

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Community Affairs Committee

**BILL:** CS/SB 386

**INTRODUCER:** Government Oversight and Accountability Committee and Senators Bogdanoff, Fasano, and Gaetz

**SUBJECT:** Procurement/Preference to Florida Businesses

**DATE:** April 5, 2011                      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Roberts	GO	Fav/CS
2.	Gizzi	Yeatman	CA	Pre-meeting
3.			BC	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

This Committee Substitute (CS) modifies the existing in-state vendor preference for public printing contracts to include counties, municipalities, school districts, and other political subdivisions as entities that may grant a preference. The CS specifies that the printing preference is equal to the preference established by the state of the lowest bidder, or 5 percent when the lowest bidder's state has no in-state preference. In relation to the procurement of personal property and services under ch. 287, F.S., the CS provides that the preference for in-state vendors shall be 5 percent when the lowest bidder's state has no in-state preference.

This CS substantially amends sections 283.35 and 287.084 of the Florida Statutes.

**II. Present Situation:**

**Public Printing Vendor Preference**

Chapter 283 of the Florida Statutes regulates public printing. Section 283.35, F.S., provides that "[e]very agency must give preference to vendors located within the state when awarding

contracts to have materials printed, whenever such printing can be done at no greater expense than the expense of awarding a contract to a vendor located outside the state and can be done at a level of quality comparable to that obtainable from a vendor located outside the state.”

Section 283.30(1), F.S., defines the term “agency” for purposes of ch. 283, F.S., to mean any official, officer, department, board, commission, division, bureau, section, district, office, authority, committee, or council, or any other unit of organization, however designated, of the executive branch of state government, and the Public Service Commission.

### **State Agency Procurement Vendor Preference**

Chapter 287 of the Florida Statutes regulates state agency procurement of personal property and services. In providing preference to Florida businesses, s. 287.084, F.S., states:

- (1) When an agency<sup>1</sup>, county, municipality, school district, or other political subdivision of the state is required to make purchases of personal property through competitive solicitation and the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is in a state or political subdivision thereof which grants a preference for the purchase of such personal property to a person whose principal place of business is in such state, then the agency, county, municipality, school district, or other political subdivision of this state may award a preference to the lowest responsible and responsive vendor having a principal place of business within this state, which preference is equal to the preference granted by the state or political subdivision thereof in which the lowest responsible and responsive vendor has its principal place of business. However, this section does not apply to transportation projects for which federal aid funds are available.
- (2) If a solicitation provides for the granting of a preference as is provided in this section, any vendor whose principal place of business is outside the State of Florida must accompany any written bid, proposal, or reply documents with a written opinion of an attorney at law licensed to practice law in that foreign state, as to the preferences, if any or none, granted by the law of that state to its own business entities whose principal places of business are in that foreign state in the letting of any or all public contracts.

### **III. Effect of Proposed Changes:**

**Section 1** provides short title for this act as the “Buy Florida Act.”

**Section 2** amends s. 283.35, F.S., by expanding application of the printing preference to each county, municipality, school district, or other political subdivision of the state. The preference

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<sup>1</sup> As used in Ch. 287, F.S., “agency” means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. “Agency” does not include the university and college boards of trustees or the state universities and colleges.

for in-state vendors, which applies when the printing can be performed in-state at a level of quality comparable to that obtainable from an out-of-state vendor that submits the lowest bid, must be:

- Equal to the preference granted by the state or political subdivision in which the lowest responsible and responsive vendor has its principal place of business; or
- Five percent if the lowest bid is submitted by a vendor whose principal place of business is located outside the state and that state does not grant a preference in competitive solicitation to vendors having a principal place of business in that state.

Any vendor whose principal place of business is in another state must accompany any written bid, proposal, or reply documents with a written opinion of an attorney licensed in that state, regarding any preferences granted by that state to its own business entities whose principal places of business are in that state in the letting of public contracts.

**Section 3** amends s. 287.084, F.S., to add an additional provision to the existing in-state preference for state agency procurement. The CS provides that in a competitive solicitation in which the lowest bid is submitted by a vendor whose principal place of business is located outside the state and that state does not grant a preference in competitive solicitation to vendors having a principal place of business in that state, the preference to the lowest responsible and responsive vendor having a principal place of business in this state shall be 5 percent.

