

By Senator Haridopolos

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1 A bill to be entitled

2 An act relating to public construction works; amending s.  
3 255.20, F.S.; revising requirements for a county,  
4 municipality, special district, or other political  
5 subdivision of the state to competitively award contracts  
6 for certain construction projects; revising exceptions to  
7 those requirements; providing procedures for an exception  
8 to those requirements when all bids or proposals are  
9 greater than a threshold amount; providing that certain  
10 construction contract terms limiting the right of a  
11 contractor to recover certain costs or damages are void;  
12 providing that certain decisions by the local governmental  
13 entity concerning additional compensation or time to which  
14 a contractor is entitled are subject to de novo review in  
15 state court; amending s. 336.41, F.S.; revising provisions  
16 authorizing a county to employ labor and provide equipment  
17 for road and bridge projects; removing authorization for a  
18 county to use its own resources for constructing and  
19 opening new roads and bridges; revising requirements for  
20 certain county road and bridge projects to be let to  
21 contract; authorizing the governing body of a municipality  
22 to employ labor and provide equipment for repair and  
23 maintenance of roads and bridges; requiring county and  
24 municipal construction and reconstruction projects using  
25 certain tax revenues to be let to contract; providing  
26 exceptions; authorizing a municipality to require that  
27 persons interested in performing work under the contract  
28 first be certified or qualified to do the work when the  
29 contract amount exceeds a certain threshold; providing for

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30 qualification of a contractor by the Department of  
31 Transportation; providing that a contractor may be  
32 considered ineligible to bid by the municipality if the  
33 contractor is behind an approved progress schedule by more  
34 than a certain amount on another project for that  
35 municipality at the time of the advertisement of the work  
36 requiring prequalification; authorizing an appeal process;  
37 requiring prequalification criteria and procedures to be  
38 published prior to advertisement or notice of  
39 solicitation; requiring notice of a public hearing for  
40 comment on such criteria and procedures prior to adoption;  
41 requiring the procedures to provide for an appeal process  
42 for objections to the prequalification process; requiring  
43 the municipality to publish for comment, prior to  
44 adoption, the selection criteria and procedures to be used  
45 if such procedures would allow selection of other than the  
46 lowest responsible bidder; requiring the selection  
47 criteria to include an appeal process; providing an  
48 effective date.

49  
50 Be It Enacted by the Legislature of the State of Florida:

51  
52 Section 1. Subsection (1) of section 255.20, Florida  
53 Statutes, is amended to read:

54 255.20 Local bids and contracts for public construction  
55 works; specification of state-produced lumber.--

56 (1) A county, municipality, special district as defined in  
57 chapter 189, or other political subdivision of the state seeking  
58 to construct, ~~or~~ improve, repair, or perform maintenance on a

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59 | public building, structure, facility, or other public  
60 | construction works must competitively award to an appropriately  
61 | licensed contractor each project that is estimated in accordance  
62 | with generally accepted cost-accounting principles to have total  
63 | construction project costs of more than \$200,000. For electrical  
64 | work, local government must competitively award to an  
65 | appropriately licensed contractor each project that is estimated  
66 | in accordance with generally accepted cost-accounting principles  
67 | to have a cost of more than \$50,000. As used in this section, the  
68 | term "competitively award" means to award contracts based on the  
69 | submission of sealed bids, proposals submitted in response to a  
70 | request for proposal, proposals submitted in response to a  
71 | request for qualifications, or proposals submitted for  
72 | competitive negotiation. This subsection expressly allows  
73 | contracts for construction management services, design/build  
74 | contracts, continuation contracts based on unit prices, and any  
75 | other contract arrangement with a private sector contractor  
76 | permitted by any applicable municipal or county ordinance, by  
77 | district resolution, or by state law. For purposes of this  
78 | section, construction costs include the cost of all labor, except  
79 | inmate labor, and include the cost of equipment and materials to  
80 | be used in the construction of the project. Subject to the  
81 | provisions of subsection (3), the county, municipality, special  
82 | district, or other political subdivision may establish, by  
83 | municipal or county ordinance or special district resolution,  
84 | procedures for conducting the bidding process.

85 |       (a) Notwithstanding any other law to the contrary, a  
86 | county, municipality, special district as defined in chapter 189,  
87 | or other political subdivision of the state seeking to construct

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88 or improve bridges, roads, streets, highways, or railroads, and  
89 services incidental thereto, at costs in excess of \$250,000 may  
90 require that persons interested in performing work under contract  
91 first be certified or qualified to perform such work. Any  
92 contractor may be considered ineligible to bid by the  
93 governmental entity if the contractor is behind on completing an  
94 approved progress schedule for the governmental entity by 10  
95 percent or more at the time of advertisement of the work. Any  
96 contractor prequalified and considered eligible by the Department  
97 of Transportation to bid to perform the type of work described  
98 under the contract shall be presumed to be qualified to perform  
99 the work described. The governmental entity may provide an appeal  
100 process to overcome that presumption with de novo review based on  
101 the record below to the circuit court.

