STORAGE NAME: h0575s2.gg
DATE: April 18, 2000

HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
GENERAL GOVERNMENT APPROPRIATIONS
ANALYSIS

BILL #: CS/CS/HB 575

RELATING TO: Open Contracting Act

SPONSOR(S): Committee on Judiciary, Committee on Governmental Operations, Representative Trovillion and others

TIED BILL(S):

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

(1) GOVERNMENTAL OPERATIONS YEAS 4 NAYS 2
(2) JUDICIARY YEAS 6 NAYS 2
(3) GENERAL GOVERNMENT APPROPRIATIONS
(4)
(5)

I. SUMMARY:

The stated purpose of this bill is to prohibit public entities from imposing labor requirements as a condition of performing public works. However, labor agreements that are entered into voluntarily and without coercion are not prohibited.

The state, political subdivisions, agencies and instrumentalities must ensure that no bids, project agreements or other controlling documents *require* potential parties to enter into or adhere to agreements with labor organizations. Further, such bidders or other parties may not be forced to require their employees, as a condition of employment, to belong to or affiliate with a labor organization, or to pay dues or fees to a labor organization in excess of the labor organization's costs relating to collective bargaining, contract administration, or grievance adjustment.

Similarly, this bill specifies that none of these governmental entities may prohibit such arrangements.

The bill creates a cause of action for a bidder, offeror, contractor, or subcontractor that may suffer injury by the operation of a bid specification, project agreement, or other controlling document that violates the bill's provisions. Such parties are given standing to challenge perceived prohibited provisions, and will be entitled to an award of costs and attorneys' fees if successful in their challenge.

This bill may have a fiscal impact on local government, but no measurable impact is anticipated on state government.

This bill provides an effective date of October 1, 2000.

PLEASE SEE COMMENTS SECTION FOR JUDICIARY COMMITTEE
STAFF ANALYSIS OF THE COMMITTEE SUBSTITUTE

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes [x]	No []	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes [x]	No []	N/A []
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

B. PRESENT SITUATION:

Right to Work laws secure the right of employees to join, to financially support labor organizations (or unions), and to participate in labor organization activities. The right of workers not to join and participate in union activities is equally protected.

Florida is one of twenty one states which are considered "Right to Work" States. Eleven of the Right to Work states are located in the southern belt from Texas to Virginia. The other ten tend to be in other non-industrialized states in the Midwest and western region (from Iowa to Idaho, Nevada and Arizona). Closed shop states (those in which workers can be required to belong to a union in order to secure employment) tend to be in the northeast quadrant states, and the Pacific Coast states.

Since 1943, Florida law, and later, the Florida Constitution, have addressed the importance of workers' rights to be free from discrimination from the public and private sector in their choice and ability to work in either a union or non-union environment. Florida law, the Florida Constitution, Federal law, and the courts have notably placed an emphasis on ***worker's,*** rather than government's, industry's or the labor organizations' interests and rights in labor matters.

Worker's opportunities to work are not simply limited to employment in unionized or open shop situations in Florida. There are variations on models of contracts that contract offerers and bidders may pursue.

One such model which would be affected by this bill is known as a Project Labor Agreement, or Pre-hire Project Labor Agreement (PLA). PLAs have long been utilized by unionized contractors and construction unions, particularly for the construction of major projects, with long durations. Many PLAs incorporate the terms and conditions set forth in the "National Construction Stabilization Agreement", which is signed by about a dozen construction unions, the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), and several large unionized contractors and their association, the National Constructors Association (NCA).

Such agreements are a labor market activity that labor organizations encourage for several reasons. PLAs often incorporate terms and conditions forbidding strikes or lockouts, provide for acceptance of union area wages (or "prevailing wages", or "union scale"), union benefits, and sometimes scheduled wage/benefit increases. Such agreements include union workplace constraints and restraints, but may also include some work rule concessions, such as forgoing daily overtime compensation if a worker works over 10 hours in a day, and pay at time-and-a-half for Saturday work, rather than pay at double the regular rate for work on Saturdays.

