

STORAGE NAME: h0433.brc

DATE: February 27, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
BUSINESS REGULATION AND CONSUMER AFFAIRS
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 433

RELATING TO: Board of Professional Engineers

SPONSOR(S): Representative Burroughs

STATUTE(S) AFFECTED: Section 471.038, F.S.

COMPANION BILL(S): SB 526 (i)

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

- (1) BUSINESS REGULATION AND CONSUMER AFFAIRS
- (2) FINANCE AND TAXATION
- (3) GENERAL GOVERNMENT APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

This bill "privatizes" the administrative, investigative, and prosecutorial duties related to the Board of Professional Engineers. To accomplish this, this bill creates the Florida Engineering Management Corporation (FEMC), which will assume the responsibility for contracting out the aforementioned duties (presently handled by board and department staff) on July 1, 1998.

Activities such as processing applications, administering examinations, issuing and renewing licenses, handling complaints, investigations, prosecutions, and inspections which will be assigned to the private corporation. The board will retain all rulemaking and license issuing authority, as well as all final decisionmaking authority for disciplinary penalties. The seven member FEMC will be composed of registered engineers, with three members appointed by the Secretary of DBPR, and four members appointed by the board.

The bill authorizes FEMC to:

- provide administrative, investigative, and prosecutorial services to the board;
- receive, hold, invest, and administer property and make expenditures for the board;
- be approved by the board and department to operate for the benefit of the board and in the best interest of the state;
- operate under a fiscal year beginning July 1 and ending June 30;
- operate under a written contract with the department and approved by the board;
- undergo an annual financial and compliance audit by an independent Certified Public Accountant in conjunction with the Auditor General; and
- submit to the Secretary, the board, and the Legislature an annual report.

All corporate records are public records subject to inspection and examination consistent with s. 119.07(1), F.S.

The bill appropriates \$800,000 (in addition to existing funds used to regulate engineers) from the board's account within the Professional Regulation Trust Fund within DBPR to fund the startup and first year operation of FEMC.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Department of Business and Professional Regulation regulates numerous professions, including engineering pursuant to Chapter 471, F.S. (Ch. 79-243, L.O.F.). The Board of Professional Engineers has authority to make rules, approve applicants, and handle discipline over the profession. DBPR is responsible for the associated administrative functions such as processing applications, complaints, inspections, investigation, prosecutions, issuing and renewing licenses, and administering examinations. The department may contract with private entities or other agencies to perform any of these administrative functions. Presently, the department purchases the engineer examination from a national association.

The department "charges" the board for the services it provides (including investigative and prosecutorial services), as well as for the services which other agencies provide (legal services provided by the Attorney General's Office), by allocating both direct and indirect costs of regulation against the board's trust fund account.

All fees, fines, and other revenues collected pursuant to the regulation of engineers by the department is deposited in the State Treasury and credited to an account within the Professional Regulation Trust Fund. The amount within this account varies based on the cyclical nature of license renewals, which makes up the majority of revenue deposited into the account. These funds are used solely to support the regulation of professional engineers, including departmental administrative costs. These funds are subject to the surcharge found in chapter 215, F.S.

Annually, the department prepares a budget which includes requests for each board, made in consultation with each board. The amount available to spend for each profession each year is determined by the amount appropriated by the Legislature, regardless of the amount of revenue in the account.

There are approximately 33,000 licensed professional engineers and business. Twenty-nine administrative complaints were filed against professional engineers during FY 1995-96.

B. EFFECT OF PROPOSED CHANGES:

This bill "privatizes" the administrative, investigative, and prosecutorial duties related to the Board of Professional Engineers. To accomplish this, this bill creates the Florida Engineering Management Corporation, which will assume the responsibility for contracting out the aforementioned duties (presently handled by board and department staff) on July 1, 1998.

The board will retain all rulemaking and license issuing authority, as well as all final decisionmaking authority for disciplinary penalties. The seven member FEMC will be

composed of registered engineers, with three members appointed by the Secretary of DBPR, and four members appointed by the board.

