third party.[3] An agreement for indemnification that protects an indemnitee against its own negligence is valid as long as the contract expresses an intent to indemnify against the indemnitee's own wrongful actions in clear and unequivocal terms.[4] Contracts providing indemnification for one's own negligence are disfavored in Florida and are strictly construed.[5]

Releases from liability have been upheld as enforceable in sporting events.[6] Thus, the doctrine of express assumption of the risk as a contractual concept is still viable. The courts have held that exculpatory clauses clearly stating that a party is released from liability for its own negligence in clear and unequivocal words are effective.[7]

In *Blackburn v. Dorta*,[8] the Supreme Court of Florida contrasted implied assumption of the risk with "express assumption of the risk" and said:

"Included within the definition of express assumption of risk are express contracts not to sue for injury or loss which may thereafter be occasioned by the covenantee's negligence as well as situations in which actual consent exists such as where one voluntarily participates in a contact sport."

Recently, for example, the First District Court of Appeal in *Borden v. Phillips*[9] upheld the language of an exculpatory clause that was clear and unambiguous, reflecting a diver's

contractual assumption of risks inherent in scuba diving and his intent to release the boat owner, captain, and professional association from all liability, including any resulting from their own negligence. The court held that the release was enforceable in a wrongful death action arising from the diver's drowning while taking scuba training, where a signed release expressly stated that none of the released parties could be held liable for any injury or death resulting from "the negligence of any party, including the released parties, whether passive or active."

I trust that the above informal advisory comments may be of assistance.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk

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[1] *See, e.g.,* s. 725.06, Fla. Stat., stating:

"Any portion of any agreement or contract for, or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating connected with it, or any guarantee of, or in connection with, any of them, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman, or between any combination thereof, wherein any party referred to herein obtains indemnification from liability for damages to persons or property caused in whole or in part by any act, omission, or default of that party arising from the contract or its performance shall be void and unenforceable unless:
(1) The contract contains a monetary limitation on the extent of the indemnification and shall be a part of the project specifications or bid documents, if any, or
(2) The person indemnified by the contract gives a specific consideration to the indemnitor for the indemnification that shall be provided for in his or her contract and section of the project specifications or bid documents, if any."

[2] *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999).

[3] *See Dade County School Board v. Radio Station WQBA*, *supra*; *Royal Indemnity Company v. Knott*, 136 So. 474, 479 (Fla. 1931).

[4] *See Cox Cable Corporation v. Gulf Power Company*, 591 So. 2d 627 (Fla. 1992) (provision to indemnify, protect and save forever harmless from and against any and all claims was insufficient to provide indemnity for the indemnitee's own acts of negligence); *University Plaza Shopping Center, Inc. v. Stewart*, 272 So. 2d 507 (Fla. 1973).

[5] *United Parcel Service of America, Inc. v. Enforcement Security Corporation*, 525 So. 2d 424 (Fla. 1st DCA 1987); *SEFC Building Corporation v. McCloskey Window Cleaning, Inc.*, 645 So. 2d 1116 (Fla. 3d DCA 1994) (contracts which attempt to indemnify party for its own wrongful acts

are viewed with disfavor and will be enforced only if they express such intent in clear, unequivocal terms).

[6] *See, e.g., DeBoer v. Florida Offroaders Driver's Association*, *Inc.*, 622 So. 2d 1134 (Fla. 5th DCA 1993); *Banfield v. Louis*, 589 So. 2d 441 (Fla. 4th DCA 1991).

[7] *Van Tuyn v. Zurich American Insurance Company*, 447 So. 2d 318 (Fla. 4th DCA 1984).

[8] 348 So. 2d 287, 290 (Fla. 1977). *Cf. O'Connell v. Walt Disney World Company*, 413 So. 2d 444, 448 (Fla. 5th DCA 1982); *Donaldson v. Cenac*, 675 So. 2d 228, 230 (Fla. 1st DCA 1996) (assumption of the risk cannot apply unless a plaintiff actually knows or in law is deemed to know that a particular risk--here the risk of negligent injury--was present, and understood the nature of the risk); *Van Tuyn v. Zurich American Insurance Company*, *supra* (for express "assumption of risk" to be valid, either by contract or by voluntary participation in an activity, it must be clear that the plaintiff understood that she was assuming the particular conduct by defendant which caused her injury).