Almost all PLAs, however, require all or most of the workers to be hired out of union halls, except when they cannot provide needed labor. Bidders are always required to sign and adhere to the conditions of the PLA. When non-union workers are permitted, the contractors or subcontractors must provide union scale wages and benefits, as well as agreeing to comply with any work rules included in the PLA.

At one time or another, state government, through its agencies, and public entities at every level in Florida, must meet their responsibilities to the citizens by contracting with private firms for goods, construction, and other services.

Some solicitations for bids, particularly in the case of construction projects, require contractors, subcontractors, and other entities who are parties to the successful bids, to agree to be subject to PLAs and adhere to their conditions.

Other states, including Utah and Ohio, have statutes with provisions similar to those found in this bill. Specifically, the provision that prohibits a ***requirement*** that contract bidders, offerors, contractors or subcontractors agree to subject themselves to provisions of pre-hire labor arrangements such as the Project Labor Agreements described. It should be noted that the Ohio statute has been successfully challenged (Case Number CV 391084, Court of Common Pleas, Cuyahoga, Ohio), and appealed (Case Number 77262, Ohio Court of Appeals for the Eighth District) on essentially the same grounds as those taken by opponents of this bill.

UNITED STATES CONSTITUTION

Commerce Clause

The third clause of Article I, Section 8, United States Constitution provides that the Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" This clause is known as the commerce clause. It gives Congress the power to regulate **interstate commerce**, commonly shortened to "commerce". It was written into the Constitution to ensure a barrier-free market among states. The United States Supreme Court has interpreted the commerce clause (also known as the Dormant Commerce Clause) as a limitation upon state power to regulate interstate commerce, even when the federal government has not imposed any regulations affecting the particular subject area.

State Sovereignty

The Tenth Amendment of the United States Constitution provides that *"[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."*

This prohibition has been viewed as a vestige of state sovereignty, but, for example, in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), the Court reversed an earlier position in *National League of Cities v. Usery,* 426 U. S. 833 (1976).

The *National League of Cities* decision held that the Tenth Amendment forbids Congress from displacing the ability of states to structure internal policies and functions.

In its reversal, the majority reasoned that state sovereignty was sufficiently protected by built-in political and constitutional restraints on the federal government.

Also, Congress has used its Fourteenth Amendment powers to restrict state activities which violate civil rights.

Due Process

The Fourteenth Amendment provides that *no state may "deprive any person of life, liberty, or property without due process of law."*

Florida has interpreted this provision to apply to the protection of the right of workers to be free to live and work in any lawful activity to the maximum extent possible. Any effort to curtail or diminish such freedom is potentially a violation of Article I of Florida's Constitution and ch. 447, F.S., which relates to labor organizations.

Supremacy Clause

The second clause of Article VI, United States Constitution, known commonly as the supremacy clause, states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

FLORIDA CONSTITUTION

Section 6, Article I, the Florida Constitution, provides that "[t]he right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees by and through a labor organization, to bargain collectively shall not be denied or abridged."

The constitutional intent to protect the ability of workers to be able to work, regardless of where the work is, and whether the work is acquired *through membership or affiliation* with a labor organization, *or not*, appears clear by the use of the term "denied", and emphasized by the term "abridged". The Sixth Edition of Black's Law Dictionary defines "abridged", in part, as follows: *"To reduce or contract; to diminish or curtail."*

Also, according to Black's Law Dictionary, the term "abridgement", as used in the First Amendment of the United States Constitution "...means neither more nor less than what it ordinarily means; abridgement occurs when legislative act either suppresses or substantially interferes with free speech."

