

1 A bill to be entitled
2 An act relating to public construction works; amending s.
3 255.20, F.S.; revising provisions requiring 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 such requirements; revising provisions relating to an
8 exemption for projects performed by a local government
9 using its own services, employees, and equipment;
10 providing that certain construction contract terms
11 purporting to limit recovery of certain costs or damages
12 by a contractor are void; providing that certain decisions
13 by the local governmental entity concerning additional
14 compensation or time to which a contractor is entitled are
15 subject to de novo review in state court; providing an
16 exception; exempting a local government owning or
17 operating a public-use airport from specified requirements
18 if performing certain tasks relating to the airport's
19 buildings, structures, or public construction works;
20 exempting a local government owning or operating a seaport
21 from specified requirements when performing certain tasks
22 relating to the seaport's buildings, structures, or public
23 construction works; exempting a local government owning or
24 operating a public transit system, public transportation
25 system, or mass transit system from specified requirements
26 when performing certain tasks relating to its buildings,
27 structures, or public construction works; amending s.
28 336.41, F.S.; revising requirements regarding contracting

29 | for certain county road and bridge projects; revising
30 | provisions authorizing a county to employ labor and
31 | provide equipment for road and bridge projects; removing a
32 | provision authorizing a county to use its own resources
33 | for constructing and opening new roads and bridges;
34 | requiring the governing body of a county or municipality
35 | to competitively award to a private sector contractor all
36 | construction and reconstruction or repair of roads and
37 | bridges; authorizing a county or municipality to use its
38 | own forces for certain projects; providing restrictions
39 | and limitations; providing for the purchase of materials
40 | for such projects; providing that a county or municipality
41 | is exempt from a certain restriction with regard to paving
42 | dirt roads; defining the term "competitively award" for
43 | specified purposes; clarifying applicability of certain
44 | provisions; specifying costs included in determining the
45 | value of a project for certain purposes; revising
46 | provisions allowing a county or municipality to perform
47 | routine maintenance; prohibiting a county, municipality,
48 | or special district from owning or operating an asphalt
49 | plant or a portable or stationary concrete batch plant
50 | with an independent mixer; authorizing a municipality to
51 | require that persons interested in performing work under
52 | the contract first be certified or qualified to do the
53 | work when the contract amount exceeds a certain threshold;
54 | providing that a contractor may be considered ineligible
55 | to bid by the municipality if the contractor is behind an
56 | approved progress schedule by more than a certain amount

57 on another project for that municipality at the time of
58 the advertisement of the work requiring prequalification;
59 authorizing an appeal process; requiring that
60 prequalification criteria and procedures be published
61 before advertisement or notice of solicitation; requiring
62 notice of a public hearing for comment on such criteria
63 and procedures before adoption; requiring that the
64 procedures provide for an appeal process for objections to
65 the prequalification process; requiring the municipality
66 to publish for comment, before adoption, the selection
67 criteria and procedures to be used if such procedures
68 would allow selection of other than the lowest responsible
69 bidder; requiring that the selection criteria include an
70 appeal process; amending s. 336.44, F.S.; conforming a
71 cross-reference; providing that certain construction
72 contract terms purporting to limit recovery of certain
73 costs or damages by contractors are void; providing that
74 certain decisions by the local governmental entity
75 concerning additional compensation or time to which a
76 contractor is entitled are subject to de novo review in
77 state court; providing an exception; providing an
78 effective date.

79
80 Be It Enacted by the Legislature of the State of Florida:

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82 Section 1. Subsection (1) of section 255.20, Florida
83 Statutes, is amended to read:

84 255.20 Local bids and contracts for public construction

85 works; specification of state-produced lumber.--

86 (1) A county, municipality, special district as defined in
87 chapter 189, or other political subdivision of the state seeking
88 to construct, ~~or~~ improve, repair, or perform maintenance on a
89 public building, structure, or other public construction works
90 must competitively award to an appropriately licensed contractor
91 each project that is estimated in accordance with generally
92 accepted cost-accounting principles to have total construction
93 project costs of more than \$200,000. For electrical work, local
94 government must competitively award to an appropriately licensed
95 contractor each project that is estimated in accordance with
96 generally accepted cost-accounting principles to have a cost of
97 more than \$50,000. As used in this section, the term
98 "competitively award" means to award contracts based on the
99 submission of sealed bids, proposals submitted in response to a
100 request for proposal, proposals submitted in response to a
101 request for qualifications, or proposals submitted for
102 competitive negotiation. This subsection expressly allows
103 contracts for construction management services, design/build
104 contracts, continuation contracts based on unit prices, and any
105 other contract arrangement with a private sector contractor
106 permitted by any applicable municipal or county ordinance, by
107 district resolution, or by state law. For purposes of this
108 section, construction costs include the cost of all labor,
109 except inmate labor, and include the cost of equipment and
110 materials to be used in the construction of the project. Subject
111 to the provisions of subsection (3), the county, municipality,
112 special district, or other political subdivision may establish,

113 | by municipal or county ordinance or special district resolution,
114 | procedures for conducting the bidding process.

115 | (a) Notwithstanding any other law to the contrary, a
116 | county, municipality, special district as defined in chapter
117 | 189, or other political subdivision of the state seeking to
118 | construct or improve bridges, roads, streets, highways, or
119 | railroads, and services incidental thereto, at costs in excess
120 | of \$250,000 may require that persons interested in performing
121 | work under contract first be certified or qualified to perform
122 | such work. Any contractor may be considered ineligible to bid by
123 | the governmental entity if the contractor is behind on
124 | completing an approved progress schedule for the governmental
125 | entity by 10 percent or more at the time of advertisement of the
126 | work. Any contractor prequalified and considered eligible by the
127 | Department of Transportation to bid to perform the type of work
128 | described under the contract shall be presumed to be qualified
129 | to perform the work described. The governmental entity may
130 | provide an appeal process to overcome that presumption with de
131 | novo review based on the record below to the circuit court.

132 | (b) With respect to contractors not prequalified with the
133 | Department of Transportation, the governmental entity shall
134 | publish prequalification criteria and procedures prior to
135 | advertisement or notice of solicitation. Such publications shall
136 | include notice of a public hearing for comment on such criteria
137 | and procedures prior to adoption. The procedures shall provide
138 | for an appeal process within the authority for objections to the
139 | prequalification process with de novo review based on the record
140 | below to the circuit court within 30 days.

- 141 (c) The provisions of this subsection do not apply:
- 142 1. When the project is undertaken to replace, reconstruct,
- 143 or repair an existing public building, structure, or other
- 144 public construction works ~~facility~~ damaged or destroyed by a
- 145 sudden unexpected turn of events, such as an act of God, riot,
- 146 fire, flood, accident, or other urgent circumstances, and such
- 147 damage or destruction creates:
- 148 a. An immediate danger to the public health or safety;
- 149 b. Other loss to public or private property which requires
- 150 emergency government action; or
- 151 c. An interruption of an essential governmental service.
- 152 2. When, after notice by publication in accordance with
- 153 the applicable ordinance or resolution, the governmental entity
- 154 does not receive any responsive bids or proposals ~~responses~~.
- 155 3. To construction, remodeling, repair, or improvement to
- 156 a public electric or gas utility system when such work on the
- 157 public utility system is performed by personnel of the system.
- 158 4. To construction, remodeling, repair, or improvement by
- 159 a utility commission whose major contracts are to construct and
- 160 operate a public electric utility system.
- 161 ~~5. When the project is undertaken as repair or maintenance~~
- 162 ~~of an existing public facility.~~
- 163 ~~5.6.~~ When the project is undertaken exclusively as part of
- 164 a public educational program.
- 165 ~~6.7.~~ When the funding source of the project will be
- 166 diminished or lost because the time required to competitively
- 167 award the project after the funds become available exceeds the
- 168 time within which the funding source must be spent, so long as

169 the governmental entity undertaking the project has not
 170 materially contributed to a delay in funding or competitively
 171 awarding the project.

172 ~~7.8.~~ When the local government has competitively awarded a
 173 project to a private sector contractor and the contractor has
 174 abandoned the project before completion or the local government
 175 has terminated the contract.

