

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 441 Scrutinized Companies

SPONSOR(S): Government Operations Subcommittee; Bernard and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 444

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	15 Y, 0 N, As CS	McDonald	Williamson
2) Judiciary Committee	16 Y, 0 N	De La Paz	Havlicak
3) State Affairs Committee			

SUMMARY ANALYSIS

This bill prohibits a company on the Scrutinized Companies with Activities in Sudan List or on the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of \$1 million or more.

The bill also does the following:

- Requires public entities to have a contract provision that allows contracts to be terminated if the company submitted a false certification or is placed on either of the Scrutinized Companies lists.
- Provides an exception to the prohibition.
- Requires a company seeking to enter into a contract of \$1 million or more to certify that it is not a scrutinized business operation.
- Provides a process by which an agency or local governmental entity can report a false certification and by which the relevant government attorney may bring civil suit.
- Specifies penalties for a company that makes a false certification.
- Preempts an ordinance or rule of any local governmental entity involving public contracts for goods or services of \$1 million or more with a company engaged in scrutinized business operations.
- Requires the Department of Management Services to submit a written notice describing the act to the Attorney General of the United States, within 30 days after the effective date of the bill.
- Provides that the act becomes inoperative on the date that federal law ceases to authorize the state to adopt and enforce the contracting prohibitions of the type provided for in the bill.

The bill has an indeterminate fiscal impact on state and local governments. The bill will adversely affect companies on the Scrutinized Companies with Activities in Sudan List or on the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List that seek to enter into contracts with Florida governmental entities.

The bill takes effect July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

PRESENT SITUATION

Federal Law

State Sponsors of Terrorism

Countries that are determined by the United States Secretary of State to have repeatedly provided support for acts of international terrorism are designated as "State Sponsors of Terrorism" and are subject to sanctions under the Export Administration Act,¹ the Arms Export Control Act,² and the Foreign Assistance Act.³ The four main categories of sanctions resulting from designations under these acts are: restrictions on U.S. foreign assistance, a ban on defense exports and sales, certain controls over exports of dual use items, and miscellaneous financial and other restrictions.⁴ Some of the miscellaneous restrictions include opposition to loans by the World Bank and other financial institutions, removal of diplomatic immunity to allow victims of terrorism to file civil lawsuits, denial of tax credits to companies and individuals for income earned in named countries, authority to prohibit U.S. citizens from engaging in transactions without a Treasury Department license, and prohibition of Department of Defense contracts above \$100,000 with companies controlled by terrorist-list states.⁵

The four countries currently designated by the U.S. Secretary of State as "State Sponsors of Terrorism" are Cuba, Iran, Sudan, and Syria.⁶

United States Sanctions against Iran

The United States has instituted a number of sanctions against Iran as a result of its state support of terrorism, human rights violations, and pursuit of a policy of nuclear development. The situation is summarized in the following excerpt from a recent Congressional Research Service report:

Iran is subject to a wide range of U.S. sanctions, restricting trade with, investment, and U.S. foreign aid to Iran, and requiring the United States to vote against international lending to Iran.

Several laws and Executive Orders authorize the imposition of U.S. penalties against foreign companies that do business with Iran, as part of an effort to persuade foreign firms to choose between the Iranian market and the much larger U.S. market. Most notable among these sanctions is a ban, imposed in 1995, on U.S. trade with and investment in Iran. That ban has since been modified slightly to allow for some bilateral trade in luxury and humanitarian-related goods. Foreign subsidiaries of U.S. firms remain generally exempt from the trade ban since they are under the laws of the countries where they are incorporated. Since 1995, several U.S. laws and regulations that seek to pressure Iran's economy, curb Iran's support for militant groups, and curtail supplies to Iran of advanced technology have been enacted. Since 2006, the United Nations Security Council has imposed some sanctions primarily attempting to curtail supply to Iran of weapons-related technology but also sanctioning some Iranian banks.

¹ Section 6(j), U.S. Export Administration Act.

² Section 40, U.S. Arms Export Control Act.

³ Section 620A, U.S. Foreign Assistance Act.

⁴ U.S. Department of State website, <http://www.state.gov/s/ct/c14151.htm>, Office of Coordinator for Counterterrorism, State Sponsors of Terrorism, last viewed on February 21, 2011.

⁵ U.S. Department of State website, <http://www.state.gov/s/ct>, Country Reports on Terrorism, last viewed on February 21, 2011.

