

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Community Affairs Committee

**BILL:** CS/CS/SB 386

**INTRODUCER:** Community Affairs Committee, Governmental Oversight and Accountability Committee, and Senators Bogdanoff, Fasano and Gaetz

**SUBJECT:** Procurement/Preference to Florida Businesses

**DATE:** April 5, 2011

**REVISED:** 4/11/11

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Mckay	Roberts	GO	Fav/CS
2.	Gizzi	Yeatman	CA	Fav/CS
3.			BC	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes  
 B. AMENDMENTS.....  Technical amendments were recommended  
 Amendments were recommended  
 Significant amendments were recommended

**I. Summary:**

This Committee Substitute for Committee Substitute (CS) modifies the existing in-state vendor preference for public printing contracts to include counties, municipalities, school districts and other political subdivisions as entities that may grant a preference. The CS specifies that the in-state preference for public printing contracts and contracts for the procurement of personal property and services shall be 5 percent.

The CS also requires state agencies to develop and adopt assessment protocols to evaluate and determine whether equipment, machinery or other inventory can be repaired or restored prior to purchasing replacement machinery, equipment or inventory under certain circumstances.

This CS substantially amends sections 283.35 and 287.084 of the Florida Statutes.

This CS creates an undesignated section of law.

## II. Present Situation:

### Public Printing Vendor Preference

Chapter 283 of the Florida Statutes regulates public printing. Section 283.35, F.S., provides that “[e]very agency must give preference to vendors located within the state when awarding contracts to have materials printed, whenever such printing can be done at no greater expense than the expense of awarding a contract to a vendor located outside the state and can be done at a level of quality comparable to that obtainable from a vendor located outside the state.”

Section 283.30(1), F.S., defines the term “agency” for purposes of ch. 283, F.S., to mean any official, officer, department, board, commission, division, bureau, section, district, office, authority, committee, or council, or any other unit of organization, however designated, of the executive branch of state government, and the Public Service Commission.

### State Agency Procurement Vendor Preference

Chapter 287 of the Florida Statutes regulates state agency procurement of personal property and services. In providing preference to Florida businesses, s. 287.084, F.S., states:

- (1) When an agency,<sup>1</sup> county, municipality, school district, or other political subdivision of the state is required to make purchases of personal property through competitive solicitation and the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is in a state or political subdivision thereof which grants a preference for the purchase of such personal property to a person whose principal place of business is in such state, then the agency, county, municipality, school district, or other political subdivision of this state may award a preference to the lowest responsible and responsive vendor having a principal place of business within this state, which preference is equal to the preference granted by the state or political subdivision thereof in which the lowest responsible and responsive vendor has its principal place of business. However, this section does not apply to transportation projects for which federal aid funds are available.
- (2) If a solicitation provides for the granting of a preference as is provided in this section, any vendor whose principal place of business is outside the State of Florida must accompany any written bid, proposal, or reply documents with a written opinion of an attorney at law licensed to practice law in that foreign state, as to the preferences, if any or none, granted by the law of that state to its own business entities whose principal places of business are in that foreign state in the letting of any or all public contracts.

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<sup>1</sup>As used in Ch. 287, F.S., “agency” means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. “Agency” does not include the university and college boards of trustees or the state universities and colleges.

### III. Effect of Proposed Changes:

**Section 1** provides a short title for this act as the “Buy Florida Act.”

**Section 2** amends s. 283.35, F.S., by expanding application of the printing preference to each county, municipality, school district, or other political subdivision of the state. Such entities shall provide preference to the responsible and responsive vendor whose principal place of business is in this state. The amount of the preference shall be 5 percent.

**Section 3** amends s. 287.084, F.S., to add an additional provision to the existing in-state preference for state agency procurement. The CS provides that in a competitive solicitation in which the lowest bid is submitted by a vendor whose principal place of business is located outside the state, the entity shall provide preference to the responsible and responsive vendor who has a principal place of business within this state. The preference given shall be 5 percent.

The CS deletes current statutory provisions which:

- Establish the preference for in-state vendors, when the printing can be performed in-state at a level of quality comparable to that obtainable from an out-of-state vendor that submits the lowest bid, to be equal to the preference granted by the state or political subdivision in which the lowest responsible and responsive vendor has its principal place of business.
- Provide that any vendor whose principal place of business is in another state must accompany any written bid, proposal, or reply documents with a written opinion of an attorney licensed in that state, regarding any preferences granted by that state to its own business entities whose principal places of business are in that state in the letting of public contracts.

**Section 4** creates an undesignated section of law to provide legislative intent that state agency purchases of new equipment, machinery or inventory due to fire, smoke, water or any other disaster incident be absolutely necessary due to the un-repairable condition of the equipment, machinery or inventory.

The CS requires state agencies to develop and adopt assessment protocols by January 1, 2012, that shall be used to evaluate and determine whether equipment, machinery or other inventory can be repaired or restored prior to a request to purchase replacement machinery, equipment or inventory under certain circumstances.