176 ~~8.9.~~ When the local government, after receiving
 177 competitive bids or proposals, decides to perform the project
 178 using its own services, employees, and equipment in compliance
 179 with the procedure in this subparagraph. If the local government
 180 receives bids or proposals that are otherwise responsive but are
 181 all at least 10 percent greater than the local government's
 182 estimated cost of the project, the governing board of the local
 183 government, after public notice, must conduct ~~conducts~~ a public
 184 meeting under s. 286.011 and decide ~~finds~~ by a majority vote ~~of~~
 185 ~~the governing board that it is in the public's best interest to~~
 186 perform the project using its own services, employees, and
 187 equipment. The public notice must be published at least 14 days
 188 prior to the date of the public meeting at which the governing
 189 board takes final action to apply this subparagraph. The notice
 190 must identify the project and, the estimated cost of the
 191 project, and specify that the purpose for the public meeting is
 192 to consider whether ~~it is in the public's best interest to~~
 193 perform the project using the local government's own services,
 194 employees, and equipment. A local government's determination ~~in~~
 195 ~~deciding whether it is in the public's best interest for local~~
 196 ~~government~~ to perform a project using its own services,

197 employees, and equipment must be supported by the following
 198 factual findings, which are subject to challenge under
 199 subsection (4):

200 a. The local government's estimated cost of the project as
 201 specified in the bid documents reasonably represents the fair
 202 market cost of performing the project using private sector
 203 contractors; and

204 b. The local government can perform the project using its
 205 own services, employees, and equipment at a cost equal to or
 206 less than its estimated cost of the project, using generally
 207 accepted accounting principles that fully account for all
 208 employee compensation and benefits, equipment, and material
 209 costs and any other associated costs and expenses, ~~the governing~~
 210 ~~board may consider the cost of the project, whether the project~~
 211 ~~requires an increase in the number of government employees, an~~
 212 ~~increase in capital expenditures for public facilities,~~
 213 ~~equipment or other capital assets, the impact on local economic~~
 214 ~~development, the impact on small and minority business owners,~~
 215 ~~the impact on state and local tax revenues, whether the private~~
 216 ~~sector contractors provide health insurance and other benefits~~
 217 ~~equivalent to those provided by the local government, and any~~
 218 ~~other factor relevant to what is in the public's best interest.~~

219 9.10. When the governing board of the local government
 220 determines upon consideration of specific substantive criteria
 221 and administrative procedures that it is in the best interest of
 222 the local government to award the project to an appropriately
 223 licensed private sector contractor according to procedures
 224 established by and expressly set forth in a charter, ordinance,

225 or resolution of the local government adopted prior to July 1,
 226 1994. The criteria and procedures must be set out in the
 227 charter, ordinance, or resolution and must be applied uniformly
 228 by the local government to avoid award of any project in an
 229 arbitrary or capricious manner. This exception shall apply when
 230 all of the following occur:

231 a. When the governing board of the local government, after
 232 public notice, conducts a public meeting under s. 286.011 and
 233 finds by a two-thirds vote of the governing board that it is in
 234 the public's best interest to award the project according to the
 235 criteria and procedures established by charter, ordinance, or
 236 resolution. The public notice must be published at least 14 days
 237 prior to the date of the public meeting at which the governing
 238 board takes final action to apply this subparagraph. The notice
 239 must identify the project, the estimated cost of the project,
 240 and specify that the purpose for the public meeting is to
 241 consider whether it is in the public's best interest to award
 242 the project using the criteria and procedures permitted by the
 243 preexisting ordinance.

244 b. If ~~In the event~~ the project is to be awarded by any
 245 method other than a competitive selection process, the governing
 246 board must find evidence that:

247 (I) There is one appropriately licensed contractor who is
 248 uniquely qualified to undertake the project because that
 249 contractor is currently under contract to perform work that is
 250 affiliated with the project; or

251 (II) The time to competitively award the project will
 252 jeopardize the funding for the project, or will materially

253 increase the cost of the project or will create an undue
254 hardship on the public health, safety, or welfare.

255 c. If ~~In the event~~ the project is to be awarded by any
256 method other than a competitive selection process, the published
257 notice must clearly specify the ordinance or resolution by which
258 the private sector contractor will be selected and the criteria
259 to be considered.