⁶ *Id.*

U.S. officials have identified Iran's energy sector as a key Iranian vulnerability because Iran's government revenues are approximately 80% dependent on oil revenues and in need of substantial foreign investment. A U.S. effort to curb international energy investment in Iran began in 1996 with the Iran Sanctions Act (ISA), but no firms have been sanctioned under it and the precise effects of ISA, as distinct from other factors affecting international firms' decisions on whether to invest in Iran, have been unclear. International pressure on Iran to curb its nuclear program has increased the hesitation of many major foreign firms to invest in Iran's energy sector, hindering Iran's efforts to expand oil production beyond 4.1 million barrels per day, but some firms continue to see opportunity in Iran.

Some in Congress express concern about the reticence of U.S. allies, of Russia, and of China, to impose U.N. sanctions that would target Iran's civilian economy. In an attempt to strengthen U.S. leverage with its allies to back such international sanctions, several bills in the 111th Congress would add U.S. sanctions on Iran. For example, H.R. 2194 (which passed the House on December 15, 2009), H.R. 1985, H.R. 1208, and S. 908 would include as ISA violations selling refined gasoline to Iran; providing shipping insurance or other services to deliver gasoline to Iran; or supplying equipment to or performing the construction of oil refineries in Iran. Several of these bills would also expand the menu of available sanctions against violators. A bill passed by the Senate on January 28, 2010 (S. 2799), contains these sanctions as well as a broad range of other measures against Iran, including reversing previous easing of the U.S. ban on trade with Iran.

In light of the strength of the democratic opposition in Iran, one trend in Congress is to alter some U.S. sanctions laws in order to facilitate the democracy movement's access to information, and to target those persons or institutions in the regime who are committing human rights abuses against protesters.⁷

The Voice Act⁸

In the Voice Act, Congress directed the President of the United States to submit a report on non-Iranian persons, including corporations with U.S. subsidiaries, who have knowingly or negligently provided hardware, software, or other forms of assistance to the government of Iran, which has furthered Iran's efforts to filter online political content, disrupt cell phone and Internet communications, and monitor the online activities of Iranian citizens.

State Law

Foreign Trade

Florida prohibits the export or sale for export of any goods, products, or services to a foreign country in violation of any federal law. Additionally, Florida law specifically restricts any interference with foreign exports except as prohibited by federal law.⁹

State Agency Procurement of Commodities and Services

The process for the procurement of commodities and contractual services by state agencies¹⁰ provides requirements for fair and open competition among vendors, agency maintenance of written documentation that supports procurement decisions, and implementation of monitoring mechanisms.¹¹

⁷ Congressional Research Service Report RS20871, *Iran Sanctions*, February 2, 2010.

⁸ P.L. 111-84, October 28, 2009.

⁹ See s. 288.855, F.S.

¹⁰ Section 287.012(1), F.S., defines "agency" to mean "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." The term "does not include the university and college boards of trustees or the state universities and colleges."

¹¹ See part I of chapter 287, F.S.

Legislative intent for chapter 287, F.S., states the process provided in the chapter is necessary in order to:

- Reduce improprieties and opportunities for favoritism;
- Ensure the equitable and economical award of public contracts; and
- Inspire public confidence in state procurement.¹²

The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include overseeing agency implementation of the procurement process,¹³ creating uniform agency procurement rules,¹⁴ implementing the online procurement program,¹⁵ and establishing state term contracts.¹⁶ The agency procurement process is partly decentralized in that agencies, except in the case of state term contracts, may procure goods and services themselves in accordance with requirements set forth in statute and rule, rather than placing orders through DMS.

Protecting Florida's Investments Act: Scrutinized Companies¹⁷

The Protecting Florida's Investments Act (PFIA), enacted in 2008, requires the State Board of Administration (SBA), acting on behalf of the Florida Retirement System Trust Fund (FRSTF), to assemble and publish a list of scrutinized companies that have prohibited business operations in Sudan and Iran.¹⁸ Once placed on a list, the SBA and its investment managers are prohibited from acquiring those companies' securities and must divest those securities if the companies do not cease prohibited activities or take certain specified actions. PFIA does not affect FRSTF investments in U.S. companies. PFIA only affects foreign companies with certain operations in Sudan and Iran involving the petroleum or energy sector, oil or mineral extraction, power production, or military support activities.