[9] 752 So. 2d 69 (Fla. 1st DCA 2000).

Indemnification contracts

Number: INFORMAL

Date: March 21, 1997

Ms. Helene C. Rosen
General Counsel, Palm Beach
County Health Care District
Post Office Box 810037
Boca Raton, Florida 33481-0037

Dear Ms. Rosen:

You ask whether the Palm Beach County Health Care District may, by contract, agree to indemnify and to hold harmless another agency, whether governmental or nongovernmental, for any damage, loss, or injury arising out of the negligent or wrongful acts of the district or its employees. Attorney General Butterworth has asked me to respond to your letter.

Article X, section 13, Florida Constitution, provides in part that "[p]rovision shall be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Thus, the power to waive the state's sovereign immunity rests with the state Legislature.[1]

With the enactment of section 768.28, Florida Statutes, the Legislature has created a limited waiver of the state's immunity in tort.[2] Monetary limitations are specified allowing payment of a judgment against the state or its agencies or subdivisions by any one person not to exceed $100,000 for any claim or judgment which, when totaled with all other claims paid by the state arising out of the same incident or occurrence, does not exceed $200,000.[3]

While there is no analogous statutory waiver of sovereign immunity in contract, The Supreme Court of Florida has stated that where the Legislature has, by general law, authorized the state and its agencies to enter into contracts, it has, in effect, waived the state's immunity in contract.[4] As stated by the Court, however, the waiver of the state's immunity in contract "is applicable only to suits on express, written contracts into which the state agency has statutory authority to enter."[5]

This office, in considering whether public agencies may enter into indemnification or hold harmless agreements with private or public entities, has previously stated that in the absence of statutory authorization, such agreements are impermissible.[6] For example, in Attorney General Opinion 80-77, this office concluded that the Governor could not, in the absence of a statute, waive the immunity of the state by agreeing the state would waive certain defenses and hold the United States harmless for any violations that the state or its employees might commit. Similarly, in Attorney General Opinion 90-21, this office stated that the Department of Corrections was not authorized to indemnify and hold a private company harmless for any damage, loss or injury caused by the department, its employees or agents.

The waiver of the state's immunity in tort has already been accomplished by section 768.28, Florida Statutes. I am not aware of any statutory provision which authorizes the department to alter the terms of section 768.28 by contract. While the courts have recognized that a legislative grant of the power to contract constitutes a waiver of the state's sovereign immunity to be sued in contract, I am not aware of any decision concluding that such authority encompasses the power to waive the state's sovereign immunity in tort beyond that which is already provided in section 768.28.

In Attorney General Opinion 95-12, this office considered the language in section 768.28(18), Florida Statutes, which states:

"Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence."

The county took the position in the above opinion that the language of section 768.28(18) only prohibited a clause in which the Department of Health and Rehabilitative Services would indemnify or assume liability for the county's negligence but would not prohibit a contractual provision holding the county harmless for any damage, loss or injury caused by the department, its employees or agents. This office concluded, however, that the first sentence of section 768.28(18) clearly prohibits a state agency from waiving *any* defense of sovereign immunity or increasing the limits of its liability when entering into a contract with a political subdivision of the state. Thus, the department could not enter into an agreement containing indemnification or hold harmless provisions that alter the state's waiver of immunity in tort or otherwise impose liability on the department for which it would not otherwise by law be responsible.

In a subsequent informal opinion to the Assistant City Attorney for Coral Springs, this office was asked to comment upon the validity of an interlocal agreement provision providing that the city agreed to bear the responsibility for the defense of and cost incurred in defending the school board from any and all liability resulting from the city's own actions. While this office recognized that it will not pass on the validity of any particular contractual provision, it stated that the city could not waive any defense of sovereign immunity or increase the limits of its liability by contract: "This conclusion would not preclude a contractual provision in the interlocal agreement which would clearly provide that each party will be liable for any losses or damages for which that party may be found legally responsible; however, it would appear to preclude any indemnity or hold harmless provisions in this contract."

As noted in the informal opinion, this office will not pass on the validity of any particular contractual provision. The opinions of this office, however, have recognized that a public agency may not, in the absence of a statute, enter into hold harmless or indemnification agreements which alter the state's waiver of immunity in tort or otherwise impose liability on the agency for which it would not otherwise be responsible. While a public agency would not be precluded from entering into a contract with a provision that clearly states that each party will be liable for any losses or damages for which that party may be found legally responsible, contractual provisions requiring a public agency to hold harmless or indemnify another entity for the public agency's

acts may be construed by the courts as extending the liability of the agency beyond that which it would otherwise be legally liable.

