

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 Governmental Oversight and Accountability Committee

BILL: SB 444

INTRODUCER: Senator Bogdanoff

SUBJECT: Contracting with Scrutinized Companies

DATE: February 2, 2011

REVISED: 2/08/11

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Naf	Roberts	GO	Fav/2 amendments
2.			CA	
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input checked="" type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

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:

- 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 government 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.
- States that the act preempts 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.
- Requires the Department of Management Services must submit a written notice describing the act to the Attorney General of the United States within 30 days after July 1, 2011.

- States 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 act.

This bill creates s. 287.135, F.S.

II. Present Situation:

The United States has instituted a number of sanctions against the nation of 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.

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.¹

State Sponsors of Terrorism

Countries which 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 Act², the Arms Export Control Act,³ and the Foreign Assistance Act.⁴ 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.⁵ 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.⁶

The four countries currently designated by the U.S. Secretary of State as "State Sponsors of Terrorism" are Cuba, Iran, Sudan, and Syria.⁷

The Voice Act

In addition, Congress recently directed the President of the United States to submit a report on non-Iranian persons, including corporations with United States subsidiaries, that have knowingly or negligently provided hardware, software, or other forms of assistance to the Government of

¹ Congressional Research Service Report RS20871, *Iran Sanctions*, February 2, 2010.

² Section 6(j), U.S. Export Administration Act.

³ Section 40, U.S. Arms Export Control Act.

⁴ Section 620A, U.S. Foreign Assistance Act.

⁵ 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 3, 2011.

⁶ U.S. Department of State website, <http://www.state.gov/s/ct>, Country Reports on Terrorism, last viewed on February 3, 2011.

⁷ See Footnote 5.

Iran that has furthered Iran's efforts to filter online political content, disrupt cell phone and Internet communications, and monitor the online activities of Iranian citizens.⁸

State Law Pertaining to Foreign Trade

Section 288.855, F.S., prohibits the export or sale of any goods or services to a foreign country in violation of federal law and restricts interference with foreign export except as otherwise prohibited by law.

State Agency Procurement of Commodities and Services

The comprehensive process contained in ch. 287, F.S., for the procurement of commodities and contractual services by executive agencies⁹ sets forth numerous requirements for fair and open competition among vendors, agency maintenance of written documentation that supports procurement decisions, and implementation of monitoring mechanisms. Legislative intent language for the chapter explains that the process 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.¹⁰

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 ch. 287, F.S., competitive procurement process;¹¹ creating uniform agency procurement rules;¹² implementing the online procurement program;¹³ and establishing state term contracts.¹⁴ 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 the DMS.

Scrutinized Companies with Activities in Sudan List and Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List

Section 215.473(1)(t), F.S., defines "scrutinized company" to mean any company that meets any of the following criteria:

- The company has business operations that involve contracts with or provision of supplies or services to the government of Sudan, companies in which the government of Sudan has any direct or indirect equity share, consortiums or projects commissioned by the government of

⁸ P.L. 111-84, October 28, 2009.

⁹ Section 287.012(1), F.S., provides that the term "agency" for purposes of ch. 287, F.S., ". . . 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."

¹⁰ Section 287.001, F.S.

¹¹ Sections 287.032 and 287.042, F.S.

¹² Sections 287.032(2) and 287.042(3), (4), and (12), F.S.

¹³ Section 287.057(23), F.S.

¹⁴ Sections 287.042(2), 287.056 and 287.1345, F.S.

Sudan, or companies involved in consortiums or projects commissioned by the government of Sudan, and:

- More than 10 percent of the company's revenues or assets linked to Sudan involve oil-related activities or mineral-extraction activities; less than 75% of the company's revenues or assets linked to Sudan involve contracts with or provision of oil-related or mineral-extracting products or services to the regional government of southern Sudan or a project or consortium created exclusively by that regional government; and the company has failed to take substantial action¹⁵; or
- More than 10 percent of the company's revenues or assets linked to Sudan involve power-production activities; less than 75 percent of the company's power-production activities include projects whose intent is to provide power or electricity to the marginalized populations of Sudan; and the company has failed to take substantial action.
- The company is complicit in the Darfur genocide.
- The company supplies military equipment within Sudan, unless it clearly shows that the military equipment cannot be used to facilitate offensive military actions in Sudan or the company implements rigorous and verifiable safeguards to prevent use of that equipment by forces actively participating in armed conflict.
- The company has business operations that involve contracts with or provision of supplies or services to the government of Iran, companies in which the government of Iran has any direct or indirect equity share, consortiums, or projects commissioned by the government of Iran, or companies involved in consortiums or projects commissioned by the government of Iran and:
 - More than 10% of the company's total revenues or assets are linked to Iran and involve oil-related activities or mineral-extraction activities; and the company has failed to take substantial action¹⁶; or
 - The company has, with actual knowledge, on or after August 5, 1996, made an investment of \$20 million or more, or any combination of investments of at least \$10 million each, which in the aggregate equals or exceeds \$20 million in any 12-month period, and which directly or significantly contributes to the enhancement of Iran's ability to develop the petroleum resources of Iran.