260 d. If ~~In the event~~ the project is to be awarded by a
261 method other than a competitive selection process, the architect
262 or engineer of record has provided a written recommendation that
263 the project be awarded to the private sector contractor without
264 competitive selection; and the consideration by, and the
265 justification of, the government body are documented, in
266 writing, in the project file and are presented to the governing
267 board prior to the approval required in this paragraph.

268 ~~10.11.~~ To projects subject to chapter 336.

269 (d)1. If the project is to be awarded based on price, the
270 contract must be awarded to the lowest qualified and responsive
271 bidder in accordance with the applicable county or municipal
272 ordinance or district resolution and in accordance with the
273 applicable contract documents. The county, municipality, or
274 special district may reserve the right to reject all bids and to
275 rebid the project or elect not to proceed with the project. This
276 subsection is not intended to restrict the rights of any local
277 government to reject the low bid of a nonqualified or
278 nonresponsive bidder and to award the contract to any other
279 qualified and responsive bidder in accordance with the standards
280 and procedures of any applicable county or municipal ordinance

281 or any resolution of a special district.

282 2. If the project uses a request for proposal or a request
283 for qualifications, the request must be publicly advertised and
284 the contract must be awarded in accordance with the applicable
285 local ordinances.

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

288 (e) If a construction project greater than \$200,000, or
289 \$50,000 for electrical work, is started after October 1, 1999,
290 and is to be performed by a local government using its own
291 employees in a county or municipality that issues registered
292 contractor licenses and the project would require a licensed
293 contractor under chapter 489 if performed by a private sector
294 contractor, the local government must use a person appropriately
295 registered or certified under chapter 489 to supervise the work.

296 (f) If a construction project greater than \$200,000, or
297 \$50,000 for electrical work, is started after October 1, 1999,
298 and is to be performed by a local government using its own
299 employees in a county that does not issue registered contractor
300 licenses and the project would require a licensed contractor
301 under chapter 489 if performed by a private sector contractor,
302 the local government must use a person appropriately registered
303 or certified under chapter 489 or a person appropriately
304 licensed under chapter 471 to supervise the work.

305 (g) Projects performed by a local government using its own
306 services and employees must be inspected in the same manner as
307 inspections required for work performed by private sector
308 contractors.

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

312 (i) This subsection does not preempt the requirements of
313 any small-business or disadvantaged-business enterprise program
314 or any local-preference ordinance.

315 (j) Notwithstanding any other law to the contrary, any
316 provision contained in a public construction contract with a
317 county, municipality, special district as defined in chapter
318 189, or other political subdivision of the state which purports
319 to limit, waive, release, or extinguish the rights of a
320 contractor to recover costs or damages for delay in performing
321 such contract, on its behalf or on behalf of its subcontractors,
322 if and to the extent the delay is caused by acts or omissions of
323 the county, municipality, special district, or political
324 subdivision, its agents or employees, or other entities with
325 which it is in privity and due to causes within its control, is
326 void and unenforceable as against public policy. The decisions
327 of a county, municipality, special district, or other political
328 subdivision concerning additional compensation or time to which
329 a contractor is entitled in connection with any public
330 construction contract is subject to de novo review in a state
331 court of appropriate jurisdiction. This paragraph does not make
332 void any provision in such construction contract which provides
333 for reasonable liquidated damages in case of a delay to the
334 completion of the project for which the contractor is
335 responsible or which provides for reasonable liquidated damages
336 to fairly compensate the contractor for its indirect costs and

337 overhead expenses associated with a delay.

338 (k) A local government owning or operating a public-use
339 airport, as defined in s. 332.004(1), is exempt from this
340 section if performing repairs or maintenance on the airport's
341 buildings, structures, or public construction works using the
342 local government's own services, employees, and equipment,
343 regardless of the total construction cost. A public construction
344 contract with such a local government for any construction,
345 improvement, repair, or maintenance work performed on a public-
346 use airport is not subject to paragraph (j).