I am enclosing copies of several of the Attorney General Opinions which discuss this issue. I trust, however, that the above informal comments may be of assistance to you in resolving this matter.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/tgk

Enclosures: Ops. Att'y Gen. Fla. 90-21 (1990) and 95-12 (1995); Inf. Op. to Mr. Leonard Rubin, dated November 6, 1996.

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[1] *See Arnold v.* Shumpert, 217 So. 2d 116 (Fla. 1968); *Davis v. Watson*, 318 So. 2d 169 (Fla. 4th DCA 1975), *cert. denied*, 330 So. 2d 16 (Fla. 1976).

[2] *See* s. 768.28(1), Fla. Stat., stating in part:

"In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. . . ."

[3] Section 768.28(5), Fla. Stat.

[4] *Pan-Am Tobacco Corporation v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984).

[5] *Id.* at 6.

[6] *See*, *e.g.,* Ops. Att'y Gen. Fla. 78-20 (1978) (state agency may not, in absence of general law so providing, enter into indemnification contract imposing liability upon state); 84-103 (1984) (city prohibited from agreeing to indemnify private corporation for any financial losses it might suffer over term of agreement).

Sovereign Immunity, indemnification agreements

Number: AGO 2000-22

Date: April 04, 2000

Subject:
Sovereign Immunity, indemnification agreements

Ms. Denise D. Dytrych
Palm Beach County Attorney
Post Office Box 1989
West Palm Beach, Florida 33402-1989

RE: SOVEREIGN IMMUNITY--COUNTIES--INDEMNIFICATION AGREEMENTS--county's ability to indemnify party of contract through agreement. s. 768.28, Fla. Stat.

Dear Ms. Dytrych:

You ask substantially the following questions:

1. May a county agree to indemnify another party to a contract for the county's own negligence in performance of the contract, if such indemnity does not exceed the limits in section 768.28, Florida Statutes?

2. If not, may the county agree to indemnify to the extent allowed by law, with a disclosure that such indemnification may be found void by a court of law and that the contracting party agrees to waive an estoppel argument to prevent the county from asserting that the indemnification is void?

3. May a county agree to purchase insurance to cover claims arising from a contract and name the contracting party as an additional insured or, alternatively, pay additional funds to the contracting party to purchase such insurance?

4. May a county agree that attorney's fees and costs will be paid to the prevailing party in a dispute arising from a contract, without an appropriation budgeted to cover the potential liability?

In sum:

1. & 2. A county may not agree to indemnify another party to a contract or alter the state's waiver of sovereign immunity such that the county's liability may be extended beyond the limits established in section 768.28, Florida Statutes.

3. A county may not agree to purchase insurance to cover claims arising from a contract and name the contracting party as an additional insured or, alternatively, pay additional funds to the contracting party to purchase such insurance. It is recognized, however, that a private vendor or party contracting with a public entity may incorporate the need for additional funds to purchase

insurance in its bid, such that the funds paid to the party will be used to purchase insurance to cover claims arising from the contract.

4. A county may not enter into an agreement that attorney's fees and costs will be paid to the prevailing party in a dispute arising from a contract to the extent such an agreement may alter the limits of liability established in section 768.28, Florida Statutes.

Questions One and Two

The ability to bring suit against the state and its subdivisions is derived from Article X, section 13, Florida Constitution, providing in part that "[p]rovision shall be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." Thus, the power to waive the state's sovereign immunity rests with the state Legislature.[1]

By enacting section 768.28, Florida Statutes, the Legislature created a limited waiver of the state's immunity in tort.[2] Monetary limits are specified to allow payment of a judgment against the state or its agencies or subdivisions to any one person not to exceed $100,000 for any claim or judgment that, when totaled with all other claims or judgments paid by the state arising out of the same incident or occurrence, does not exceed $200,000.[3]

It is well settled that section 768.28, Florida Statutes, constitutes the only manner in which the state's immunity in tort has been waived.[4] While it has been judicially recognized that a legislative grant of the power to contract constitutes a waiver of the state's immunity to be sued in contract,[5] there have been no decisions that such authority would allow a political subdivision to contract away its immunity in tort beyond that provided in section 768.28, Florida Statutes.

