

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: SB 1460

INTRODUCER: Senator Simmons

SUBJECT: Preference in Award of State Contracts

DATE: January 25, 2012

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------|----------------|-----------|--------------------|
| 1. | Anderson | Yeatman | CA | Pre-meeting |
| 2. | | | ED | |
| 3. | | | GO | |
| 4. | | | BC | |
| 5. | | | | |
| 6. | | | | |

I. Summary:

The bill expands the reciprocal preference provided in current law to include the purchase of construction services. It also provides that for a competitive solicitation in which payment is to be made, in whole or in part, from funds appropriated by the state, Florida's reciprocal preference preempts and supersedes any local ordinance or regulation based upon specified criteria. Finally, the bill provides that, other than the requirements imposed for solicitations involving state funds, a county, municipality, school district, or other political subdivision of the state is not prevented from awarding a contract to any vendor in accordance with applicable state laws or local ordinances or regulations.

This bill substantially amends s. 287.084 of the Florida Statutes.

II. Present Situation:

Chapter 287, F.S., regulates state agency¹ procurement of personal property and services. The Department of Management Services is responsible for overseeing state purchasing activity, including professional and construction services, as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology.² The Division of

¹ As defined in s. 287.012(1), 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.

² See ss. 287.032 and 287.042, F.S.

State Purchasing in the department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.³

Agencies may use a variety of procurement methods, depending on the cost and characteristics of the needed good or service, the complexity of the procurement, and the number of available vendors. These include the following:

- "Single source contracts," which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- "Invitations to bid," which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- "Requests for proposal," which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- "Invitations to negotiate," which are used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services, by an agency dealing with a limited number of vendors.⁴

Current law requires that contracts for commodities or contractual services in excess of \$35,000⁵ must be procured utilizing a competitive solicitation process.^{6,7}

Local governmental units are not subject to the provisions of Chapter 287, F.S. Local governmental units may look to Chapter 287, F.S., for guidance in the procurement of goods and services, but many have local policies or ordinances to address competitive solicitations.

Florida law authorizes state agencies, counties, municipalities, school districts, and other political subdivisions to use a preference in the award of contracts for the purchase of personal property, through competitive solicitation, when the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is another state, or political subdivision of that state.⁸ The reciprocal preference is discretionary and may be used by a procuring entity to award a preference to the lowest responsible and responsive vendor having a principal place of business in this state.⁹ The preference available is limited to the preference provided for by an out-of-state bidder's home state.¹⁰ Florida state and local agencies can only apply a preference against a bidder from another state if, and to the extent that, the other state imposes a preference on Florida bidders.¹¹

³ Chapter 287, F.S., provides requirements for the procurement of personal property and services. Part I of that chapter pertains to commodities, insurance, and contractual services, and part II pertains to motor vehicles.

⁴ See ss. 287.012(6) and 287.057, F.S.

⁵ Section 287.012, F.S.

⁶ Section 287.057(1), F.S.

⁷ As defined in s. 287.012(6), F.S., "competitive solicitation" means the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement.

⁸ Section 287.084(1), F.S.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

If a solicitation to purchase personal property provides for the granting of a preference, any vendor whose principal place of business is not in Florida must submit with the bid, proposal, or reply documents with a written opinion of an attorney, licensed in the vendor's state, explaining the preferences that state provides to vendors, within the vendor's state, for public contracts.¹²

Florida's preference law does not apply to transportation projects for which federal aid funds are available.¹³

III. Effect of Proposed Changes:

Section 1 amends s. 287.084, F.S., relating to preference to Florida business. The bill expands the reciprocal preference in current law to include the purchase of construction services.

The bill requires the procuring entity to disclose in its solicitation documents if state funds are being used in the payment, and the amount of the funds or the percentage of the funds compared to the anticipated total cost of the personal property or construction services. For a competitive solicitation in which payment is to be made, in whole or in part, from funds appropriated by the state, the bill provides that Florida's reciprocal preference preempts and supersedes any local ordinance or regulation that grants a preference to a vendor based upon the following specified criteria:

- The vendor maintaining an office or place of business within a particular jurisdiction;
- The vendor hiring employees or subcontractors from within a specific jurisdiction; or
- The vendor's prior payment of local taxes, assessments, or duties within a particular local jurisdiction.

Finally, the bill provides that, other than the requirements imposed for solicitations involving state funds, a county, municipality, school district, or other political subdivision of the state is not prevented from awarding a contract to any vendor in accordance with applicable state laws or local ordinances or regulations.

Section 2 provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

¹² Section 287.084(2), F.S.

¹³ See s. 287.084(1), F.S. The Common Grant Rule issued by the U.S. Department of Transportation, 49 C.F.R. 18.36(c)(2), prohibits the use of state or local geographical preferences in the evaluation of bids or proposals for projects involving federal funds.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The establishment of local preference laws could implicate the Equal Protection Clause and the Commerce Clause of the United States 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.”¹⁴ The in-state preference provisions in this bill could constitute an equal protection violation. If such legislation is challenged, the court would use a rational basis test to determine the constitutionality of the alleged discriminatory treatment.¹⁵ 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.¹⁶

The Commerce Clause

The United States Constitution provides that Congress shall have the power “to regulate commerce . . . among the states.”¹⁷ The Commerce Clause acts not only as a positive grant of power to Congress, but also as a negative constraint upon the states.¹⁸

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.”¹⁹
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.”²⁰

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.²¹ 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.²² Since the state is acting as a “market participant”

¹⁴ U.S. CONST. amend. XIV, § 1. *See also* FLA. CONST. art. I, s. 2.

¹⁵ *Nordlinger v. Hahn*, 505 U.S. 1, 33-34 (1992) (stating that a “classification *rationaly* furthers a state interest when there is some fit between the disparate treatment and the legislative purpose.”).

¹⁶ *Id.*

¹⁷ U.S. CONST. art. I, s. 8, cl. 3.

¹⁸ *See Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹⁹ *National Collegiate Athletic Ass’n v. Associated Press*, 18 So. 3d 1201, 1211 (Fla. 1st DCA 2009) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-579).

²⁰ *Id.* (citations omitted); *See Bainbridge v. Turner*, 311 F.3d 1104, 1108-1109.

²¹ *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).

²² *Id.*

under this bill, 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:

The bill could result in more business being awarded to Florida based companies as a result of the new preference for construction services.

C. Government Sector Impact:

There is no known fiscal impact on local governments; however, there may be an operational impact as the statute would preempt local ordinances or regulations in certain circumstances. Department of Revenue estimated an increase in cost of \$125,000.²³

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²³ Substantive Analysis of SB 574, Department of Revenue, February 21, 2011 (on file with the Community Affairs Committee). SB 1460 is identical to SB 574 which was filed during the 2011 Legislative Session.