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CS/CS/HB 611, Engrossed 1

2009 Legislature

1 A bill to be entitled
 2 An act relating to public construction projects; amending
 3 s. 255.20, F.S.; increasing the threshold amount for which
 4 certain public projects must be competitively awarded;
 5 revising exceptions to the requirement that certain public
 6 projects be competitively awarded; defining the terms
 7 "repair" and "maintenance"; requiring local governments to
 8 provide notice for certain public projects; providing
 9 notice requirements; extending the notice period for
 10 specified public meetings; requiring a local government to
 11 support a decision to perform a project with its own
 12 employees and to make a factual finding that the project
 13 cost will be the same or less than the lowest bid;
 14 providing additional exceptions for projects related to
 15 public-use airports, certain ports, and certain public
 16 transit or transportation systems; authorizing
 17 governmental entities to consider certain contractors
 18 ineligible to bid; revising the index and year on which
 19 the required adjustment of the threshold amounts is based;
 20 revising provisions for certain contractors and vendors to
 21 challenge a local government's actions; providing an
 22 effective date.

23
 24 Be It Enacted by the Legislature of the State of Florida:

25
 26 Section 1. Section 255.20, Florida Statutes, is amended to
 27 read:
 28 255.20 Local bids and contracts for public construction

ENROLLED

CS/CS/HB 611, Engrossed 1

2009 Legislature

29 | works; specification of state-produced lumber.--
 30 | (1) A county, municipality, special district as defined in
 31 | chapter 189, or other political subdivision of the state seeking
 32 | to construct or improve a public building, structure, or other
 33 | public construction works must competitively award to an
 34 | appropriately licensed contractor each project that is estimated
 35 | in accordance with generally accepted cost-accounting principles
 36 | to cost ~~have total construction project costs of~~ more than
 37 | \$300,000 ~~\$200,000~~. For electrical work, the local government
 38 | must competitively award to an appropriately licensed contractor
 39 | each project that is estimated in accordance with generally
 40 | accepted cost-accounting principles to ~~have a cost of~~ more than
 41 | \$75,000 ~~\$50,000~~. As used in this section, the term
 42 | "competitively award" means to award contracts based on the
 43 | submission of sealed bids, proposals submitted in response to a
 44 | request for proposal, proposals submitted in response to a
 45 | request for qualifications, or proposals submitted for
 46 | competitive negotiation. This subsection expressly allows
 47 | contracts for construction management services, design/build
 48 | contracts, continuation contracts based on unit prices, and any
 49 | other contract arrangement with a private sector contractor
 50 | permitted by any applicable municipal or county ordinance, by
 51 | district resolution, or by state law. For purposes of this
 52 | section, cost includes ~~construction costs include~~ the cost of
 53 | all labor, except inmate labor, and ~~include~~ the cost of
 54 | equipment and materials to be used in the construction of the
 55 | project. Subject to the provisions of subsection (3), the
 56 | county, municipality, special district, or other political

ENROLLED

CS/CS/HB 611, Engrossed 1

2009 Legislature

57 subdivision may establish, by municipal or county ordinance or
58 special district resolution, procedures for conducting the
59 bidding process.

60 (a) Notwithstanding any other law ~~to the contrary~~, a
61 governmental entity ~~a county, municipality, special district as~~
62 ~~defined in chapter 189, or other political subdivision of the~~
63 ~~state~~ seeking to construct or improve bridges, roads, streets,
64 highways, or railroads, and services incidental thereto, at a
65 cost ~~costs~~ in excess of \$250,000 may require that persons
66 interested in performing work under contract first be certified
67 or qualified to perform such work. A ~~Any~~ contractor may be
68 considered ineligible to bid ~~by the governmental entity~~ if the
69 contractor is behind by 10 percent or more on completing an
70 approved progress schedule for the governmental entity ~~by 10~~
71 ~~percent or more~~ at the time of advertising ~~advertisement~~ of the
72 work. A prequalified ~~Any~~ contractor ~~prequalified and~~ considered
73 eligible by the Department of Transportation to bid to perform
74 the type of work described under the contract is ~~shall be~~
75 presumed to be qualified to perform the work described. The
76 governmental entity may provide an appeal process to overcome
77 that presumption with de novo review based on the record below
78 to the circuit court.

79 (b) For ~~With respect to~~ who are not
80 prequalified by ~~with~~ the Department of Transportation, the
81 governmental entity shall publish prequalification criteria and
82 procedures prior to advertisement or notice of solicitation.
83 Such publications must ~~shall~~ include notice of a public hearing
84 for comment on such criteria and procedures prior to adoption.

ENROLLED

CS/CS/HB 611, Engrossed 1

2009 Legislature

85 The procedures must ~~shall~~ provide for an appeal process within
 86 the authority for making objections to the prequalification
 87 process with de novo review based on the record below to the
 88 circuit court within 30 days.