FEDERAL STATUTE AND EXECUTIVE ACTION

There are many federal laws, with a plethora of attendant regulations, related to the protection of workers. Some notable laws are the Fair Labor Standards Act, Equal Employment Opportunity Act, Davis-Bacon Act, Workers' Compensation Act, Wagner-Peyser Act, Employee Polygraph Protection Act, Migrant and Seasonable Agricultural Workers Protection Act, McNamara-O'Hara Service Contract Act, Immigration & Nationality Act, Mine Safety and Health Act, Occupational Safety and Health Act, and the National Labor Relations Act (or NLRA).

Many of these same statutes also deal with contracts with federal agencies, or contracts with federal money involved, and some, such as The Competition in Contracting Act, focus on competition, rather than workers.

All such statutes seem to have in common either a focus on the welfare of workers, or fairness in competition.

Rights of Employees Under the National Labor Relations Act (NLRA)

Section 7 of the NLRA (RIGHTS OF EMPLOYEES) provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment..."

Unfair Labor Practices Under the NLRA

Section 8(a) of the NLRA establishes unfair labor practices for an employer:

1) "To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7..." (above - to form or join, or refrain from forming or joining a labor organization);

2) "To dominate or interfere with the formation or administration of any labor organization..."; or

3) "[B]y discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization..."

Section 8(b) establishes an unfair labor practice for labor organizations "to restrain or coerce...employees in the exercise of the rights guaranteed in Section 7..."(to form or join, or refrain from forming or joining a labor organization).

Section 8(e) establishes an unfair labor practice "for any labor organization and any employer to enter any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void..."

Section 8(f) clarifies that it is not "an unfair labor practice for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members..."

In other words, it is an unfair labor practice for labor organizations to agree with employers to discriminate, by boycott, against others, EXCEPT that it is generally permissible to discriminate when applied to agreements between labor organizations and employers in the construction industry.

Public Employers Under the NLRA

In general, public employers are specifically exempted from the NLRA under the definition of "employer", 29 U.S.C. 152.2., section 8(e), relating to unfair labor practices. The NLRA prohibits employers and labor organizations from boycotting other employers or persons.

There is an exception. "Provided, that nothing in this subsection (e) [this subsection] shall apply to an agreement between a labor organization and an *employer in the construction industry..."* (Emphasis added).

The Trades Council refers to this section when pointing out that "Congress took special care to provide extra labor protections for the construction industry", but public employers would not be "employers" in this section as they are not in the construction industry.

PRESIDENTIAL MEMORANDUM OF UNDERSTANDING

On June 5, 1997, in a compromise with the United States Congress, President Clinton issued a Memorandum for the Heads of Executive Departments and Agencies (Memorandum of Understanding, or Memo), addressing the use of Project Labor Agreements for federal construction.

This Memo encourages departments and agencies "to consider Project Labor Agreements as another tool...to achieve economy and efficiency in Federal construction projects." It authorizes departments and agencies, on a project-by-project basis, to use a Project Labor Agreement where it would advance the government's interest in cost, efficiency, and where "no laws applicable to the specific construction project preclude the use of the proposed project labor agreement."

The Memorandum of Understanding[1] specifies that **"[t]his memorandum does not require an executive department or agency to use a project labor agreement on any project, nor does it preclude the use of a project labor agreement..." This memorandum also does not require contractors to enter into a project labor agreement with any particular labor organization." *** (***** - Emphasis added)

FLORIDA STATUTE

Chapter 447, F.S., addresses labor organizations. Most of Part I (General Provisions), has been a part of Florida statute since 1943. Sections 447.01 through 447.03, F.S., make clear what Florida's public policy is with regard to workers, and how important Florida views workers' freedom and ability to choose employers and work situations. Railway labor organizations and members are generally exempt from the provisions of Part I of this chapter pursuant to federal statute.

Section 447.01, F.S., announces that "[t]he working person, unionist or nonunionist, must be protected. The right to work is the right to live." Further, "[i]t is here now declared to be the policy of the state, in the exercise of its sovereign constitutional police power, to regulate the activities and affairs of labor unions..."