**Section 4** provides that this act shall take effect July 1, 2011.

#### **IV. Constitutional Issues:**

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

The establishment of local preference laws may potentially implicate the Equal Protection Clause and the Commerce Clause of the U.S. Constitution.

##### ***The Equal Protection Clause***

The United States Constitution provides that “no State shall . . . deny to any person within its jurisdiction, the equal protection of law.”<sup>2</sup> The in-state preference provisions in this CS may constitute an equal protection violation. If

<sup>2</sup> U.S. CONST. amend. XIV, § 1. See also FLA. CONST. art. I, s. 2.

such legislation is challenged, the court would use a rational basis test to determine the constitutionality of the alleged discriminatory treatment.<sup>3</sup> Under the rational basis test, a court must uphold a state statute so long as the classification bears a rational relationship to a legitimate state interest.<sup>4</sup>

### ***The Commerce Clause***

The United States Constitution provides that Congress shall have the power “to regulate commerce . . . among the states.”<sup>5</sup> The Commerce Clause acts not only as a positive grant of power to Congress, but also as a negative constraint upon the states.<sup>6</sup>

Courts have used a two-tiered analysis to determine whether a statutory scheme violates the Commerce Clause:

1. “If a statute ‘directly regulates or discriminates against interstate commerce, or [if] its effect is to favor in-state economic interests over out-of-state interests,’ the court may declare it unconstitutional as applied, without further inquiry.”<sup>7</sup>
2. “. . . if the statute regulates evenhandedly and if it has only an indirect effect on interstate commerce, the court must determine whether the state’s interest is legitimate and, if so, whether the burden on interstate commerce exceeds the local benefits.”<sup>8</sup>

However, when a state or local government is acting as a “market participant” rather than a “market regulator,” it is not subject to the limitations of the Commerce Clause.<sup>9</sup> A state is considered to be a “market participant” when it is acting as an economic actor such as a purchaser of goods and services.<sup>10</sup> Since the state is acting as a “market participant” under this CS, the in-state preference provisions herein are likely to be upheld as an exception to the Commerce Clause.

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

Indeterminate.

<sup>3</sup> *Nordlinger v. Hahn*, 505 U.S. 1, 33-34 (1992) (stating that a “classification *rationally* furthers a state interest when there is some fit between the disparate treatment and the legislative purpose.”).

<sup>4</sup> *Id.*

<sup>5</sup> U.S. CONST. art. I, s. 8, cl. 3.

<sup>6</sup> See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>7</sup> *National Collegiate Athletic Ass’n v. Associated Press*, 18 So. 3d 1201, 1211-1212 (Fla. 1st DCA 2009) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-579).

<sup>8</sup> *Id.* (citations omitted); See *Bainbridge v. Turner*, 311 F.3d 1104, 1108-1109.

<sup>9</sup> See *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204, 204 (1983) (providing that a state may grant and enforce a preference to local residents when entering into construction projects for public projects).

<sup>10</sup> *Id.*

**C. Government Sector Impact:**

As a result of this CS, counties, municipalities, school districts, and other political subdivisions will be authorized to grant in-state vendor preference for public printing contracts.

In the procurement of personal property and services under ch. 287, F.S., the CS provides that the preference for in-state vendors shall be 5 percent when the lowest bidder's state has no in-state preference.

The fiscal impact of these changes is indeterminate at this time.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Section 2 of the CS provides that the printing preference to an in-state vendor in instances when the lowest responsible and responsive vendor is an out-of-state vendor shall be equal to the preference provided in the state where the out-of-state vendor's principal place of business is located.

If the out-of-state vendor's principal place of business is located in a state that has a reciprocal numberless in-state vendor preference, the numerical preference would be difficult to apply/determine since each states' preference language would mirror the other.

**VIII. Additional Information:**

- A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Governmental Oversight and Accountability on March 23, 2011:**

The committee substitute removes references discussing how the preference would apply to PRIDE (Prison Rehabilitative Industries and Diversified Enterprises, Inc.), and clarifies how the preference will apply in printing contracts.

- B. Amendments:**

None.