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HOUSE OF REPRESENTATIVES
COUNCIL FOR SMARTER GOVERNMENT
ANALYSIS

BILL #: HB 61

RELATING TO: Open Contracting Act

SPONSOR(S): Representative(s) Trovillion

TIED BILL(S): None

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

(1) STATE ADMINISTRATION
(2) COUNCIL FOR SMARTER GOVERNMENT
(3)
(4)
(5)

I. SUMMARY:

Federal and state Right to Work laws give employees the right to join, financially support, and participate in labor organizations. Federal law sometimes preempts state law regarding labor organizations.

This bill creates the "Open Contracting Act", which prohibits the state and any political subdivision, agency, or instrumentality of the state from imposing certain labor requirements as a condition for performing public works. The terms "instrumentality of the state" and "public works" are not defined in this bill or in the Florida Statutes. "Agency" is not defined in this bill; however, there are several definitions of "agency" throughout the Florida Statutes which vary as to which governmental entities they include. Bid specifications, project agreements, and other controlling documents are not to contain provisions that

- Require bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations;
- Discriminate against bidders, offerors, contractors, or subcontractors for refusing to become or remain signatories with one or more labor organizations; or
- Require bidders, offerors, contractors, or subcontractors to enter into or enforce any agreement that requires its employees, as a condition of employment, to
    - Become members of or become affiliated with a labor organization; or
    - Pay dues or fees to labor organization, over an employee's objection, in excess of the employee's share of the labor organization's costs relating to collective bargaining, contract administration, or grievance adjustment.

This bill also creates a new cause of action for "any bidder, offeror, contractor, or subcontractor that may suffer injury as a direct result" of a violation under this act. The bidder, offeror, contractor, or subcontractor that prevails is entitled to an award of its reasonable attorney's fees and costs.

This bill may raise preemption issues involving the National Labor Relations Act (NLRA) if the state is determined to regulate matters that are governed by the NLRA. The preemption question turns on whether the state or a political subdivision is regulating labor or acting as a market participant.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [X]
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]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Right to Work Laws

Federal and state Right to Work laws give employees the right to join, financially support, and participate in labor organization (union) activities. However, federal law sometimes preempts state law dealing with labor organizations.

Section 7 of the National Labor Relations Act (NLRA) 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

Florida Constitution

Section 6, Article I of 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."

Florida Statutes

Chapter 447, F.S., addresses labor organizations. Most of Part I (General Provisions), has been a part of the Florida Statutes since 1943. Section 447.01, F.S., provides Florida's public policy with regard to labor organizations, and the importance of protecting working persons.

The term "labor organization" is defined in s. 447.02(1), F.S., as

> 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 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., states that employees have the right to self-organization; to form, join or assist labor unions or labor organizations; or to refrain from such activity, and to bargain collectively.

Local Government

Some local governments use contracts called project labor agreements (PLAs) for public works contracts. A PLA is defined as "a required set of labor standards [for] contractors [and management] for the life of a project. PLAs generally cover wages and working conditions, require that all employees join a union and pay dues, designate the union as the sole representative of the employees, and require payment into union benefit funds." PLAs also generally include a guarantee that there will be no strikes, lockouts, or other similar disruptions. *Compensation and Working Conditions: 105th Congress Addresses Working Conditions*, William J. Wiatrowski, Division of Compensation Data Analysis, Bureau of Labor Statistics, Department of Labor (Winter 1997) at 4. However, due to the Right to Work provisions of the constitution, PLAs in Florida do not require employees to join a union or pay union dues. However, state and local governments can choose to use a PLA that encompasses union and non-union workers.

Under current state law, there is no requirement to be or not to be in a labor organization in order to contract with the state or its political subdivisions, or any instrumentalities of the state.

C. EFFECT OF PROPOSED CHANGES:

This bill creates the "Open Contracting Act", which prohibits the state and any "political subdivision", "agency", or "instrumentality of the state" from imposing certain labor requirements as a condition for performing "public works."