Section 447.02, F.S., defines terms. The term "labor organization" means any organization of employees or local or subdivision thereof, having within its membership residents of the state, whether incorporated or not, organized for the purpose of dealing with employers concerning hours of employment, rate of pay, working conditions, or grievances of any kind relating to employment and recognized as a unit of bargaining by one or more employers doing business

[1] Contact with the Executive Office of the President did not yield any supplemental detail related to this Memorandum of Understanding, except that an assurance was made that it was carefully researched, and would not have been issued if staff had any reason to believe it was either unconstitutional, or in violation of any federal statute.

in this state, except that an “employee organization”, as defined in s. 447.203(11), F.S., shall be included in this definition at such time as it seeks to register pursuant to s. 447.305, F.S.

Section 447.03, F.S., speaks as clearly as s. 447.01, F.S., which recognizes and protects workers' freedom to work without any requirements or prohibitions as to union membership.

This section provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor unions or labor organizations or refrain from such activity, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

OTHER STATE STATUTE

There are at least two other states that have passed legislation with provisions very similar to those found in this bill. Utah, and Ohio are good examples since Utah is a so-called "Right to Work" state, and Ohio is not.

Utah Open Contracting Act

According to the Utah Office of Legislative Research, the Utah legislation followed a construction contract relating to the Salt Palace. The County of Salt Lake included the requirement for a Project Labor Agreement in it. The practice of requiring such labor arrangements was challenged, and the Utah Legislature passed a law prohibiting the requirement of such an arrangement in public contracts.

Neither the Office of Legislative Research, the Utah Anti-discrimination/ Labor Commission, or the (Region 27) office of National Labor Relations Board (NLRB) know of any challenges to the Utah statute. Though Utah is a "Right to Work" state, the NLRB states that area, including Nevada, Colorado and Utah (especially Salt Lake County) has a strong union presence.

Ohio Open Contracting Act

The more recent Ohio legislation, styled as "Amended House Bill 101", became law (Ohio Revised Code R.C. 4116) without the Governor's signature in October, 1999. As noted earlier, this law is being challenged by the Ohio State Building and Construction Trades Council, et al. in case number CV 391084. A county judge found the statute would result in a "denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining, and therefore, to be preempted by the NLRA and invalid under the Supremacy Clause of the United States Constitution. This decision is now on appeal in the Eighth District of Ohio in case number 77262. Oral argument in that case will not be scheduled until late 2000 at the earliest.

Here, the Ohio Associated Builders & Contractors, Inc. have filed an Amicus Curiae Brief. They point out that the statute, by its terms does not " direct private entities to engage in any conduct, one way or the other, with regard to their own labor relations. The law simply says that the State will not 'require a contractor or subcontractor to...enter into agreements with labor organizations' " "The statute does not in any way prevent private entities from choosing to engage in union-only construction; nor does the law "interfere" with private decisions regarding labor relations. Indeed, it is perverse for [the Ohio law] to be challenged under a theory of labor preemption because the law is clearly designed to *avoid* any state interference with private sector labor relations. Contractors remain free to contract with unions, or not to do so. All [the law] says is that the state will *not* impose any requirement on this issue when it comes to the state's own contracts. Such a law cannot possibly be preempted by federal labor [law]."

C. EFFECT OF PROPOSED CHANGES:

PROVISIONS OF HB 575

This bill is styled as the "Open Contracting Act". It applies Part I of ch. 447, Florida Statutes, and Article I (Declaration of Rights), Section 6 (the Right to Work), of the Florida Constitution, to contracts offered by the state, any political subdivision, agencies, or instrumentalities of the state.

The stated purpose for the bill is to prohibit public entities from imposing certain labor requirements as a condition of performing public works. However, labor agreements that are entered into voluntarily and without coercion are not prohibited.