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

90 1. If ~~When~~ the project is undertaken to replace,
 91 reconstruct, or repair an existing public building, structure,
 92 or other public construction works ~~facility~~ damaged or destroyed
 93 by a sudden unexpected turn of events, such as an act of God,
 94 riot, fire, flood, accident, or other urgent circumstances, and
 95 such damage or destruction creates:

96 a. An immediate danger to the public health or safety;

97 b. Other loss to public or private property which requires
 98 emergency government action; or

99 c. An interruption of an essential governmental service.

100 2. If ~~When~~, after notice by publication in accordance with
 101 the applicable ordinance or resolution, the governmental entity
 102 does not receive any responsive bids or proposals ~~responses~~.

103 3. To construction, remodeling, repair, or improvement to
 104 a public electric or gas utility system if ~~when~~ such work on the
 105 public utility system is performed by personnel of the system.

106 4. To construction, remodeling, repair, or improvement by
 107 a utility commission whose major contracts are to construct and
 108 operate a public electric utility system.

109 5. If ~~When~~ the project is undertaken as repair or
 110 maintenance of an existing public facility. For the purposes of
 111 this paragraph, the term "repair" means a corrective action to
 112 restore an existing public facility to a safe and functional

ENROLLED

CS/CS/HB 611, Engrossed 1

2009 Legislature

113 condition and the term "maintenance" means a preventive or
 114 corrective action to maintain an existing public facility in an
 115 operational state or to preserve the facility from failure or
 116 decline. Repair or maintenance includes activities that are
 117 necessarily incidental to repairing or maintaining the facility.
 118 Repair or maintenance does not include the construction of any
 119 new building, structure, or other public construction works or
 120 any substantial addition, extension, or upgrade to an existing
 121 public facility. Such additions, extensions, or upgrades shall
 122 be considered substantial if the estimated cost of the
 123 additions, extensions, or upgrades included as part of the
 124 repair or maintenance project exceeds the threshold amount in
 125 subsection (1) and exceeds 20 percent of the estimated total
 126 cost of the repair or maintenance project using generally
 127 accepted cost-accounting principles that fully account for all
 128 costs associated with performing and completing the work,
 129 including employee compensation and benefits, equipment cost and
 130 maintenance, insurance costs, and materials. An addition,
 131 extension, or upgrade shall not be considered substantial if it
 132 is undertaken pursuant to the conditions specified in
 133 subparagraph 1. Repair and maintenance projects and any related
 134 additions, extensions, or upgrades may not be divided into
 135 multiple projects for the purpose of evading the requirements of
 136 this subparagraph.

137 6. If ~~When~~ the project is undertaken exclusively as part
 138 of a public educational program.

139 7. If ~~When~~ the funding source of the project will be
 140 diminished or lost because the time required to competitively

ENROLLED

CS/CS/HB 611, Engrossed 1

2009 Legislature

141 award the project after the funds become available exceeds the
 142 time within which the funding source must be spent.

143 8. ~~If~~ When the local government ~~has~~ competitively awarded
 144 a project to a private sector contractor and the contractor ~~has~~
 145 abandoned the project before completion or the local government
 146 ~~has~~ terminated the contract.

147 9. ~~If~~ When the governing board of the local government
 148 complies with all of the requirements of this subparagraph,
 149 ~~after public notice,~~ conducts a public meeting under s. 286.011
 150 after public notice, and finds by a majority vote of the
 151 governing board that it is in the public's best interest to
 152 perform the project using its own services, employees, and
 153 equipment. The public notice must be published at least 21 ~~14~~
 154 days before ~~prior to~~ the date of the public meeting at which the
 155 governing board takes final action ~~to apply this subparagraph.~~
 156 The notice must identify the project, the components and scope
 157 of the work, and the estimated cost of the project using
 158 generally accepted cost-accounting principles that fully account
 159 for all costs associated with performing and completing the
 160 work, including employee compensation and benefits, equipment
 161 cost and maintenance, insurance costs, and materials. The notice
 162 must specify that the purpose for the public meeting is to
 163 consider whether it is in the public's best interest to perform
 164 the project using the local government's own services,
 165 employees, and equipment. Upon publication of the public notice
 166 and for 21 days thereafter, the local government shall make
 167 available for public inspection, during normal business hours
 168 and at a location specified in the public notice, a detailed