Although the department presently has authority to "contract out" administrative, investigatory, and prosecutorial duties, it has mostly limited itself to contracting out some few administrative duties. This bill mandates that the department contract out essential *all* of its staff responsibilities related to this board. If successful, it is entirely possible that many other boards will seek to adopt this model. The effect of that would be a radical shrinking of the Department of Business and Professional Regulation's role in regulatory matters.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

The responsibility for administrative, investigative, and prosecutorial tasks associated with the regulation of Professional Engineers is taken from the Board of Professional Engineers and assigned to a newly-created private corporation.

(2) what is the cost of such responsibility at the new level/agency?

Indeterminate.

(3) how is the new agency accountable to the people governed?

The mechanism for accountability is unclear. It may, in fact, be absent.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

Yes.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. The creation of a private corporation to regulate licensed engineers will allow greater freedom to those who are regulated to pursue more aggressive or expensive regulatory strategies and tactics.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Creates s. 417.038, F.S., to establish the Florida Engineers Management Corporation to provide administrative, investigative and prosecutorial services to the Board of Professional Engineers. Establishes the organization, powers, and duties of the corporation and its contractual relationship with the department and the board. Creates a seven-member board of directors composed of engineers.

The bill authorizes FEMC to:

- provide administrative, investigative, and prosecutorial services to the board;
- receive, hold, invest, and administer property and make expenditures for the board;
- be approved by the board and department to operate for the benefit of the board and in the best interest of the state;
- operate under a fiscal year beginning July 1 and ending June 30;
- operate under a written contract with the department and approved by the board;
- undergo an annual financial and compliance audit by an independent Certified Public Accountant in conjunction with the Auditor General; and
- submit to the Secretary, the board, and the Legislature an annual report.

All corporate records are public records subject to inspection and examination consistent with s. 119.07(1), F.S.

The written contract with the DBPR and approved by the board shall provide for: approval of the articles of incorporation and bylaws by the department and board; approval of an annual budget by the board and department; annual certification by the board; and reversion to the board, or the state if the board ceases to exist, of moneys and property.

Section 2. Appropriates \$800,000 from the account of the Board of Professional Engineers for startup and first year operation of the corporation.

Section 3. Provides an effective date of July 1, 1997.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

<u>Expenditures:</u>	1997-98	1998-99
Department of Business & Professional Regulation		
Salaries and Benefits (11.5 FTEs)	\$320,833	\$320,833
Expenses	75,602	75,602
OPS	119,069	119,069
Special Category	355,246	355,246
Contract Monitoring (2 FTEs)	81,662	81,662
Professional Regulation Trust Fund	\$952,412	\$952,412

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

<u>Expenditures:</u>	1997-98	1998-99
Department of Business & Professional Regulation		
Professional Regulation Trust Fund	\$952,412	\$952,412

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. **DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

1. Direct Private Sector Costs:

As stated by the department, this bill will have an impact on the more than 33,000 licensees of the board; however, it is uncertain at this time if this proposal will lead to a positive or negative impact on those licensees. It should not have any other impact on the private sector.

2. Direct Private Sector Benefits:

See above.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. **FISCAL COMMENTS:**

Information provided by the Florida Engineering Society regarding a proposed budget for the Florida Engineers Management Corporation is as follows:

Non-recurring Expenses for Start-up	\$586,000
12 Months Ending 6-30-97 (license renewal year)	\$2,170,000
12 Months Ending 6-30-98 (no license renewal)	\$2,023,000

The start-up figures include expenses such as: salaries and fringe benefits; rent; telephone; office expenses; reproduction; postage; insurance; legal and accounting; conferences and meetings; travel expenses; travel (leased auto); outside consultants; employment/training; furniture and equipment rental; computer-hardware/software; computer supplies; DBPR support fee; and technology services.

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 the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have 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 and municipalities.