This bill applies not only to the manufacture and construction of public works projects, but to the procurement of products and services, and oversight responsibilities relative to the same. It clarifies that the state, a political subdivision, agency or instrumentality may ***not***:

1) Require those who may eventually become parties (including bidders, offerors, contractors, or subcontractors) to contracts with such governmental entities, to enter into or adhere to agreements with labor organizations on the same or related projects; or

2) Discriminate against those same parties for refusing to become, or remaining signatories, or otherwise adhering to such agreements on the same or related construction projects; or

3) Require those same parties to enter into, adhere to, or enforce any agreement which would *REQUIRE* employees, as a condition of employment, to become affiliated with a labor organization; to pay dues or fees to a labor organization (over an employee's objection), in excess of the employee's share of labor organization's costs relating to collective bargaining, contract administration, or grievance adjustment.

The bill creates a cause of action for a bidder, offeror, contractor, or subcontractor that may suffer injury by the operation of a bid specification, project agreement, or other controlling document that violates the bill's provisions. Such parties are given standing to challenge perceived prohibited provisions, and will be entitled to an award of costs and attorneys' fees if successful in their challenge.

To the extent that prohibited practices occurred, the language of this bill could be considered essentially deregulatory in nature, prohibiting requirements resulting in discrimination in public contracts, rather than imposing such requirements.

This bill neither requires nor prohibits any particular type of labor arrangement. Contracts still may be entered into with bidders, offerors, contractors, or subcontractors who are non-unions firms (or unionized firms), or with those that have business relationships with other firms which are non-union (or unionized), or with those using, or not using voluntary, uncoerced labor arrangements such as Project Labor Agreements.

This bill neither requires nor prohibits contracting with firms (including contractors, subcontractors or other related firms) which may have some operations which are subject to agreements with labor organizations, and other operations which are not subject to agreements with labor organizations.

OPPONENT CONCERNS

Nevertheless, some opponents of this bill, as noted in submitted documents, are concerned that it "...provides, essentially that the State, or any of its political subdivisions or agencies is **prohibited from utilizing contractors for public construction projects where the contractor insists upon or will use a Project Labor Agreement**."***** They argue that "[b]ecause federal law provides that contractors have a right to enter into such agreements, [they] conclude that the law proposed by House Bill 575 has been preempted by federal law and is therefore unconstitutional." (***** Emphasis added)

Proponents agree that this bill does apply to, and prohibits, contracts which require (*insist*) that agreements, such as Project Labor Agreements, be used. However, they strongly assert that opponents who drafted this analysis have evidently drawn the mistaken conclusion that this bill also would prohibit the utilization of contractors that *will use* agreements such as Project Labor Agreements.

Proponents say that under the provisions of this bill, contractors that utilize voluntary, uncoerced Project Labor Agreements are specifically protected, unless the contract "bid specifications, project agreements, and other controlling documents entered into, required, or subject to approval by the state, political subdivision, agency or instrumentality" require agreements such as Project Labor Agreements. Nothing in this bill is intended to prevent successful bidders from entering into voluntary Project Labor Agreements or any other legal labor-management arrangement.

Opponents believe the provisions of this bill are unconstitutional under the commerce and supremacy clauses, and preempted by the National Labor Relations Act (NLRA).

In this regard, in a thorough, and well documented position paper, the Florida Building & Construction Trades Council addresses the two preemption principles it believes are applicable.

The Garmon Preemption Principle

The first preemption principle is known as the "*Garmon* preemption", created in the case of *San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)*. Opponents assert that the *Garmon* preemption applies to this bill to the extent that the *Garmon* preemption prohibits states from regulating "activities which are protected under Section 7 of the NLRA, or which constitute unfair labor practices under Section 8."

Proponents believe this preemption principle is a narrow one that exists to prevent state regulation of activities that the NLRA affirmatively protects or prohibits. Since this bill does not require, or prohibit workers from joining unions, nor does it require, or permit an unfair labor practice, it cannot be in violation of the NLRA.