The term "political subdivision" is defined broadly in s. 1.01(8), F.S., to include "counties, cities, towns, villages, special tax districts, special road and bridge districts, bridge districts, and all other districts in the state."

One definition of "agency" in the Florida Statutes includes entities acting "on behalf" of a public agency. s. 119.011(2), F.S. The Supreme Court of Florida adopted a totality of factors test for determining whether a private entity is acting on behalf of a public agency. The six factors are as follows:

(1) Did the public agency create the private entity?

(2) Were public funds used?

(3) Did the public agency regulate or control the private agency?

(4) Did the private entity's services constitute an integral part of the public agencies decision-making process?

(5) Was the private entity performing a government function? (6) Was the goal of the private entity to provide a public service?

See News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992).

However, there are numerous definitions of "agency" within the Florida Statutes, ranging from relatively narrow (*see* s. 110.203(1), F.S., for public records purposes) to broad (*see* s. 120.52(1), F.S., under the Administrative Procedure Act, which includes regional planning agencies, educational units, and other entities not included in s. 110.203(1),F.S.). There is no definition for agency in this bill. Accordingly, it may be unclear as to the scope of the governmental entities affected.

The terms "instrumentality of the state" and "public works" are not defined within the Florida Statutes or within this bill. This bill uses the term "instrumentality" to describe additional entities that must not use the provisions prohibited by this bill. 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 political subdivisions for the purposes of determining sovereign immunity include "corporations primarily acting as instrumentalities or agencies of the state." s. 768.28(2), F.S. Accordingly, this bill reaches third party 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.

The term "public work" is found throughout the statutes but is not actually defined. *See* ss. 6.05 ("a lighthouse, beacon, marine hospital, or other public work"), and 213.67 ("a public building or public work for the state"), F.S., and chapters 255 (Public Property and Publicly Owned Buildings) and 287 (Procurement of Personal Property and Services), F.S. The term appears to be used as a general reference to public buildings as well as other commonly public ventures, such as roads and utilities.

Under this bill, the "state and any political subdivision, agency, or instrumentality of the state" must ensure that "bid specifications, project agreements, and other controlling documents" entered into do not

- Require bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations;
- Discriminate against bidders, offerors, contractors, or subcontractors for refusing to become or remain signatories with one or more labor organizations; or
- Require that bidders, offerors, contractors, or subcontractors enter into or enforce any agreement that requires its employees, as a condition of employment, to
- Become members of or become affiliated with a labor organization; or
- Pay dues or fees to labor organization, over an employee's objection, in excess of the employee's share of the labor organization's costs relating to collective bargaining, contract administration, or grievance adjustment.

Not unlike labor organizations, the Florida Bar, which licenses and regulates lawyers practicing in Florida, requires membership dues. There are numerous federal and state court opinions regarding compulsory dues of state bars. In *Gibson v. The Florida Bar*, 798 F.2d 1564, 1568 (11th Cir.1986),

the court, relying on *Abood v. Detroit Board of Education*, 97 S.Ct. 1782,1800 (U.S.Mich. 1977), held that the Florida Bar could use compulsory dues to finance its lobbying efforts only to the extent that its legislative positions were germane to the bar's stated purpose, and that "[u]nder this analysis, the Bar's interests are closely aligned with those of a labor union, and its lobbying activities are more accurately viewed as partisan politics than the supposedly impartial recommendation of a governmental entity." In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Supreme Court, also relying on *Abood*, ruled that a compulsory state bar association may constitutionally fund with mandatory dues only those political or ideological activities "germane" to it purpose. The Florida Bar has since revised their rules to include an escrow/rebate provision for attorneys to object to a particular legislative position of the bar. The objecting member is then refunded pro rata the portion of the membership dues at issue. Rule 2-9.3, Rules Regulating the Florida Bar.

In *Abood*, the court stated:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.
>
> *Abood* at 1800.