ENROLLED

CS/CS/HB 611, Engrossed 1

2009 Legislature

169 itemization of each component of the estimated cost of the
 170 project and documentation explaining the methodology used to
 171 arrive at the estimated cost. At the public meeting, any
 172 qualified contractor or vendor who could have been awarded the
 173 project had the project been competitively bid shall be provided
 174 with a reasonable opportunity to present evidence to the
 175 governing board regarding the project and the accuracy of the
 176 local government's estimated cost of the project. In deciding
 177 whether it is in the public's best interest for the local
 178 government to perform a project using its own services,
 179 employees, and equipment, the governing board must ~~may~~ consider
 180 the estimated cost of the project, ~~and~~ the accuracy of the
 181 estimated cost in light of any other information that may be
 182 presented at the public meeting and whether the project requires
 183 an increase in the number of government employees, ~~or~~ an
 184 increase in capital expenditures for public facilities,
 185 equipment, ~~or~~ other capital assets. The local government may
 186 further consider, the impact on local economic development, the
 187 impact on small and minority business owners, the impact on
 188 state and local tax revenues, whether the private sector
 189 contractors provide health insurance and other benefits
 190 equivalent to those provided by the local government, and any
 191 other factor relevant to what is in the public's best interest.

192 10. If ~~When~~ the governing board of the local government
 193 determines upon consideration of specific substantive criteria
 194 ~~and administrative procedures~~ that it is in the best interest of
 195 the local government to award the project to an appropriately
 196 licensed private sector contractor pursuant ~~according~~ to

ENROLLED

CS/CS/HB 611, Engrossed 1

2009 Legislature

197 administrative procedures established by and expressly set forth
 198 in a charter, ordinance, or resolution of the local government
 199 adopted before ~~prior to~~ July 1, 1994. The criteria and
 200 procedures must be set out in the charter, ordinance, or
 201 resolution and must be applied uniformly by the local government
 202 to avoid awarding a ~~award of any~~ project in an arbitrary or
 203 capricious manner. This exception applies only if ~~shall apply~~
 204 ~~when~~ all of the following occur:

205 a. ~~When~~ The governing board of the local government, after
 206 public notice, conducts a public meeting under s. 286.011 and
 207 finds by a two-thirds vote of the governing board that it is in
 208 the public's best interest to award the project according to the
 209 criteria and procedures established by charter, ordinance, or
 210 resolution. The public notice must be published at least 14 days
 211 before ~~prior to~~ the date of the public meeting at which the
 212 governing board takes final action ~~to apply this subparagraph~~.
 213 The notice must identify the project, the estimated cost of the
 214 project, and specify that the purpose for the public meeting is
 215 to consider whether it is in the public's best interest to award
 216 the project using the criteria and procedures permitted by the
 217 preexisting charter, ordinance, or resolution.

218 b. ~~In the event~~ The project is to be awarded by any method
 219 other than a competitive selection process, and the governing
 220 board finds ~~must find~~ evidence that:

221 (I) There is one appropriately licensed contractor who is
 222 uniquely qualified to undertake the project because that
 223 contractor is currently under contract to perform work that is
 224 affiliated with the project; or

ENROLLED

CS/CS/HB 611, Engrossed 1

2009 Legislature

225 (II) The time to competitively award the project will
 226 jeopardize the funding for the project, ~~or will~~ materially
 227 increase the cost of the project, or will create an undue
 228 hardship on the public health, safety, or welfare.

229 c. ~~In the event~~ The project is to be awarded by any method
 230 other than a competitive selection process, and the published
 231 notice ~~must~~ clearly specifies ~~specify~~ the ordinance or
 232 resolution by which the private sector contractor will be
 233 selected and the criteria to be considered.

234 d. ~~In the event~~ The project is to be awarded by a method
 235 other than a competitive selection process, and the architect or
 236 engineer of record has provided a written recommendation that
 237 the project be awarded to the private sector contractor without
 238 competitive selection, ~~and~~ the consideration by, and the
 239 justification of, the government body are documented, in
 240 writing, in the project file and are presented to the governing
 241 board prior to the approval required in this paragraph.

242 11. To projects subject to chapter 336.

243 (d)~~1.~~ If the project:

244 1. Is to be awarded based on price, the contract must be
 245 awarded to the lowest qualified and responsive bidder in
 246 accordance with the applicable county or municipal ordinance or
 247 district resolution and in accordance with the applicable
 248 contract documents. The county, municipality, or special
 249 district may reserve the right to reject all bids and to rebid
 250 the project, or elect not to proceed with the project. This
 251 subsection is not intended to restrict the rights of any local
 252 government to reject the low bid of a nonqualified or

ENROLLED

CS/CS/HB 611, Engrossed 1

2009 Legislature

253 nonresponsive bidder and to award the contract to any other
 254 qualified and responsive bidder in accordance with the standards
 255 and procedures of any applicable county or municipal ordinance
 256 or any resolution of a special district.

257 2. ~~If the project~~ Uses a request for proposal or a request
 258 for qualifications, the request must be publicly advertised and
 259 the contract must be awarded in accordance with the applicable
 260 local ordinances.