Opponents believe *Wisconsin Dept. of Indus. v Gould, Inc.*, 475 U.S. 282, 286 (1986), applies to this bill, and provides an example where this bill would be preempted by the NLRA.

Proponents say that this bill is almost identical to the Ohio statute which has been challenged by the Ohio State Building and Construction Trades Council, but in that appeal plaintiff-appellees have not argued that *Garmon* applies to R.C. 4116 [the Ohio statute], because it has nothing to do with the present controversy. Namely, because the statute does not relate to areas that are 'protected by section 7 of the NLRA or constitute unfair labor practices under section 8, *Garmon* preemption simply does not apply. In this respect, it must be noted that public employers are specifically exempted from the definition of 'employer'. 29 U.S.C. 152(2); *Associated Builders & Contractors, Inc. v. City of Seward,* 966 F. 2d 492, 496-97 (1992); see also, Abood v. Detroit Bd. of Ed., 431 U.S. 209, 223 (1997)."

The Machinists Preemption Principle

The second preemption principle the Trades Council points to "is known as the '*Machinists* preemption', created in the case of *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976)." "The *Machinists* preemption prohibits state regulation in an area of labor relations which is left 'to be controlled by the free play of economic forces'." "The *Machinists* preemption preserves Congress' 'intentional balance' 'between uncontrolled power of management and labor to further their respective interests'." *Golden State Transit Corp. v Los Angeles*, 475 U.S. 608, 614 (1986)

In this case the Wisconsin Employment Relations Commission attempted to define an unfair labor practice under state law, finding that workers' refusal to work overtime was an unfair labor practice. The Supreme Court found that the workers' refusal was not an unfair labor practice, and held that the state favored management, disrupting the free play of economic forces in the area of labor relations which Congress had intended to be unregulated. The *Machinists* preemption is intended to allow management and labor to battle in a zone free from all regulations, whether state or federal. *Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc*., 507 U.S. 226 (1993), (known as *Boston Harbor*).

Proponents assert that solicitations of bids which require PLAs is a direct violation of the *Machinists* preemption precisely because the "Machinists preemption is designed to prevent a state from helping one side of the management-labor (organization) battle by regulating in the zone 'left free for the free play of contending economic forces' and preserves Congress' 'intentional balance between the uncontrolled power of management and labor to further their respective interests.' " Boston Harbor, 507 at 226 (quoting Golden State II, 475 U.S. at 614)

Proponents claim this bill is aimed specifically to remedy a perceived violation of the intent and spirit of the NLRA and the Machinists preemption created by mandated PLAs, which artificially restrict competition in the marketplace. More importantly, they contend, the practical effect of mandated PLAs is that in a state with a small minority of workers who are union members, the vast majority of the workers (sometimes virtually all of workers) employed on projects which are under PLAs are union members.

Proponents say the outcome clearly evidences that the current practice of mandated PLAs in contract offers does not eliminate non-union employers and workers from such public construction projects, but it overwhelmingly favors unionized employers, and union members. The consequences are contrary to the intent of Florida's Constitution, and Florida's statutes to protect all workers' right to compete for jobs without impediment related to membership or participation in union or labor organizations.

Concerns Summary

Concerns about this bill seem to turn on a central issue..Is this bill a regulation which unfairly tips the economic scales in the labor-management relations zone in such a way that it unfairly favors management?

A secondary concern is related to perceived illegal, or unconstitutional interference with local public officials in the exercise of their discretion in designing the specifications and conditions of construction project contracts. If the state enacts legislation affecting local construction projects, is there a violation of the "Market Participation Doctrine", which is found in cases arising under the Dormant Commerce Clause.