102 (b) With respect to contractors not prequalified with the  
103 Department of Transportation, the governmental entity shall  
104 publish prequalification criteria and procedures prior to  
105 advertisement or notice of solicitation. Such publications shall  
106 include notice of a public hearing for comment on such criteria  
107 and procedures prior to adoption. The procedures shall provide  
108 for an appeal process within the authority for objections to the  
109 prequalification process with de novo review based on the record  
110 below to the circuit court within 30 days.

111 (c) The provisions of this subsection do not apply:

112 1. When the project is undertaken to replace, reconstruct,  
113 or repair an existing facility damaged or destroyed by a sudden  
114 unexpected turn of events, such as an act of God, riot, fire,  
115 flood, accident, or other urgent circumstances, and such damage  
116 or destruction creates:

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- 117 a. An immediate danger to the public health or safety;
- 118 b. Other loss to public or private property which requires
- 119 emergency government action; or
- 120 c. An interruption of an essential governmental service.
- 121 2. When, after notice by publication in accordance with the
- 122 applicable ordinance or resolution, the governmental entity does
- 123 not receive any responsive bids or proposals ~~responses~~.
- 124 3. To construction, remodeling, repair, or improvement to a
- 125 public electric or gas utility system when such work on the
- 126 public utility system is performed by personnel of the system.
- 127 4. To construction, remodeling, repair, or improvement by a
- 128 utility commission whose major contracts are to construct and
- 129 operate a public electric utility system.
- 130 ~~5. When the project is undertaken as repair or maintenance~~
- 131 ~~of an existing public facility.~~
- 132 5.6. When the project is undertaken exclusively as part of
- 133 a public educational program.
- 134 6.7. When the funding source of the project will be
- 135 diminished or lost because, through no fault of the governmental
- 136 entity, the time required to competitively award the project
- 137 after the funds become available exceeds the time within which
- 138 the funding source must be spent.
- 139 7.8. When the local government has competitively awarded a
- 140 project to a private sector contractor and the contractor has
- 141 abandoned the project before completion or the local government
- 142 has terminated the contract.
- 143 8.9. When, after receipt of bids or proposals, all
- 144 responsive bids or proposals are at least 10 percent greater than
- 145 the local government's estimated cost of the project. In this

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146 case, the local government may request that a professional  
147 engineer not affiliated with the local government prepare an  
148 independent estimate of the fair market cost of the project. If  
149 the professional engineer's cost estimate is within 10 percent of  
150 at least one of the responsive bids or proposals, the project  
151 must be competitively awarded. If the professional engineer's  
152 cost estimate is not within 10 percent of at least one of the  
153 responsive bids or proposals, the local government may request  
154 that a certified public accountant not affiliated with the local  
155 government prepare, in conjunction with the professional  
156 engineer, an estimate of the cost of the project if performed by  
157 the local government using its own services, employees, and  
158 equipment and using generally accepted accounting principles that  
159 fully account for all employee compensation and benefits,  
160 equipment and material costs, and any other associated costs and  
161 expenses. Only if the accountant's estimate is less than the  
162 lowest-priced responsive bid or proposal and the governing board  
163 of the local government, after public notice, conducts a public  
164 meeting under s. 286.011 and finds by a majority vote of the  
165 governing board that it is in the public's best interest to  
166 perform the project using its own services, employees, and  
167 equipment may the local government perform the work using its own  
168 services, employees, and equipment. The public notice must be  
169 published at least 14 days prior to the date of the public  
170 meeting at which the governing board takes final action to apply  
171 this subparagraph. The notice must identify the project, the  
172 estimated cost of the project, and specify that the purpose for  
173 the public meeting is to consider whether it is in the public's  
174 best interest to perform the project using the local government's

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175 own services, employees, and equipment. In deciding whether it is  
176 in the public's best interest for local government to perform a  
177 project using its own services, employees, and equipment, the  
178 governing board may consider the cost of the project, whether the  
179 project requires an increase in the number of government  
180 employees or, an increase in capital expenditures for public  
181 facilities, equipment, or other capital assets, the impact on  
182 local economic development, the impact on small and minority  
183 business owners, the impact on state and local tax revenues,  
184 whether the private sector contractors provide health insurance  
185 and other benefits equivalent to those provided by the local  
186 government, and any other factor relevant to what is in the  
187 public's best interest.