The criteria used in defining what constitute a scrutinized company in Sudan or Iran is in PFIA.¹⁹ A scrutinized company is judged according to whether it meets the following criteria:

Sudan:

1. Has a material business relationship with the government of Sudan or a government-created project involving oil related, mineral extraction, or power generation activities;
2. Has a material business relationship involving the supply of military equipment;
3. Imparts minimal benefit to disadvantaged citizens that are typically located in the geographic periphery of Sudan; or
4. Is complicit in the genocidal campaign in Darfur.²⁰

Iran:

1. Has a material business relationship with the government of Iran or a government-created project involving oil related or mineral extraction activities; or
2. Has made material investments with the effect of significantly enhancing Iran's petroleum sector.²¹

Authority to Prohibit Contracts

State and local governments have proposed or enacted measures restricting agencies having economic ties with firms that transact business with or in foreign countries of whose conduct the state or local government finds objectionable. Case law, however, indicates that in the absence of federal

¹² Section 287.001, F.S.

¹³ See ss. 287.032 and 287.042, F.S.

¹⁴ See ss. 287.032(2) and 287.042(3), (4), and (12), F.S.

¹⁵ See s. 287.057(23), F.S.

¹⁶ See ss. 287.042(2), 287.056, and 287.1345, F.S.

¹⁷ Section 215.473, F.S.

¹⁸ A complete list of scrutinized companies and companies that are under continuing examination by the SBA can be found on the SBA website.

¹⁹ See s. 215.473(1)(t), F.S.

²⁰ Section 215.473(1)(t)1.-3., F.S.

²¹ Section 215.473(1)(t)4., F.S.

authority being granted for such action, those statutes may be preempted by the dormant federal foreign affairs powers.²²

The federal government has expressly given state and local governments authority to divest from companies directly invested in certain Sudanese or Iranian sectors.²³ The laws define an "investment" to include the entry into or the renewal of a contract for goods or services. The federal laws require that the state or local government provide written notice to each person to which a measure is applied, provide an opportunity to each person to comment in writing on the applicability of the measures, and provide that the application of the measure cannot occur earlier than 90 days after the written notice date. The government enacting the measure is required to send notice to the U.S. Attorney General within 30 days after adopting a measure.

EFFECT OF PROPOSED CHANGES

The bill creates a prohibition against contracting with scrutinized companies for goods or services. It creates definitions for the terms "awarding body"²⁴ and "local governmental entity,"²⁵ and definitions contained in s. 287.012, F.S., and s. 215.473, F.S., are included by reference.

The bill prohibits a company on the Scrutinized Companies with Activities in Sudan List or on the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of \$1 million or more.

The bill requires that any contract with an agency or local governmental entity for goods or services of \$1 million or more, entered into or renewed on or after July 1, 2011, contain a provision that allows for the termination of the contract, at the option of the awarding body, if the company is found to have submitted a false certification or has been placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List.

The bill allows an agency or local governmental entity to make a case-by-case exception to the prohibition if all of the following conditions are met:

- The scrutinized business operations²⁶ were made before July 1, 2010;
- The scrutinized business operations have not been expanded or renewed after July 1, 2010;
- The agency or local governmental entity determines that it is in the best interest of the state or local community to contract with the company; or
- The company has adopted, has publicized, and is implementing a formal plan to cease scrutinized business operations and to refrain from engaging in any new scrutinized business operations.

An exception may also be granted if one of the following conditions is met:

- The local governmental entity makes a public finding that, absent such an exemption, the local governmental entity would be unable to obtain the goods or services for which the contract is offered.

²² In 2000, the U.S. Supreme Court unanimously held in *Crosby v. National Foreign Trade Council* that a Massachusetts law restricting state transactions with firms doing business in Burma was preempted by a federal Burma statute. See 530 U.S. 363(2003); but see *Faculty Senate of Fla. Int'l Univ. v. Winn*, 616 F.3d 1206 (11th Cir. 2010) (upholding a university prohibition on using state or nonstate funds on activities related to travel to a terrorist state).

²³ The Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, ss. 1 to 12, Dec. 31, 2007, 121 Stat. 2516, as amended Pub. L. No. 111-195, Title II, s. 205(a), July 1, 2010, 124 Stat. 1344.; 22 U.S.C. s. 8532.

²⁴ "Awarding body" means, for purposes of state contracts, an agency or department, and for purposes of local contracts, means the governing body of the local governmental entity.