**Section 5** provides that this act shall take effect July 1, 2011.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

## D. Other Constitutional Issues:

The establishment of local preference laws may potentially implicate the Equal Protection Clause and the Commerce Clause of the U.S. Constitution.

***The Equal Protection Clause***

The United States Constitution provides that “no State shall . . . deny to any person within its jurisdiction, the equal protection of law.”<sup>2</sup> The in-state preference provisions in this CS may constitute an equal protection violation. If such legislation is challenged, the court would use a rational basis test to determine the constitutionality of the alleged discriminatory treatment.<sup>3</sup> Under the rational basis test, a court must uphold a state statute so long as the classification bears a rational relationship to a legitimate state interest.<sup>4</sup>

***The Commerce Clause***

The United States Constitution provides that Congress shall have the power “to regulate commerce . . . among the states.”<sup>5</sup> The Commerce Clause acts not only as a positive grant of power to Congress, but also as a negative constraint upon the states.<sup>6</sup>

Courts have used a two-tiered analysis to determine whether a statutory scheme violates the Commerce Clause:

1. “If a statute ‘directly regulates or discriminates against interstate commerce, or [if] its effect is to favor in-state economic interests over out-of-state interests,’ the court may declare it unconstitutional as applied, without further inquiry.”<sup>7</sup>
2. “. . . if the statute regulates evenhandedly and if it has only an indirect effect on interstate commerce, the court must determine whether the state’s interest is legitimate and, if so, whether the burden on interstate commerce exceeds the local benefits.”<sup>8</sup>

However, when a state or local government is acting as a “market participant” rather than a “market regulator,” it is not subject to the limitations of the Commerce Clause.<sup>9</sup> A state is considered to be a “market participant” when it is acting as an economic actor such as a

<sup>2</sup> U.S. CONST. amend. XIV, § 1. *See also* FLA. CONST. art. I, s. 2.

<sup>3</sup> *Nordlinger v. Hahn*, 505 U.S. 1, 33-34 (1992) (stating that a “classification *rationally* furthers a state interest when there is some fit between the disparate treatment and the legislative purpose.”).

<sup>4</sup> *Id.*

<sup>5</sup> U.S. CONST. art. I, s. 8, cl. 3.

<sup>6</sup> *See* *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>7</sup> *National Collegiate Athletic Ass’n v. Associated Press*, 18 So. 3d 1201, 1211-1212 (Fla. 1st DCA 2009) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-579).

<sup>8</sup> *Id.* (citations omitted); *See* *Bainbridge v. Turner*, 311 F.3d 1104, 1108-1109.

<sup>9</sup> *See* *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 204 (1983) (providing that a state may grant and enforce a preference to local residents when entering into construction projects for public projects).

purchaser of goods and services.<sup>10</sup> Since the state is acting as a “market participant” under this CS, the in-state preference provisions herein are likely to be upheld as an exception to the Commerce Clause.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

As a result of this CS, counties, municipalities, school districts, and other political subdivisions will be authorized to grant in-state vendor preference for public printing contracts.

The CS provides that the preference for in-state vendors shall be 5 percent for public printing contracts and in the procurement of personal property and services.

State agencies will be required to develop and adopt assessment protocols by January 1, 2012, that shall be used to evaluate and determine whether equipment, machinery or other inventory can be repaired or restored before requesting replacement equipment, machinery or inventory.

The fiscal impact of these changes is indeterminate at this time.

**VI. Technical Deficiencies:**

The Department of Management Services has recommended that the term “repaired” in section 4 of the CS be clarified. This section addresses a state agency’s determination of whether equipment, machinery or inventory is repairable prior to purchasing replacement equipment, machinery or inventory. The Department notes that it is unclear what threshold should apply in determining whether an equipment, machinery or inventory is “repairable”.<sup>11</sup>

**VII. Related Issues:**

None.

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<sup>10</sup> *Id.*

<sup>11</sup> Email from Tom Berger, Deputy Director of Division of Real Estate, Department of Management Services, to Aaron Nevins, Legislative Aide to Senator Bogdanoff (April 8, 2011).

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Community Affairs on April 11, 2011:**

This CS provides a 5 percent preference to the responsible and responsive vendor whose principal place of business is in this state.

The CS deletes provisions of the bill that established the preference for in-state vendors, when the printing can be performed in-state at a level of quality comparable to that obtainable from an out-of-state vendor that submits the lowest bid, to be equal to the preference granted by the state or political subdivision in which the lowest responsible and responsive vendor has its principal place of business, and deletes related provisions thereto.

The CS also requires state agencies to develop and adopt assessment protocols by January 1, 2012, that shall be used to evaluate and determine whether equipment, machinery or other inventory can be repaired or restored prior to a request to purchase replacement machinery, equipment or inventory under certain circumstances.

**CS by Governmental Oversight and Accountability on March 23, 2011:**

The CS removes references discussing how the preference would apply to PRIDE (Prison Rehabilitative Industries and Diversified Enterprises, Inc.), and clarifies how the preference will apply in printing contracts.

- B. **Amendments:**

None.