188 ~~9.10.~~ When the governing board of the local government  
189 determines upon consideration of specific substantive criteria  
190 and administrative procedures that it is in the best interest of  
191 the local government to award the project to an appropriately  
192 licensed private sector contractor according to procedures  
193 established by and expressly set forth in a charter, ordinance,  
194 or resolution of the local government adopted prior to July 1,  
195 1994. The criteria and procedures must be set out in the charter,  
196 ordinance, or resolution and must be applied uniformly by the  
197 local government to avoid award of any project in an arbitrary or  
198 capricious manner. This exception shall apply when all of the  
199 following occur:

200 a. When the governing board of the local government, after  
201 public notice, conducts a public meeting under s. 286.011 and  
202 finds by a two-thirds vote of the governing board that it is in  
203 the public's best interest to award the project according to the

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204 criteria and procedures established by charter, ordinance, or  
205 resolution. The public notice must be published at least 14 days  
206 prior to the date of the public meeting at which the governing  
207 board takes final action to apply this subparagraph. The notice  
208 must identify the project, the estimated cost of the project, and  
209 specify that the purpose for the public meeting is to consider  
210 whether it is in the public's best interest to award the project  
211 using the criteria and procedures permitted by the preexisting  
212 ordinance.

213 b. In the event the project is to be awarded by any method  
214 other than a competitive selection process, the governing board  
215 must find evidence that:

216 (I) There is one appropriately licensed contractor who is  
217 uniquely qualified to undertake the project because that  
218 contractor is currently under contract to perform work that is  
219 affiliated with the project; or

220 (II) The time to competitively award the project will  
221 jeopardize the funding for the project, or will materially  
222 increase the cost of the project or will create an undue hardship  
223 on the public health, safety, or welfare.

224 c. In the event the project is to be awarded by any method  
225 other than a competitive selection process, the published notice  
226 must clearly specify the ordinance or resolution by which the  
227 private sector contractor will be selected and the criteria to be  
228 considered.

229 d. In the event the project is to be awarded by a method  
230 other than a competitive selection process, the architect or  
231 engineer of record has provided a written recommendation that the  
232 project be awarded to the private sector contractor without

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233 competitive selection; and the consideration by, and the  
234 justification of, the government body are documented, in writing,  
235 in the project file and are presented to the governing board  
236 prior to the approval required in this paragraph.

237 ~~10.11.~~ To projects subject to chapter 336.

238 (d)1. If the project is to be awarded based on price, the  
239 contract must be awarded to the lowest qualified and responsive  
240 bidder in accordance with the applicable county or municipal  
241 ordinance or district resolution and in accordance with the  
242 applicable contract documents. The county, municipality, or  
243 special district may reserve the right to reject all bids and to  
244 rebid the project or elect not to proceed with the project. This  
245 subsection is not intended to restrict the rights of any local  
246 government to reject the low bid of a nonqualified or  
247 nonresponsive bidder and to award the contract to any other  
248 qualified and responsive bidder in accordance with the standards  
249 and procedures of any applicable county or municipal ordinance or  
250 any resolution of a special district.

251 2. If the project uses a request for proposal or a request  
252 for qualifications, the request must be publicly advertised and  
253 the contract must be awarded in accordance with the applicable  
254 local ordinances.

255 3. If the project is subject to competitive negotiations,  
256 the contract must be awarded in accordance with s. 287.055.

257 (e) If a construction project greater than \$200,000, or  
258 \$50,000 for electrical work, is started after October 1, 1999,  
259 and is to be performed by a local government using its own  
260 employees in a county or municipality that issues registered  
261 contractor licenses and the project would require a licensed

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262 contractor under chapter 489 if performed by a private sector  
263 contractor, the local government must use a person appropriately  
264 registered or certified under chapter 489 to supervise the work.

265 (f) If a construction project greater than \$200,000, or  
266 \$50,000 for electrical work, is started after October 1, 1999,  
267 and is to be performed by a local government using its own  
268 employees in a county that does not issue registered contractor  
269 licenses and the project would require a licensed contractor  
270 under chapter 489 if performed by a private sector contractor,  
271 the local government must use a person appropriately registered  
272 or certified under chapter 489 or a person appropriately licensed  
273 under chapter 471 to supervise the work.

274 (g) Projects performed by a local government using its own  
275 services and employees must be inspected in the same manner as  
276 inspections required for work performed by private sector  
277 contractors.

278 (h) A construction project provided for in this subsection  
279 may not be divided into more than one project for the purpose of  
280 evading this subsection.

281 (i) This subsection does not preempt the requirements of  
282 any small-business or disadvantaged-business enterprise program  
283 or any local-preference ordinance.

