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 538

INTRODUCER: Senator Bogdanoff and others

SUBJECT: Preference to Florida Businesses in Procurement of Personal Property and Services

DATE: December 5, 2011 REVISED:

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

I. Summary:

The bill 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 preference, and specifies the preference.

The bill alters the preference for in-state vendors by requiring, rather than authorizing, the preference for in-state vendors. The bill provides the preference shall be 5 percent for public printing contracts and in the procurement of personal property and services.

This bill substantially amends the following sections of the Florida Statutes: ss. 283.35 and 287.084.

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[1] procurement of personal property and services. In providing preference to Florida businesses, s. 287.084, F.S., states:

(1) When an agency, 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 a short title: 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 this state. The preference shall be five percent if the lowest bid is submitted by a vendor whose principal place of business is located outside the state if the printing can be performed in this state at a level of quality comparable to that obtainable from the vendor submitting the lowest bid located outside the state.

Section 3 amends s. 287.084, F.S., by requiring preferences be given to in-state vendors and adding an additional provision to the existing preference. The preference for in-state vendors will

[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.

be mandatory, rather than authorized. The bill provides the preference shall be 5 percent for public printing contracts and in the procurement of personal property and services.

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 must be 5 percent.

Section 4 provides an effective date of July 1, 2012.

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."[2] The in-state preference provisions in this bill may 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.[3] 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.[4]

The Commerce Clause
The United States Constitution provides that Congress shall have the power "to regulate commerce . . . among the states."[5] The Commerce Clause acts not only as a positive grant of power to Congress, but also as a negative constraint upon the states. [6]

[2] U.S. CONST. amend. XIV, § 1. *See also* FLA. CONST. art. I, s. 2.
[3] *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.").
[4] *Id.*
[5] U.S. CONST. art. I, s. 8, cl. 3.
[6] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

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."[7]
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."[8]

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. [9] 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.[10] Since the state is acting as a "market participant" 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:

This bill could result in more business being awarded to in-state vendors as a product of the preference being given to them.

C. Government Sector Impact:

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

The bill provides that the preference for in-state vendors shall be 5 percent for public printing contracts and in the procurement of personal property and services.

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

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[7] *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).
[8] *Id.* (citations omitted); *See Bainbridge v. Turner*, 311 F.3d 1104, 1108-1109.
[9] 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).
[10] *Id.*

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.