V. COMMENTS:

The bill has a couple of errors, and also several deficiencies and potential constitutional problems.

The bill is silent as to which *specific duties* within the phrase "administrative, investigative, and prosecutorial services" will be given to (and exercised solely by) the newly-created private entity, and which duties may (or will) be retained by the board. It appears that a persuasive argument could be made that *all* duties presently performed by board and department staff relating to the regulation of engineers would be completely ceded to the private entity. No provision is made for retaining oversight by the department (or the board, for that matter), unless such limitations or oversight were to become expressed in the contract established between the corporation and the department.

Also, it is not clear whether the contract the corporation will operate under is merely *imposed* by the department (so long as it is approved by the board), or whether the corporation has some capacity to *negotiate* terms. It is not clear whether the contract may encompass more items than specifically set forth in the enacting statutes. The duration of the contract is not set, and no procedure allowing re-enactment, modification, or termination of the contract is established.

In several instances, it appears that giving specific rulemaking authority to the department would be appropriate. However, the bill does *not* make such a specific provision, and the rulemaking authority would therefore be retained by the board.

Since the bill does not specifically retain department oversight over investigations and prosecutions, it is certainly *conceivable* that no oversight will therefore exist. If so, that creates a constitutional problem. Courts have held that police powers (which are certainly encompassed within the phrase "investigative and prosecutorial powers") may not be delegated outside the government body to which they are assigned, unless oversight (and ultimate control) is retained by the government body.

In Palm Beach County Health Care District v. Everglades Memorial Hospital, Inc., 658 So.2d 577 (Fla.4th DCA 1995), the court emphasized the lack of accountability as being the problem, and held that:

We emphasize that this is not a scheme under which accountable public officials sitting as members of the private. . . board would have effective control over decisions affecting the obligation of public moneys. Here the independent private. . . board is self-perpetuating without regard to whether its membership includes [governmental entity] board representation. The [governmental entity] must pay the private corporation public money for a period of at least 40 years with virtually no input, control or accountability by or to the public. Further, the public is powerless to remove the persons making the decisions. Such a surrender of public responsibility is invalid.

Also, in Carter v. City of Stuart, 468 So.2d 955 (Fla. 1985), the court was more succinct:

. . .inherent in the right to exercise police powers is the right to determine strategy and tactics for the deployment of those powers.

Finally, in Hernandez v. City of Miami, 305 So.2d 86 (Fla.1956), the court stated that:

“a municipality cannot contract away the exercise of its police powers.”

The Department of Business and Professional Regulation has expressed its concerns, stating in a memo from its Deputy General Counsel:

The public/private partnership proposal contemplates that a private entity will be performing investigative and prosecutorial functions which are fundamental to regulation of the profession and involve the exercise of discretion in the denial of a professional's livelihood. While the law does not preclude these activities from being delegated to a private entity, what the Department and Board must determine is the degree of supervision and control over the delegation that must be retained in order to ensure that the regulatory activities are legally valid. The issue of antitrust exemption and state action immunity doctrine is similar to that posed by the issue of the delegation of police powers. The suggestions below are an attempt to try to address both of the issues of delegation of police powers and active supervision to protect immunity from antitrust actions.

In order to address concerns relating to proper delegation and active supervision, the Department would advise that the following adjustments be considered for the public/private partnership.

1. Review by a state employee of all initial complaints against a licensee for legal sufficiency.
2. Review by a state employee of all investigative files for individual complaints.
3. Review by a state employee of all administrative complaints.
4. Review by a state employee of all stipulations.
5. Review by a state employee of all final orders.
6. Review by a state employee of all dismissed or closed cases.

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7. Authority retained by the state to open, investigate, and prosecute any cases/complaints.

The Department of Business and Professional Regulation questioned the authority of the private corporation to "receive, hold, invest, and administer property" for the benefit of the Board of Professional Engineers. The authority for investment of state funds rests with the State Board of Administration.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION AND CONSUMER AFFAIRS:

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