According to opponents,"[w]hen a state owns and manages property and interacts with private persons in the marketplace in its capacity as property owner or manager, the state is not subject to preemption. Thus, the state's role and purpose in passing a law or acting in a certain manner is critical; the key question being is the state simply doing something in its capacity as a market participant (like a property owner deciding how he wishes work performed on his property), or is it rather setting policy as a regulator. In the case of the former, the state is not subject to preemption, while in the case of the latter it is. In determining whether a state acts as a market participant rather than a regulator courts will consider things like was the state motivated by a desire to complete a project as quickly and effectively as possible at the least possible cost, and is the state action at issue tailored to one particular job or does it affect a labor policy in general. In this case, House Bill 575 does not control how the state will perform one construction project but rather it is a bill which purports to create a law which governs every single construction project the state or any municipality or any agency may encounter."

Opponents perceive this bill as an attempt at prohibiting all PLAs. Based on this perception they conclude that the state is tipping the scale in the zone of labor-management relations unfairly in favor of non-unionized employers, and therefore, are illegally "regulating" the zone without being a market participant.

Proponents observe that PLAs virtually always benefit unionized bidders, contractors, subcontractors and workers over non-unionized bidders, contractors and sub-contractors and workers. They perceive public contracts with specifications requiring PLAs as regulatory, tipping the scale in the zone of labor-management relations unfairly in favor of unionized employers and workers, and are an illegal, or at least, discriminatory "regulation" of this zone.

They believe the state is very much a market participant in that counties, and municipalities, for instance, are political subdivisions of the state, and the state has the right to exercise its "sovereign constitutional police power", to set policy relative to issues such as workers' opportunities to jobs on public works projects. They assert that states have the same authority of preemption over political subdivisions as the federal government reserves over the respective states.

This bill is an attempt at eliminating (de-regulating) the perceived discriminatory regulation of the marketplace zone, protecting PLAs as a marketplace choice of bidders and others, while removing any constraint requiring them to accept PLA wage rates, benefits, and working conditions as a condition of being awarded a bid, or participating on a project.

The state seems well within its authority if it exercises its right of preemption over any political subdivision which acts in a manner seen as contrary to the provisions of Article I, Section 6, Florida Constitution, or the National Labor Relations Act, resulting in a denial or abridgement (reduction, contraction, diminishment or curtailment) of employment opportunities and open

trade. Proponents view this bill as essentially de-regulatory in nature, rather than regulatory, directed at ensuring an open market with open contract opportunities.

D. SECTION-BY-SECTION ANALYSIS:

Section 1 - **A)** Provides that this act may be cited as the "Open Contracting Act"; **B)** declares its purpose; **C)** prohibits the state, political subdivisions, agencies or instrumentalities from: 1) placing requirements in contract offers that: a) bidders and others must agree to certain types of arrangements with labor organizations; b) discriminate against bidders and others who will not subject themselves to such arrangements with labor organizations; and c) require bidders and others enforce any agreement that would require their employees to become members, or become affiliated with a labor organization; or require their employees to pay dues or fees (over the worker's objection) to a labor organization, which exceed the labor organization's costs relating to collective bargaining, contract administration, or grievance adjustment; 2) prohibiting bidders, offerors, contractors, or subcontractors from voluntarily entering into or adhering to uncoerced labor-management arrangements or agreements with labor organizations; **D)** creates a cause of action for a bidder, offeror, contractor, or subcontractor that may suffer injury by the operation of a bid specification, project agreement, or other controlling document that violates the bill's provisions. Such parties are given standing to challenge perceived prohibited provisions, and will be entitled to an award of costs and attorneys' fees if successful in their challenge.

Section 2 - Provides an effective date of October 1, 2000.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

Unknown.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Opponents claim this bill would prohibit Project Labor Agreements, harming unions, unionized employers, and union members.

Proponents claim that since Project Labor Agreements require union scale wage rates and benefits, and contain other costly conditions of employment. The perceived added costs discourage non-unionized bidders from attempting to compete on bids mandating Project Labor Agreements.