²⁵ "Local governmental entity" means "a county, municipality, special district, or other political subdivision of the state."

²⁶ Section 215.473(1)(s), F.S., defines "scrutinized business operations" to mean "business operations that have resulted in a company becoming a scrutinized company."

- For a contract with an executive agency, the Governor makes a public finding that, absent such an exemption, the agency would be unable to obtain the goods or services for which the contract is offered.
- For a contract with an office of a state constitutional officer other than the Governor, the state constitutional officer makes a public finding that, absent such an exception, the office would be unable to obtain the goods or services for which the contract is offered.

An agency or local governmental entity must require a company that submits a bid or proposal for, or that otherwise proposes to enter into or renew, a contract with the agency or local governmental entity for goods or services of \$1 million or more to certify that the company is not a scrutinized business operation under s. 215.473, F.S. The certification must be submitted at the time a bid or proposal is submitted or before a contract is executed or renewed.

When an agency or local governmental entity determines that a company has submitted a false certification that it is not a scrutinized business operation, it must provide the company with written notice and 90 days to respond in writing to the determination. If the company fails to demonstrate that it has ceased its engagement in scrutinized business operations, then:

- The awarding body *must* report the company to the Attorney General and provide information demonstrating the false certification. The Attorney General must determine whether to bring a civil action against the company. Additionally, the awarding body *may* report the company to the municipal attorney, county attorney, or district attorney who may determine whether to bring a civil action against the company.
- If a civil action is brought and the court determines that the company submitted a false certification, the company is required to pay all reasonable attorney's fees and costs (including costs for investigations that led to the finding of false certification) and a civil penalty equal to the greater of \$2 million or twice the amount of the contract for which the false certification was submitted. A civil action to collect the penalties must commence within 3 years after the date the false certification is made.
 - The bill specifies that only the awarding body may cause a civil action to be brought, and that the section does not create or authorize a private right of action or enforcement of the provided penalties. An unsuccessful bidder, or any other person other than the awarding body, may not protest the award or contract renewal on the basis of a false certification.
- An existing contract with the company must be terminated at the option of the awarding body.
- The company is ineligible to bid on any contract with an agency or a local governmental entity for 3 years after the date of determining that the company submitted a false certification.

The bill specifies that its provisions preempt any ordinance or rule of any local governmental entity involving public contracts for goods or services of \$1 million or more with a company engaged in scrutinized business operations.

Within 30 days after the effective date of the bill, the Department of Management Services must submit a written notice describing the act to the Attorney General of the United States.

Finally, the act becomes inoperative on the date that federal law ceases to authorize the state to adopt and enforce the contracting prohibitions of the type provided.

B. SECTION DIRECTORY:

Section 1. Creates s. 287.135, F.S., to create prohibitions against contracting with scrutinized companies.

Section 2. Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
Indeterminate.
2. Expenditures:
Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
Indeterminate.
2. Expenditures:
Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The impact on the private sector is indeterminate; however, there will likely be an adverse affect on companies on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List that seek to enter into contracts with governmental entities in the state.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue

2. Other:

Under the Supremacy Clause of the United States Constitution,²⁷ where the federal government and a state government legislates on the same subject, the federal law is supreme and will, in general, have the effect of voiding the conflicting state law.²⁸ The Supremacy Clause applies when state law is inconsistent with federal law. If state law attempts to invalidate the substance of a federal law or treaty, the state law cannot stand. Similarly, state law which encourages conduct inconsistent with that required by federal law is invalid. The same result holds if state law forbids conduct that federal law allows, or interferes with the achievement of a federal objective.²⁹ However, states are generally free to legislate in areas not controlled by federal law.

²⁷ U.S. Const. art. VI, cl. 2.

²⁸ See, *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 509 (1989).

²⁹ *Perez v. Campbell*, 402 U.S. 637 (1971); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

Congress, however, has authorized the type of contractual restrictions included in this bill and the bill contains a provision that specifically makes it inoperative if Congress ever rescinds that authority. Therefore, this bill should not violate the Supremacy Clause of the U.S. Constitution.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 8, 2011, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably with committee substitute. The committee substitute addresses the drafting issues noted in the original bill analysis. Additionally, it requires public entities to have a contract provision that allows contracts to be terminated if the company submits a false certification or is placed on either of the Scrutinized Companies list.