In light of the waiver of immunity in tort under section 768.28, Florida Statutes, on behalf of the state and its subdivisions, and in the absence of any statutory provision that authorizes a county to alter the terms of that section by contract, the county may not agree to indemnify another entity for the county's negligence beyond that in section 768.28, Florida Statutes. It makes common sense, however, that a county could contractually recognize its liability as provided by law.

The Supreme Court of Florida has recently determined in *Florida Department of Natural Resources v. Garcia*[6] that a plain reading of section 768.28(18), Florida Statutes, shows that "government entities are only prohibited from entering into agreements to indemnify another government entity for the other entity's negligence, or to assume any liability for the other entity's negligence."

Section 768.28(18), Florida Statutes, expressly provides:

"Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state. *Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence*. This does not preclude a party from

requiring a nongovernmental entity to provide such indemnification or insurance." (e.s.)

While it has been argued that the above language only prohibits a clause in which the state agrees to indemnify another party or assume liability for the other party's negligence, this office has taken the position that the statute clearly provides that a state agency or a subdivision of the state may not waive any defense of sovereign immunity or increase the limits of its liability when entering into a contract with another party.[7] This interpretation would preclude the county from including language in a contractual agreement that would affect any defense the county may raise under section 768.28, Florida Statutes, or otherwise altering the extent of the state's waiver of sovereign immunity.

In Attorney General Opinion 99-56, this office was asked whether the Florida National Guard could enter into a land use agreement that contained an indemnification clause. While the agreement recognized that any indemnification would have to be consistent with state law, the contract further provided that the Guard waived all rights and released the county from all demands or claims arising from the agreement. This office concluded that, absent statutory authority, an agency may not enter into agreements that alter the state's waiver of immunity and such language releasing the county from liability arising under the contract might be construed as extending the liability of an agency beyond that for which it would otherwise be legally liable.

As applied to the instant situation, the *Garcia* decision recognizes that a county may agree to indemnify another public entity that is a party to a contract for the county's own negligence. Any such indemnification agreement, however, would have to be crafted to make clear that it does not alter the state's waiver of sovereign immunity or extend the county's liability beyond the limits established in section 768.28, Florida Statutes.

Accordingly, the county may agree to indemnify another party for the county's own negligence, but may not otherwise alter the extent of its liability under section 768.28, Florida Statutes.

Question Three

As noted above, a subdivision of the state may not enter into a contract with a provision that requires one party to indemnify or insure the other party for the other party's negligence.[8] Moreover, as reflected in the previous discussion, nothing in a contract may alter the state's waiver of sovereign immunity.

Section 111.072, Florida Statutes, authorizes any county, municipality, or political subdivision to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage it may choose or to have any combination thereof in anticipation of any judgment or settlement that its officers, employees, or agents may be liable to pay pursuant to a civil or civil rights lawsuit described in section 111.07, Florida Statutes. This authority is reiterated in section 768.28(15)(a), Florida Statutes, providing that the state's subdivisions are authorized

"to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they may choose, or to have any combination thereof, in anticipation of any claim, judgment, and claims bill which they may be liable to pay pursuant to this section."

The plain language of the statute limits the procurement of insurance for the coverage of claims, judgments and claims bills for which the governmental entity may be liable to pay pursuant to section 768.28, Florida Statutes. There is no authority to purchase insurance for the benefit of the other party to a contract, effectively providing for the indemnification of the other party.[9]

It is recognized, however, that a private vendor or party contracting with a public entity may incorporate the need for additional funds to purchase insurance in its bid or proposal, such that the funds paid by the county to the party for performance of the contract will be used to purchase insurance to cover claims arising from the contract.

Question Four

As discussed above, the county may not agree to alter the state's waiver of sovereign immunity and extend the county's liability beyond the limits established in section 768.28, Florida Statutes. Thus, a county may not enter into an agreement that attorney's fees and costs will be paid to the prevailing party in a dispute arising from a contract to the extent such an agreement alters the limits of liability established in section 768.28, Florida Statutes.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tls

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[1] *See Arnold v. Shumpert,* 217 So. 2d 116 (Fla. 1968); *Davis v. Watson*, 318 So.2d 169 (Fla. 4th DCA 1975), *cert. den*., 330 So. 2d 16 (Fla. 1976). *Cf*. s. 215.245, Fla. Stat., permitting the state and its political subdivisions to enter into indemnification agreements with the Federal Government with respect to water resources development projects.