This bill also creates a new cause of action for "any bidder, offeror, contractor, or subcontractor that may suffer injury as a direct result" of a violation of its provisions. Because this bill does not explain what kind of injury is required, it is assumed that some sort of financial injury must occur. Under this cause of action, the bidder, offeror, contractor, or subcontractor that prevails is entitled to an award of reasonable attorney's fees and costs. The timeframe within which an action can be brought is not addressed, this might allow lawsuits after the construction process has begun. Bid challenges against an agency, as defined in chapter 120, F.S., the Administrative Procedures Act (APA), result in an administrative hearing before the Division of Administrative Hearing. Because this bill does not define "agency", it is unclear as to whether some or all of the agencies affected would be governed by the APA procedures, or whether some of the agencies would be outside the scope of the APA, and therefore be governed by the circuit courts.

Last year a similar bill, HB 575, was introduced; however, that bill died on the calendar. The Department of Management Services' analysis of HB 575 indicates that HB 575 has no effect on the Department's facilities management or building construction procurement specifications, which do not include any labor organization requirements. 2000 Substantive Bill Analysis, Department of Management Services, (April 7, 2000).

While the state procurement process may not be directly affected, this bill may apply to agreements between local governments and major private contractors, subcontractors or other service providers. To the extent that those contractors utilize agreements that may violate the provisions of this bill, the state procurement process could be affected. This bill appears to discourage local governments and other political subdivisions of the state from using PLAs, but states that "nothing in this act shall prohibit . . . entering into . . . agreements with one or more labor organizations . . . provided the agreements are made voluntarily and without coercion."

This bill provides an effective date of October 1, 2001.

D. SECTION-BY-SECTION ANALYSIS:

See Present Situation and Effect of Proposed Changes.

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:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This bill does not appear to have a fiscal impact on state or local governments.

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 action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This bill may raise preemption issues involving the National Labor Relations Act (NLRA) to the extent that the state is determined to regulate matters that are governed the NLRA. Central to a determination of whether the state is regulating matters which are otherwise preemptively governed by the NLRA is whether the state or a political subdivision is acting as a "market participant" (a seller or buyer of an interstate product or services) under federal law, or as a "regulator" (by its regulation of non-state contracts relating to any public works construction projects). The state's role in the market may be effectively regulating private agreements, which would go beyond 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 under the Commerce Clause, the Third Clause of Article 1, Section 8 of the U.S. Constitution, allowing states to operate in the market free of preempting federal law restrictions). In those cases, the Supreme Court stated that the U.S. Constitution does not limit the ability of states to operate freely in the market, as long as they do not interrupt the "flow of", or "burden" interstate commerce. The preemption question turns on whether the state or political subdivision is regulating labor or acting as a market participant. (Bill Analysis on HB 575: Committee on Judiciary Supplemental Analysis, Committee on Judiciary (2000), at p. 14.)

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Last year, HB 575, a similar bill introduced by Representative Trovillion and others, died on the calendar.

Opponents of this bill assert that the bill will eliminate the autonomy of local governments to choose whether or not a PLA is the best type of agreement to use for a public work contract. Especially, when the project is technically complicated and requires a specialized workforce that is easier to attain through a PLA. Conference with Mike Williams, Florida Building & Construction Trades Council, January 18th, 2001.

Proponents contend that PLAs favor union employees over non-union employees, which they think is contrary to the intent of Florida's constitution and statutes to protect all workers' right to compete for jobs without consideration of their affiliation with labor organizations. They also claim that this bill prohibits the requirement of PLAs in bid documents, but does not prohibit the winning bidder from using a PLA after being selected. Rick Watson, Association of Builders and Contractors of Florida, Inc., January 19th, 2001.

On January 25, 2001, the Committee on State Administration heard HB 61, and after a favorable vote, Representative McGriff moved to reconsider and leave HB 61 pending.

On February 6, 2001, the Committee on State Administration reported HB 61 favorably; no motion to reconsider the bill was made.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:	Staff Director:
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AS REVISED BY THE COUNCIL FOR SMARTER GOVERNMENT:

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