

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 153 Preference to Florida Businesses in Procurement of Personal Property and Services

SPONSOR(S): Hooper and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 538

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	15 Y, 0 N	Meadows	Williamson
2) Appropriations Committee			
3) State Affairs Committee			

SUMMARY ANALYSIS

Current law requires state agencies to give a preference to vendors located within Florida when awarding contracts to have materials printed, if such printing can be done at a cost no greater than the cost of awarding a contract to a vendor located outside of the state and if it can be done at a level of quality comparable to that which can be obtained from an out of state vendor.

The bill expands the application of the in-state vendor printing preference to each county, municipality, school district, or other political subdivision of this state. The preference is set at 5 percent if the lowest bid is submitted by a vendor whose principal place of business is located outside of Florida and if the printing can be performed in Florida at a level of quality comparable to that obtainable from the vendor submitting the lowest bid located outside the state. The bill no longer requires that the printing be performed by the in-state vendor at an expense no greater than what the out of state vendor would charge.

Current 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 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. The preference is limited to the preference provided by an out-of-state bidder's home state. Florida state and local agencies can only apply a preference against a vendor from another state if, and to the extent that, the vendor's home state imposes a preference on Florida bidders.

The bill requires state agencies, counties, municipalities, school districts, and other political subdivisions to utilize the in-state vendor preference for the procurement of personal property. The ability to apply the in-state vendor preference is no longer discretionary. It provides that agencies, counties, municipalities, school districts, and other political subdivisions must give a vendor who's principle place of business is in Florida and who offered the lowest bid, a preference to the same extent as an out of state vendor would receive in his or her home state. 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 bill requires that a 5 percent preference be given to the lowest responsible and responsive vendor having a principal place of business in Florida.

The bill appears to have an unknown fiscal impact on state and local governments.

The bill provides an effective date of July 1, 2012.

This bill may be a county or municipality mandate. See Section III.A.1 of the analysis.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Public Printing Vendor Preference

Chapter 283, F.S., regulates the procurement of public printing. Current law provides that every agency¹ must give a preference to vendors located within the state when awarding contracts to have materials printed, whenever such printing can be provided at a cost no greater than the cost of awarding a contract to a vendor located outside of the state.² In addition, the level of quality must be comparable to that obtainable from the vendor located outside of the state.³

Procurement of Personal Property and Services

Chapter 287, F.S., regulates state agency⁴ procurement of personal property and services. The Department of Management Services is responsible for overseeing state purchasing activity including professional and contractual services as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology.⁵ The Division of 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.

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 proposals," 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 high complexity, customized, mission-critical services, by an agency dealing with a limited number of vendors.⁶

Current law requires contracts for commodities or contractual services in excess of \$35,000 to be procured utilizing a competitive solicitation process.^{7,8}

¹ Section 283.30(1), F.S., defines the term "agency" 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.

² Section 283.35, F.S.

³ *Id.*

⁴ 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.

⁵ See ss. 287.032 and 287.042, F.S.

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

⁷ Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold contained in s. 287.017, F.S., to be competitively bid.

⁸ 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.

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 In-state Preference

Florida law authorizes state agencies, counties⁹, 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.¹⁰ 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.¹¹ The preference available is limited to the preference provided for by an out-of-state bidder's home state.¹² Florida state and local agencies can only apply a preference against a vendor from another state if, and to the extent that, the vendor's home state imposes a preference on Florida bidders.¹³

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 a written opinion of an attorney, licensed in the vendor's state, explaining the preferences that the vendor's state provides to vendors for public contracts.¹⁴

Florida's preference law does not apply to transportation projects for which federal aid funds are available.¹⁵

Florida Home Rule

In 1973, the Florida Legislature enacted the Municipal Home Rules Power Act (act), now codified in Chapter 166, F.S.¹⁶ The act guarantees that local governments retain governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services.¹⁷ The act further dictated that local governments should be allowed to enact legislation unless clearly directed otherwise by the state.¹⁸

Effect of Proposed Changes

The bill provides that the act may be cited as the "Buy Florida Act."

⁹ Thirty three of the 67 Florida counties currently have a local procurement preference. (Testimony from Representative Brodeur on HB 673, Government Operations Subcommittee meeting, January 18, 2012.)

¹⁰ Section 287.084(1), F.S.

¹¹ *Id.*

¹² *Id.*

¹³ Currently, 38 states have reciprocal procurement preferences. See Oregon State Procurement Office, *Reciprocal Preference Information*, available online at <https://www.oregon.gov/DAS/SSD/SPO/reciprocal.shtml> (last visited on January 18, 2012).

¹⁴ Section 287.084(2), F.S.

¹⁵ See s. 287.084(1), F.S. The Common Grant Rule issued by the U.S. Department of Transportation, 49 C.F.R.s. 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.

¹⁶ See Chapter 166, F.S.

¹⁷ Section 166.021(4), F.S.