261 3. ~~If the project~~ Is subject to competitive negotiations,
 262 the contract must be awarded in accordance with s. 287.055.

263 (e) If a construction project greater than \$300,000
 264 ~~\$200,000~~, or \$75,000 ~~\$50,000~~ for electrical work, is started
 265 after October 1, 1999, ~~and~~ is to be performed by a local
 266 government using its own employees in a county or municipality
 267 that issues registered contractor licenses, and the project
 268 would require a ~~licensed~~ contractor licensed under chapter 489
 269 if performed by a private sector contractor, the local
 270 government must use a person appropriately registered or
 271 certified under chapter 489 to supervise the work.

272 (f) If a construction project greater than \$300,000
 273 ~~\$200,000~~, or \$75,000 ~~\$50,000~~ for electrical work, is started
 274 after October 1, 1999, ~~and~~ is to be performed by a local
 275 government using its own employees in a county that does not
 276 issue registered contractor licenses, and the project would
 277 require a ~~licensed~~ contractor licensed under chapter 489 if
 278 performed by a private sector contractor, the local government
 279 must use a person appropriately registered or certified under
 280 chapter 489 or a person appropriately licensed under chapter 471

ENROLLED

CS/CS/HB 611, Engrossed 1

2009 Legislature

281 to supervise the work.

282 (g) Projects performed by a local government using its own
 283 services and employees must be inspected in the same manner ~~as~~
 284 ~~inspections~~ required for work performed by private sector
 285 contractors.

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

289 (i) This subsection does not preempt the requirements of
 290 any small-business or disadvantaged-business enterprise program
 291 or any local-preference ordinance.

292 (j) A county, municipality, special district as defined in
 293 s. 189.403, or any other political subdivision of the state that
 294 owns or operates a public-use airport as defined in s. 332.004
 295 is exempt from this section when performing repairs or
 296 maintenance on the airport's buildings, structures, or public
 297 construction works using the local government's own services,
 298 employees, and equipment.

299 (k) A local government that owns or operates a port
 300 identified in s. 403.021(9)(b) is exempt from this section when
 301 performing repairs or maintenance on the port's buildings,
 302 structures, or public construction works using the local
 303 government's own services, employees, and equipment.

304 (l) A local government that owns or operates a public
 305 transit system as defined in s. 343.52, a public transportation
 306 system as defined in s. 343.62, or a mass transit system
 307 described in s. 349.04(1)(b) is exempt from this section when
 308 performing repairs or maintenance on the buildings, structures,

ENROLLED

CS/CS/HB 611, Engrossed 1

2009 Legislature

309 or public construction works of the public transit system,
 310 public transportation system, or mass transit system using the
 311 local government's own services, employees, and equipment.

312 (m) Any contractor may be considered ineligible to bid by
 313 the governmental entity if the contractor has been found guilty
 314 by a court of any violation of federal labor or employment tax
 315 laws regarding subjects such as safety, tax withholding, workers
 316 compensation, unemployment tax, social security and Medicare
 317 tax, wage or hour, or prevailing rate laws within the past 5
 318 years.

319 (2) The threshold amount of \$300,000 ~~\$200,000~~ for
 320 construction or \$75,000 ~~\$50,000~~ for electrical work, as
 321 specified in subsection (1), must be adjusted by the percentage
 322 change in the Engineering News-Record's Building Cost Consumer
 323 Price Index from January 1, 2009 ~~1994~~, to January 1 of the year
 324 in which the project is scheduled to begin.

325 (3) All county officials, boards of county commissioners,
 326 school boards, city councils, city commissioners, and all other
 327 public officers of state boards or commissions that are charged
 328 with the letting of contracts for public work, for the
 329 construction of public bridges, buildings, and other structures
 330 must ~~always~~ specify lumber, timber, and other forest products
 331 produced and manufactured in this state if ~~whenever~~ such
 332 products are available and their price, fitness, and quality are
 333 equal. This subsection does not apply to ~~when~~ plywood specified
 334 for monolithic concrete forms, if ~~when~~ the structural or service
 335 requirements for timber for a particular job cannot be supplied
 336 by native species, or if ~~when~~ the construction is financed in

ENROLLED

CS/CS/HB 611, Engrossed 1

2009 Legislature

337 whole or in part from federal funds with the requirement
338 ~~requirements~~ that there be no restrictions as to species or
339 place of manufacture.

340 (4) Any qualified contractor or vendor who could have been
341 awarded the project had the project been competitively bid has
342 ~~shall have~~ standing to challenge a ~~the propriety of the~~ local
343 government's actions to determine if the local government has
344 complied with ~~when the local government seeks to invoke the~~
345 ~~provisions of~~ this section. The prevailing party in such action
346 is ~~shall be~~ entitled to recover its reasonable attorney's fees.

347 Section 2. This act shall take effect October 1, 2009.
348