[2] *See* s. 768.28(1), Fla. Stat., stating in part:

"In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. . . ."

And see Department of Health and Rehabilitative Services v. McDougall, 359 So. 2d 528, 532 (Fla. 1st DCA 1978) (a state agency is liable for a wrongful act or omission of any employee of the agency while acting within the scope of his office or employment under circumstances in which the state or such agency, if a private person, would be liable to the claimant in accordance with the general laws of this state).

[3] Section 768.28(5), Fla. Stat.

[4] *See* Op. Att'y Gen. Fla. 99-56 (1999).

[5] *See Pan-Am Tobacco Corporation v. Department of Corrections,* 471 So. 2d 4 (Fla. 1984). Section 768.28(2), Fla. Stat., includes counties and municipalities within the definition of "state agencies or subdivisions."

[6] Slip Op. No. SC93065, February 10, 2000, (Fla. 2000).

[7] *See* Op. Att'y Gen. Fla. 95-12 (1995) (Department of Health and Rehabilitative Services was not authorized to enter into contractual agreement to hold another governmental entity harmless from any damage, loss, or injury arising out the negligence by departmental employees, agents, or subcontractors).

[8] *See* s. 768.28(18), Fla. Stat.

[9] *Cf.* Ops. Att'y Gen. Fla. 94-14 (1994) and 93-34 (1993) (district school board may obtain insurance in excess of the limits of sovereign immunity in anticipation of claims bill which it may be liable to pay; by doing so, it does not waive its defense of sovereign immunity or increase its limits of liability).

From: Christina Tweed
To: Donnella Clarke
Cc: Stephane Malet; Zachary Bell; Shyanne Harnage; Sebrina Brown; Virginia Hughes
Subject: FW: Request for Removal of Section (17) - Liability
Date: Thursday, May 8, 2025 10:47:09 AM
Attachments: image005.png
image006.png
image007.png

Good Morning Ms. Clark,

I forwarded your request for removal of Section (17) from the funding agreement to our legal department here at FDEM. Please see the reply below from our senior attorney, Douglas Galvan.

If you have any further questions or concerns, please feel free to contact me.

Kind Regards,

Tina

Christina Tweed, FCCM

Grant Manager, Bureau of Recovery

Florida Division of Emergency Management

Email: Christina.Tweed@em.myflorida.com

Office: 850-815-4483

https://www.floridadisaster.org

From: Douglas Galvan <Douglas.Galvan@em.myflorida.com>
Sent: Tuesday, May 6, 2025 4:18 PM
To: Christina Tweed <Christina.Tweed@em.myflorida.com>
Cc: Stephane Malet <Stephane.Malet@em.myflorida.com>; Virginia Hughes <Virginia.Hughes@em.myflorida.com>; Sebrina Brown <Sebrina.Brown@em.myflorida.com>; Stephanie Houp <Stephanie.Houp@em.myflorida.com>; Caleb Keller <Caleb.Keller@em.myflorida.com>
Subject: RE: Request for Removal of Section (17) - Liability

Dear Christina,

After careful consideration of the request and a review of the relevant provisions, FDEM must respectfully decline the request to remove Section 17 from the agreement. This decision is based on the following key points:

1. **Interpretation of Section 17 – Responsibility for Own Acts:** Section 17 states that the Subrecipient (the City) "agrees to be fully responsible for its negligent or tortious acts or omissions which result in claims or suits against the Agency [FDEM] and agrees to be liable for any damages proximately caused by the acts or omissions to the extent set forth in section 768.28, Florida Statutes."

   This language is carefully drafted to clarify that the City is responsible for *its own*

negligent or tortious acts or omissions. It does not require the City to indemnify FDEM for FDEM's negligence or the negligence of any third party. Instead, it affirms the City's accountability for damages proximately caused by its actions or inactions, and critically, this responsibility is explicitly limited by and subject to the provisions of Section 768.28, Florida Statutes, which governs sovereign immunity for governmental entities in Florida. The clause is intended to operate within, not waive, the established statutory protections and limitations of sovereign immunity.