¹⁸ Section 166.021(3), F.S., provides:

(3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:

(a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;

(b) Any subject expressly prohibited by the constitution;

(c) Any subject expressly preempted to state or county government by the constitution or by general law; and

(d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution.

Public Printing Vendor Preference

The bill expands the application of the in-state vendor printing preference to each county, municipality, school district, or other political subdivision of this state. Each agency, county, municipality, school district, or other political subdivision must apply the in-state vendor printing preference when soliciting printing contracts. The preference is set at 5 percent if the lowest bid is submitted by a vendor whose principal place of business is located outside of Florida and if the printing can be performed in Florida at a level of quality comparable to that obtainable from the vendor submitting the lowest bid located outside the state. The bill no longer requires that the printing be performed by the in-state vendor at an expense no greater than what the out of state vendor would charge.

Vendor Preference for Procurement of Personal Property

The bill requires state agencies, counties, municipalities, school districts, and other political subdivisions to utilize the in-state vendor preference for the procurement of personal property. The ability to apply the in-state vendor preference is no longer discretionary. It provides that agencies, counties, municipalities, school districts, and other political subdivisions must give a vendor who's principle place of business is in Florida and who offered the lowest bid, a preference to the same extent as an out of state vendor would receive in his or her home state. This bill does not hinder a local government's authority to provide local procurement preferences by ordinance or regulation.

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 bill requires that a 5 percent preference be given to the lowest responsible and responsive vendor having a principal place of business in Florida.

The bill requires out of state vendors to submit with the bid, proposal, or reply documents a written opinion of an attorney, licensed in the vendor's state, explaining the preferences that the vendor's state provides to vendors for public contracts.

B. SECTION DIRECTORY:

Section 1 provides a short title.

Section 2 amends s. 283.35, F.S., to require agencies, counties, municipalities, school districts, or other political subdivisions of the state to grant a specified preference to a vendor located within the state when awarding a contract for printing.

Section 3 amends s. 287.084, F.S., to require agencies, counties, municipalities, school districts, or other political subdivisions of the state in procuring personal property to award a preference to the lowest responsible and responsive vendor who has a principle place of business within this state.

Section 4 provides an effective date of July 1, 2012

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Unknown. See Fiscal Comments.

2. Expenditures:

Unknown. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:
Unknown. See Fiscal Comments.

2. Expenditures:
Unknown. See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill could result in more business being awarded to in-state vendors as a product of the state preference being given to them. The bill could also result in less business being awarded to in-state vendors in the panhandle and northern Florida counties for out of state projects in the border states, as they would be assessed a reciprocal procurement preference from Georgia, Alabama, Mississippi, and Louisiana.¹⁹

D. FISCAL COMMENTS:

The fiscal impact on both the state and local governments is unknown. State and local governments may see an increase in revenues due to more in-state vendors being awarded printing and personal property contracts through competitive solicitations and, in turn, spending the monies in Florida. However, the bill may also have a negative effect as the state and local governments may experience increased expenditures with the possibility of higher contract prices as a result of the preference.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision of Art. VII, s. 18, of the Florida Constitution may apply because this bill requires counties and municipalities to grant a 5 percent in-state preference, in the award of contracts for printing or personal property, to vendors whose principle place of business is in Florida; however, an exemption may apply if the bill results in an insignificant fiscal impact to county or municipal governments. The exceptions to the mandates provision of Art. VII, s. 18, of the Florida Constitution appear to be inapplicable because the bill does not articulate a threshold finding of serving an important state interest.

2. Other:

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.”²⁰ 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.²¹ 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.²²

¹⁹ See Oregon State Procurement Office, *Reciprocal Preference Information*, available online at <https://www.oregon.gov/DAS/SSD/SPO/reciprocal.shtml> (last visited on January 18, 2012).

²⁰ U.S. CONST. amend. XIV, § 1. See also FLA. CONST. art. I, s. 2.

²¹ *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.”).

²² *Id.*

The Commerce Clause

The United States Constitution provides that Congress shall have the power “to regulate commerce . . . among the states.”²³ The Commerce Clause acts not only as a positive grant of power to Congress, but also as a negative constraint upon the states.²⁴

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.”²⁵
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.”²⁶

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.²⁷ 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.²⁸

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or additional rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Department of Revenue

According to the Department of Revenue (DOR), there could be an impact on DOR’s budget, depending on the bid situation, the price a vendor bids, and the percent preference a state has, Florida could potentially pay more for products or services from an in-state vendor. An example from the last fiscal year was provided:

- DOR spent approximately \$2.5 million in printing and personal property categories last year and a 5 percent preference could possibly equate to an estimated increased cost to DOR of \$125,000.²⁹

Other Comments: Department of Management Services

The Department of Management Services also provided, in part, the following statements regarding recommended changes:

- Agencies will be required to include preference language in all solicitations and apply such preferences. In determining how to apply the preference from another state, procurement managers will be required to review and comprehend the legal opinion of an attorney applying laws from another state. This could lead to errors if the preferences are not fully understood or applied correctly. Other states may not have the same terminology, which further increases the likelihood of mistakes. Additionally, there is no determination as to the accuracy of the attorney’s opinion.³⁰
- It is not completely clear how to award the 5% preference. The bill states that agencies shall “grant a preference to the lowest responsible and responsive vendor having a

²³ U.S. CONST. art. I, s. 8, cl. 3.