284 (j) Notwithstanding any other law to the contrary, any  
285 provision contained in any public construction contract for a  
286 county, municipality, special district as defined in chapter 189,  
287 or other political subdivision of the state which purports to  
288 limit, waive, release, or extinguish the rights of a contractor  
289 to recover costs or damages for delay in performing such  
290 contract, either on its behalf or on behalf of its

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291 subcontractors, if and to the extent the delay is caused by acts  
292 or omissions of the county, municipality, special district, or  
293 political subdivision, its agents or employees, or other entities  
294 with which it is in privity and due to causes within its control,  
295 shall be void and unenforceable as against public policy. The  
296 decisions of a county, municipality, special district, or other  
297 political subdivision concerning additional compensation or time  
298 to which a contractor is entitled in connection with any public  
299 construction contract shall be subject to de novo review in a  
300 state court of appropriate jurisdiction.

301 Section 2. Section 336.41, Florida Statutes, is amended to  
302 read:

303 336.41 Counties and municipalities; employing labor and  
304 providing road equipment; accounting; when competitive bidding  
305 required.--

306 (1) The governing body of a county or municipality  
307 ~~commissioners~~ may employ labor and provide equipment as may be  
308 necessary, except as provided in subsection (3), for ~~constructing~~  
309 ~~and opening of new roads or bridges~~ and repair and maintenance of  
310 any existing roads and bridges.

311 (2) It shall be the duty of all persons to whom the  
312 governing body of a county or municipality delivers ~~commissioners~~  
313 ~~deliver~~ equipment and supplies for road and bridge purposes to  
314 make a strict accounting of the same to the governing body  
315 ~~commissioners~~.

316 (3) (a) All construction and reconstruction of roads and  
317 bridges, including resurfacing, full scale mineral seal coating,  
318 and major bridge and bridge system repairs, to be performed  
319 utilizing the proceeds ~~of the 80-percent portion of the surplus~~

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320 of the constitutional fuel ~~gas~~ tax under s. 206.41(1)(a), the  
321 county fuel tax under s. 206.41(1)(b) for county projects or the  
322 municipal fuel tax under s. 206.41(1)(c) for municipal projects,  
323 the ninth-cent fuel tax under s. 206.41(1)(d) when imposed by the  
324 county, or the local option fuel tax under s. 206.41(1)(e) when  
325 imposed by the county shall be let to contract to the lowest  
326 responsible bidder by competitive bid.

327 (b) Notwithstanding paragraph (a), the county or  
328 municipality may use its own forces,~~except~~ for:

329 1.(a) Construction and maintenance in emergency  
330 situations.~~and~~

331 2.(b) In addition to emergency work, construction and  
332 reconstruction, including resurfacing, mineral seal coating, and  
333 bridge repairs, having a total cumulative annual value not to  
334 exceed 5 percent of its proceeds listed in paragraph (a) ~~80-~~  
335 percent portion of the constitutional gas tax or \$400,000,  
336 whichever is greater.~~and~~

337 3.(c) Construction of sidewalks, curbing, accessibility  
338 ramps, or appurtenances incidental to roads and bridges if each  
339 project is estimated in accordance with generally accepted cost-  
340 accounting principles to have total construction project costs of  
341 less than \$400,000 or as adjusted by the percentage change in the  
342 Construction Cost Index from January 1, 2008.~~and~~

343  
344 ~~for which the county may utilize its own forces.~~

345 (c) However, if, after proper advertising, no bids are  
346 received by a county or municipality for a specific project, the  
347 county or municipality may use its own forces to construct the  
348 project, notwithstanding the limitation of this subsection.

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349       (d) Nothing in this section shall prevent the county or  
350 municipality from performing routine maintenance as authorized by  
351 law.

352       (4) (a) For contracts in excess of \$250,000, any county or  
353 municipality may require that persons interested in performing  
354 work under the contract first be certified or qualified to do the  
355 work. Any contractor prequalified and considered eligible to bid  
356 by the department to perform the type of work described under the  
357 contract shall be presumed to be qualified to perform the work so  
358 described. Any contractor may be considered ineligible to bid by  
359 the county or municipality if the contractor is behind an  
360 approved progress schedule by 10 percent or more on another  
361 project for that county or municipality at the time of the  
362 advertisement of the work. The county or municipality may provide  
363 an appeal process to overcome such consideration with de novo  
364 review based on the record below to the circuit court.

365       (b) The county or municipality, as appropriate, shall  
366 publish prequalification criteria and procedures prior to  
367 advertisement or notice of solicitation. Such publications shall  
368 include notice of a public hearing for comment on such criteria  
369 and procedures prior to adoption. The procedures shall provide  
370 for an appeal process within the county or municipality for  
371 objections to the prequalification process with de novo review  
372 based on the record below to the circuit court.

373       (c) The county or municipality, as appropriate, shall also  
374 publish for comment, prior to adoption, the selection criteria  
375 and procedures to be used by the county or municipality if such  
376 procedures would allow selection of other than the lowest  
377 responsible bidder. The selection criteria shall include an

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378 | appeal process within the county or municipality with de novo  
379 | review based on the record below to the circuit court.

380 |       Section 3. This act shall take effect July 1, 2008.