2. **Standard Agreement Provision:** Section 17 is a standard provision included in all Subaward and Grant Agreements issued by FDEM. This standardization is crucial for ensuring consistency, fairness, and clarity in our contractual relationships with all subrecipients across the state. Modifying this fundamental provision for one entity would create inconsistencies and could complicate the administration of grant programs statewide.

We acknowledge the concerns raised by your City Attorney's Office regarding indemnification and the references to Attorney General Opinions and Florida case law. However, we believe Section 17 is distinguishable from the types of broad indemnification clauses that those authorities typically advise against. As noted in your memorandum, the Florida Supreme Court in *Fla. Dep't of Nat. Res. v. Garcia*, 753 So. 2d 72, 77 (Fla. 2000), found that "government entities are only prohibited from entering into agreements to indemnify another government entity for the *other entity's negligence*, or to assume any liability for the *other entity's negligence*." Section 17 aligns with this principle by focusing on the City's liability for *its own* acts or omissions, not those of FDEM.

Therefore, FDEM maintains that Section 17 is an appropriate and necessary component of the Subaward and Grant Agreement, clearly delineating responsibilities in a manner consistent with Florida law. We value our partnership with the City of Fort Pierce and hope this explanation clarifies our position. We are confident that the agreement, in its current form, provides a fair and legally sound basis for our collaboration.

We would be pleased to meet with you and representatives from the City Attorney's Office to discuss this matter further at your convenience. Please let us know your availability.

Sincerely,

Douglas Galvan

Senior Attorney

Florida Division of Emergency Management

Cell: 448-229-2178 Office: 850-815-4116

Douglas.Galvan@em.myflorida.com

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From: Donnella Clarke <dclarke@cityoffortpierce.com>
Sent: Friday, May 2, 2025 1:37 PM
To: Stephane Malet <Stephane.Malet@em.myflorida.com>; Zachary Bell <Zachary.Bell@em.myflorida.com>
Cc: Shyanne Harnage <sharnage@cityoffortpierce.com>; Sebrina Brown <Sebrina.Brown@em.myflorida.com>; Virginia Hughes <Virginia.Hughes@em.myflorida.com>
Subject: Request for Removal of Section (17) - Liability

Good afternoon,

Following a legal review and consultation with our City Attorney's Office, we would like to respectfully inquire about the possibility of removing Section 17 of the Subaward and Grant Agreement.

Specifically, we are requesting the following:

1. **Removal of Section 17 from the agreement**, if permissible.

    - Section 17 – Liability, on page 7, of this Grant Agreement does not actually use the word "indemnification", the language used appears to be a requirement that the City indemnify FDEM without specifically using the word.

    The language states the City:

> "agrees to be fully responsible for its negligent or tortious acts or omissions which result in claims or suits against the Agency [FDEM] and agrees to be liable for any damages proximately caused by the acts or omissions to the extent set forth in section 768.28, Florida Statutes" (emphasis added). While attempts have been made with the language to limit this responsibility to what is permitted under the City's sovereign immunity protections, Courts can and have found entities to have waived sovereign immunity. Additionally, indemnification is disfavored by the Courts. Further, indemnification language is advised against by the Florida Attorney General's Office due to the language of Section 768.28, Florida Statutes. I have included Attorney General Opinions with this Memorandum in support of and to explain this Office's position that terms requiring the City to indemnify another should not be entered into by the City. The Florida Supreme Court, in a matter of first impression, has found, however, that "government entities are only prohibited from entering into agreements to indemnify another government entity for the other entity's negligence, or to assume any liability for the other entity's negligence". Fla. Dep't of Nat. Res. v. Garcia, 753 So. 2d 72, 77 (Fla. 2000). While such may now be permitted by this one ruling by the Florida Supreme Court, such does not mean it is required or recommended. Therefore, it is recommended the Grants Division attempt to have Section 17 removed by FDEM from this Grant Agreement."

Please let us know if further discussion is needed.

We appreciate your time and consideration, on this matter.

Thank you in advance for your guidance.

Donnella Clarke MSC, PMP®, PMI-ACP® **I Grants Manager I City of Fort Pierce**

Grants Administration Division

Phone: 772-467-3168

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Under Florida law, correspondence with the Florida Division of Emergency Management concerning agency business that is neither confidential nor exempt pursuant to Florida Statutes is a public record and will be made available to the public upon request.