D. FISCAL COMMENTS:

Opponents claim this bill would prohibit Project Labor Agreements, which have numerous benefits, including sometimes reducing costs by ensuring a supply of workers, and reduced labor strife.

Proponents claim that since Project Labor Agreements virtually always use union scale wage rates and benefits, and contain other costly conditions of employment, that Project Labor Agreements, especially when imposed on projects, result in higher project costs.

Although proponents and opponents seem to view this bill passionately enough to believe that the consequences of its passage are fiscally significant, no hard data is available to substantiate an accurate estimate of fiscal impact.

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 require counties or municipalities to spend funds, or to take an action requiring the expenditure of funds.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

See PRESENT SITUATION, and EFFECT OF PROPOSED CHANGES.

B. RULE-MAKING AUTHORITY:

This bill does not directly grant rule-making authority.

C. OTHER COMMENTS:

COMMITTEE ON JUDICIARY SUPPLEMENTAL ANALYSIS/ANALYSIS OF COMMITTEE SUBSTITUTE

Effects on State Contracts

The Department of Management Services indicates that the bill will have no effect on the Department's facilities management or building construction procurement specifications, which do not include any labor organization requirements. However, while the state procurement process may not be directly affected, the bill may apply to contracts between major private contractors and subcontractors or other service providers. To the extent that contractors utilize contracts that may violate the provisions of the bill, the state procurement process will be affected. For the most part however, the bill's effects will be limited to local government or other political subdivisions of the state.

The bill also uses the term "instrumentality" to describe additional entities that must not use prohibited contract provisions. An "instrumentality" is ordinarily defined as "[s]omething by which an end is achieved; a means, medium, agency. Black's Law Dictionary, 6th Ed. Florida law provides that state agencies or subdivisions include "corporations primarily acting as instrumentalities or agencies of the state..." s. 768.28, F.S. The bill would reach private contractors who act as "instrumentalities" of the state (such as private correctional corporations) if those entities are involved in the construction or manufacture of public works or have some control over the construction contracts.

Litigation Effects/New Cause of Action

The new cause of action created by the bill may increase litigation involving public works contracts.

Preemption

The bill may raise preemption issues involving the National Labor Relations Act to the extent that the state is legally determined to regulate matters that are left to the Act. Central to this question will be whether the state or a political subdivision is acting as a "market participant" under federal law and whether its regulation of "downstream" contracts relating to any public works construction projects is preempted. It may be that the state's role is as a market participant; however, its reaching regulation of private agreements may exceed the market participation doctrine. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) and Reeves, Inc., v. Stake, 447 U.S. 429 (1980)(defining the market participation doctrine, which allows states to operate in the market free of preempting federal law restrictions). The Supreme Court has stated that the U.S. Constitution does not limit the ability of states to operate freely in the market. The preemption question will ultimately turn on whether the state or a political subdivision is regulating labor or acting as a market participant.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

At its meeting on February 22, 2000, the Committee on Governmental Operations adopted one amendment. The amendment clarifies that the state, its political subdivisions, agencies and instrumentalities may not prohibit bidders and others from entering into agreements with labor

organizations when voluntary and uncoerced. The amendment was incorporated into the bill, which was reported favorably as a committee substitute.

The Committee on Judiciary adopted a strike-everything amendment on March 15, 2000, and made the bill a committee substitute. The amendment clarifies the intent of the bill, removes redundant and unnecessary language, and clarifies the cause of action and attorney's fees provision.

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:	Staff Director:
Russell J. Cyphers, Jr.	Jimmy O. Helms

AS REVISED BY THE COMMITTEE ON JUDICIARY:

Prepared by:	Staff Director:
Michael W. Carlson, J.D.	PK Jameson, J.D.

AS FURTHER REVISED BY THE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS:

Prepared by:	Staff Director:
Marsha M. Belcher	Cynthia P. Kelly