All funds, assets, trustees, and other designates under the State Board of Administration¹⁷ are required to categorize scrutinized companies into a "Scrutinized Companies with Activities in Sudan List" and a "Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List."¹⁸

¹⁵ Section 215.473(1)(w), F.S., defines "substantial action specific to Sudan" to mean "adopting, publicizing, and implementing a formal plan to cease scrutinized business operations within 1 year and to refrain from any such new business operations; undertaking humanitarian efforts in conjunction with an international organization, the government of Sudan, the regional government of southern Sudan, or a nonprofit entity evaluated and certified by an independent third party to be substantially in a relationship to the company's Sudan business operations and of benefit to one or more marginalized populations of Sudan; or, through engagement with the government of Sudan, materially improving conditions for the genocidally victimized population in Darfur."

¹⁶ Section 215.473(1)(v), F.S., defines "substantial action specific to Iran" to mean "adopting, publicizing, and implementing a formal plan to cease scrutinized business operations within 1 year and to refrain from any such new business operations."

¹⁷ The State Board of Administration is constituted by the governor, the chief financial officer, and the attorney general as provided for in s. 4(e), Art. IV of the State Constitution. Duties of the State Board of Administration include, but are not limited to, investment of specified public funds pursuant to s. 215.44, F.S.

¹⁸ Section 215.473(2)(b), F.S.

III. Effect of Proposed Changes:

The bill provides the following definitions for the created section of law:

- “Awarding body” for purposes of state contracts, an agency or department, and for purposes of local contracts, means the governing body of the local governmental entity.
- “Local governmental entity” means a county, municipality, special district, or other political subdivision of the state.

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 agency¹⁹ or local governmental entity for goods or services of \$1 million or more.

The bill allows an agency or local governmental entity to make a case-by-case exception to the prohibition if:

- The scrutinized business operations²⁰ 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;
- 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; *and*
- *One* of the following occurs:
 - 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.
 - 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 exemption, the office would be unable to obtain the goods or services for which the contract is offered.

An agency or local governmental 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, at the time a bid or proposal is submitted or before a contract is executed or renewed, that the company is not a scrutinized business operation under s. 215.473.

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

¹⁹ As defined in s. 287.012(1), F.S.

²⁰ S. 215.473(1)(s), F.S., defines “scrutinized business operations” to mean “business operations that have resulted in a company becoming a scrutinized company.”

- 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. The awarding body *may* report the company to the municipal attorney, county attorney, or district attorney and provide information demonstrating the false certification. Such attorney 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 shall 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 \$250,000 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 shall 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 the act preempts 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.

The Department of Management Services must submit a written notice describing the act to the Attorney General of the United States within 30 days after July 1, 2011.

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 act.

The bill provides an effective date of July 1, 2011.

Other Potential Implications:

The provisions of ch. 287, F.S., currently apply only to agencies as defined in the chapter, which specifies only units of the executive branch of state government. The requirements of this bill apply to both state agencies and to local governmental entities not governed by ch. 287, F.S., but the bill places the new section of law within ch. 287, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will adversely affect 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 Florida governmental entities.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

The bill provides that 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 may not engage in specified contracting activities. Lines 74-80, however, require a company seeking to enter into specified contracts to certify that it is not a scrutinized business operation. Lines 85-87 imply that the company must demonstrate that it has ceased its engagement in scrutinized business operations. The Legislature may wish to consider amending the bill to require a company to certify and, if necessary, demonstrate that it is not on the Scrutinized Companies with Activities in Sudan List or on the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List.

Lines 81-85 imply a requirement that an agency or local governmental agency that determines a company has submitted a false certification must provide the company with written notice and 90 days to respond in writing. The Legislature may wish to consider amending the bill to explicitly state that process.

Lines 107-108 do not specify whether “an existing contract with the company” means only a contract for which false certification was submitted or any contract which the company may have with the agency or local governmental entity.

Lines 109-110 do not specify whether the 3 years during which a company is ineligible to bid on a contract means 3 years from the agency or local government’s determination or 3 years from a court’s determination.

The Legislature may wish to change “made” in line 114 to “submitted” for consistency and clarity.

VII. Related Issues:

The bill creates definitions for “awarding body” and “local governmental entity,” and provides that other terms used in the act are defined in s. 287.012, F.S., and in 215.473, F.S. The term “awarding body” may be superfluous because all the entities it encompasses are included in the definition of “local governmental entity” within the bill and in the definition of “agency” in s. 287.012, F.S.

To prevent any potential impairment of contracts concerns, the Legislature may wish to consider requiring agencies and local governmental entities to include a termination provision in contracts for goods and services of \$1 million or more if a determination of false certification is made.

VIII. Additional Information:

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

None.

B. Amendments:

Barcode 781182 by Governmental Oversight and Accountability on February 8, 2011:

Line 105: Corrects a technical error by providing that the civil penalty for a false certification is equal to the greater of \$2 million or twice the amount of the contract.

Barcode 439830 by Governmental Oversight and Accountability on February 8, 2011:

Line 114: Changes “made” to “submitted” for clarity and consistency of terminology.