347 (l) A local government owning or operating a seaport, as
348 identified in s. 403.021(9)(b), is exempt from this section if
349 performing repairs or maintenance on the seaport's buildings,
350 structures, or public construction works using the local
351 government's own services, employees, and equipment, regardless
352 of the total construction cost. A public construction contract
353 with such a local government for any construction, improvement,
354 repair, or maintenance work performed on a public seaport is not
355 subject to paragraph (j).

356 (m) A local government owning or operating a public
357 transit system as defined in s. 343.52, a public transportation
358 system as defined in s. 343.62, or a mass transit system as
359 defined in s. 349.04(1)(b), is exempt from this section if
360 performing repairs or maintenance on the buildings, structures,
361 or public construction works, of a public transit system, public
362 transportation system, or mass transit system using the local
363 government's own services, employees, and equipment, regardless
364 of the total construction cost. A public construction contract

365 with such a local government for any construction, improvement,
 366 repair, or maintenance work performed on a public transit
 367 system, public transportation system, or mass transit system is
 368 not subject to paragraph (j).

369 Section 2. Section 336.41, Florida Statutes, is amended to
 370 read:

371 336.41 Counties and municipalities; employing labor and
 372 providing road equipment; accounting; when competitive bidding
 373 required.--

374 ~~(1) The commissioners may employ labor and provide~~
 375 ~~equipment as may be necessary, except as provided in subsection~~
 376 ~~(3), for constructing and opening of new roads or bridges and~~
 377 ~~repair and maintenance of any existing roads and bridges.~~

378 (1)(2) It is ~~shall be~~ the duty of all persons to whom the
 379 governing body of a county or municipality delivers
 380 ~~commissioners deliver~~ equipment and construction materials
 381 ~~supplies~~ for road and bridge purposes to make a strict
 382 accounting of the same to the governing body ~~commissioners~~.

383 (2)(a)(3) The governing body of a county or municipality
 384 shall competitively award to a private sector contractor all
 385 construction, and reconstruction, or repair of roads and
 386 bridges, including resurfacing, full scale mineral seal coating,
 387 and major bridge and bridge system repairs, ~~to be performed~~
 388 ~~utilizing the proceeds of the 80 percent portion of the surplus~~
 389 ~~of the constitutional gas tax shall be let to contract to the~~
 390 ~~lowest responsible bidder by competitive bid, except for:~~

391 (b) Notwithstanding paragraph (a), the county or
 392 municipality may use its own forces for:

393 1.(a) Construction and maintenance in emergency
 394 situations., ~~and~~
 395 ~~2.(b) In addition to emergency work,~~ Construction, and
 396 reconstruction, or repair of roads and bridges, including
 397 resurfacing, full-scale mineral seal coating, and major bridge
 398 and bridge system repairs. However:
 399 a. A single project may not exceed \$250,000 in value or as
 400 adjusted by the percentage change in the Construction Cost Index
 401 dated January 1, 2009, exclusive of materials purchased in
 402 accordance with sub-subparagraph c.
 403 b. A project under this subsection may not be divided into
 404 more than one project for the purpose of avoiding the
 405 requirements of this subsection.
 406 c. All materials for such projects must be purchased or
 407 furnished from a commercial source, with the exception of
 408 government-owned local material pits for sand, shell, gravel,
 409 and rock existing before January 1, 2008.
 410 d. A county or municipality is not subject to the maximum
 411 project value in sub-subparagraph a. for paving dirt roads only.
 412 Such county or municipality is subject to sub-subparagraph c.,
 413 ~~having a total cumulative annual value not to exceed 5 percent~~
 414 ~~of its 80 percent portion of the constitutional gas tax or~~
 415 ~~\$400,000, whichever is greater, and~~
 416 3.(e) Construction of sidewalks, curbing, accessibility
 417 ramps, or appurtenances incidental to roads and bridges if each
 418 project is estimated in accordance with generally accepted cost-
 419 accounting principles to have total construction project costs

420 of less than \$400,000 or as adjusted by the percentage change in
 421 the Construction Cost Index from January 1, 2008~~.7~~

422
 423 ~~for which the county may utilize its own forces.~~

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

428 (d) As used in this section, the term "competitively
 429 award" means to award a contract based on the submission of
 430 sealed bids, proposals submitted in response to a request for
 431 qualifications, or proposals submitted for competitive
 432 negotiations. This subsection expressly allows contracts for
 433 construction management services, design-build contracts,
 434 continuation contracts based on unit prices, and any other
 435 contract arrangement with a private sector contractor permitted
 436 by any applicable municipal or county ordinance, by district
 437 resolution, or by state law.