²⁴ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

²⁵ *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).

²⁶ *Id.* (citations omitted); See *Bainbridge v. Turner*, 311 F.3d 1104, 1108-1109.

²⁷ 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).

²⁸ *Id.*

²⁹ Analysis of HB 153, Department of Revenue, November 17, 2011, at 2 (on file with the Government Operations Subcommittee).

³⁰ Analysis of HB 1161, Department of Management Services, April 8, 2010, at 3 (The language of HB 1161(2010) and HB 153 (2012) are substantially similar) (on file with the Government Operations Subcommittee).

principal place of business within this state.” It is not clear what is meant by “lowest”. If this means lowest priced, it would be easy to determine the preference in an Invitation to Bid (ITB). However, it may be difficult to determine how to apply to the “lowest” in-state vendor when using a Request for Proposals (RFP) or Invitation to Negotiate (ITN) where price is a consideration, but not always the primary driving factor.³¹

- The bill provides that a 5% [in-state printing] preference is to be granted to an out-of-state vendor if the work can be performed in-state at a level of quality comparable to an out-of-state vendor performing the work outside of Florida. It is uncertain how to determine, and may be very difficult for agencies to determine, if work can be performed “at a level of quality comparable” to an out-of-state vendor.³²
- There may be conflict with federal regulations if the procurement involves the use of any federal grant money. There are federal regulations that prohibit the use of in-state preferences when procuring services with federal money. One example is 10 CFR s. 600.236, which prohibits in-state preferences relating to procurements using federal money through the United States Department of Energy.³³

Other Comments: Department of Transportation

The Department of Transportation (FDOT) provided, in part, the following comments regarding the proposed changes:

- Section 283.35, Florida Statutes, does not provide an exception to transportation projects where federal funds are available. The exception for federally funded projects is only in section 287.084, Florida Statutes.³⁴
 - It is FDOT’s opinion that Section 283.35, Florida Statutes, cannot be reasonably read to apply to a contract for a transportation project that has some incidental printing included in the contract. FDOT believes it only applies to contracts “to have materials printed.”³⁵
 - If the intent is for the preference on printing contracts to extend to contracts that included incidental printing, it would be appropriate to include the same exception for federally funded transportation projects.³⁶

Other Comments: Principle Place of Business

Current law does not provide for a definition of “principle place of business.” There are two competing tests to determine where a company’s principle place of business is located.

The first is the “substantial predominance” test, which analyzes the following criteria: the location of its employees, where sales took place, its production activities, its tangible property, its sources of income, the value of land owned and leased, and the replacement cost of assets located in a certain state.³⁷

The second test is the “nerve center test.” Under this test, a company’s principle place of business refers to the place where the corporation’s high level officers direct, control, and coordinate the corporation’s activities.³⁸

³¹ Analysis of HB 153, Department of Management Services, October 5, 2011, at 3 (on file with the Government Operations Subcommittee).

³² *Id.*

³³ Substantive Analysis of HB 1161 (2010), Department of Management Services, April 8, 2010, at 2 (The language of HB 1161(2010) and HB 153 (2012) are substantially similar) (on file with the Government Operations Subcommittee). See generally Congressional Research Service, *Location-Based Preferences in Federal and Federally Funded Contracting: An Overview of the Law*, October 1, 2010, available at: assets.opencrs.com/rpts/R41115_20101001.pdf (on file with the Government Operations Subcommittee).

³⁴ Substantive Analysis of HB 153, Department of Transportation, January 4, 2012, at 3 (on file with the Government Operations Subcommittee).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Ghaderi v. United Airlines, Inc.*, 136 F.Supp.2d 1041, 1044-46 (N.D. Cal. 2001). See also, *Diaz v. Target Corp.*, No. 09-3477, 2009 U.S. Dist. LEXIS 62000 (C.D. Cal. July 2, 2009); *Castaneda v. Costco Wholesale Corp.*, No. 08-7599, 2009 U.S. Dist. LEXIS 3595 (C.D. Cal. Jan. 9, 2009).

³⁸ *Hertz Corp. v. Friend et al.*, 130 S.Ct. 1181 (2010).

The Department of Management Services has previously utilized the “nerve center” test to determine a company’s principle place of business. In a 2010 memorandum to purchasing directors, the department indicated it intended to use the nerve center test when applying the Florida based business preference found in section 49 of Chapter 2010-151, Laws of Florida, to both state term contracts and other department issued solicitations.³⁹

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

³⁹ Memorandum to Purchasing Directors, Department of Management Services, September 2, 2010 at 3 (on file with the Government Operations Subcommittee).