438 (e) For purposes of this section, the value of a project
 439 includes the cost of all labor, except inmate labor, labor
 440 burden, and equipment, including ownership, fuel, and
 441 maintenance costs to be used in the construction and
 442 reconstruction of the project.

443 (f) ~~Nothing in~~ This section ~~does not shall~~ prevent the
 444 county or municipality from performing routine maintenance as
 445 authorized by law and defined in s. 334.03, including the
 446 grading and shaping of dirt roads.

447 (g) Notwithstanding any law to the contrary, a county,
 448 municipality, or special district may not own or operate an
 449 asphalt plant or a portable or stationary concrete batch plant
 450 having an independent mixer.

451 (3)-(4)-(a) For contracts in excess of \$250,000, any county
 452 or municipality may require that persons interested in
 453 performing work under the contract first be certified or
 454 qualified to do the work. Any contractor prequalified and
 455 considered eligible to bid by the department to perform the type
 456 of work described under the contract shall be presumed to be
 457 qualified to perform the work so described. Any contractor may
 458 be considered ineligible to bid by the county or municipality if
 459 the contractor is behind an approved progress schedule by 10
 460 percent or more on another project for that county or
 461 municipality at the time of the advertisement of the work. The
 462 county or municipality may provide an appeal process to overcome
 463 such consideration with de novo review based on the record below
 464 to the circuit court.

465 (b) The county or municipality, as appropriate, shall
 466 publish prequalification criteria and procedures prior to
 467 advertisement or notice of solicitation. Such publications shall
 468 include notice of a public hearing for comment on such criteria
 469 and procedures before ~~prior to~~ adoption. The procedures shall
 470 provide for an appeal process within the county or municipality
 471 for objections to the prequalification process with de novo
 472 review based on the record below to the circuit court.

473 (c) The county or municipality, as appropriate, shall also
 474 publish for comment, before ~~prior to~~ adoption, the selection

475 criteria and procedures to be used by the county or municipality
 476 if such procedures would allow selection of other than the
 477 lowest responsible bidder. The selection criteria shall include
 478 an appeal process within the county or municipality with de novo
 479 review based on the record below to the circuit court.

480 Section 3. Subsection (1) of section 336.44, Florida
 481 Statutes, is amended, and subsection (6) is added to that
 482 section, to read:

483 336.44 Counties; contracts for construction of roads;
 484 procedure; contractor's bond.--

485 (1) The commissioners shall let the work on roads out on
 486 contract, in accordance with s. 336.41(2) ~~s. 336.41(3)~~.

487 (6) Notwithstanding any other law to the contrary, any
 488 provision contained in any public construction contract with a
 489 county, municipality, special district as defined in chapter
 490 189, or other political subdivision of the state that purports
 491 to limit, waive, release, or extinguish the rights of a
 492 contractor to recover costs or damages for delay in performing
 493 such contract, either on its behalf or on behalf of its
 494 subcontractors, if and to the extent the delay is caused by acts
 495 or omissions of the county, municipality, special district, or
 496 political subdivision, its agents or employees, or other
 497 entities with which it is in privity and due to causes within
 498 its control, shall be void and unenforceable as against public
 499 policy. The decisions of a county, municipality, special
 500 district, or other political subdivision concerning additional
 501 compensation or time to which a contractor is entitled in
 502 connection with any public construction contract shall be

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503 subject to de novo review in a state court of appropriate
504 jurisdiction. This subsection shall not be construed to void any
505 provision in such construction contract that provides for
506 reasonable liquidated damages in case of a delay to the
507 completion of the project for which the contractor is
508 responsible or that provides for reasonable liquidated damages
509 to fairly compensate the contractor for its indirect costs and
510 overhead expenses associated with a delay.

511 Section 4. This act shall take effect July 1, 2008.