

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 673 Preference in Award of State Contracts

**SPONSOR(S):** Brodeur and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1460

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	8 Y, 3 N, As CS	Meadows	Williamson
2) Community & Military Affairs Subcommittee			
3) Government Operations Appropriations Subcommittee			
4) State Affairs Committee			

### SUMMARY ANALYSIS

Current law authorizes state agencies, counties, municipalities, school districts, and other political subdivisions to award a preference to a Florida based business 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. The reciprocal preference law 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 Florida. The preference available is limited to the preference provided for by an out-of-state bidder's home state. 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.

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.

The bill does not appear to have a fiscal impact on state or local governments.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Present Situation

##### Procurement of Construction Services

Chapter 255, F.S., regulates construction services<sup>1</sup> for public property and publically owned buildings. The Department of Management Services is responsible for establishing, through administrative rules, the following:

- Procedures for determining the qualifications and responsibility of potential bidders prior to advertisement for and receipt of bids for building construction contracts;
- Procedures for awarding each state agency construction project to the lowest qualified bidder;
- Procedures to govern negotiations for construction contracts and modifications to contract documents when such negotiations are determined by the secretary of the Department of Management Services to be in the best interest of the state; and
- Procedures for entering into performance-based contracts for the development of public facilities when the Department of Management Services determines the use of such contracts to be in the best interest of the state.<sup>2</sup>

The Florida Building Code<sup>3</sup> and the Florida Fire Prevention Code<sup>4</sup>, govern the design, construction, erection, alteration, modification, repair, and demolition of all public and private buildings. The codes must be enforced by local jurisdictions or local enforcement districts unless specifically exempted.<sup>5</sup>

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.<sup>6</sup> In addition, such projects must be advertised in the Florida Administrative Weekly at least 21 days prior to the bid opening.<sup>7,8</sup> Counties, municipalities, special districts<sup>9</sup>, or other political subdivisions seeking to construct or improve a public building must competitively bid the project if the projected cost is in excess of \$300,000.<sup>10</sup>

##### *Florida Preference to State Residents*

Florida law provides a preference that requires contracts for construction projects funded by money appropriated with state funds to contain a provision requiring the contractor to give preference to the employment of state residents in the performance of the work if state residents have substantially equal

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<sup>1</sup> As defined in s. 255.072(2), F.S., “construction services” means all labor, services, and materials provided in connection with the construction, alteration, repair, demolition, reconstruction, or any other improvements to real property. The term “construction services” does not include contracts or work performed for the Department of Transportation.

<sup>2</sup> Section 255.29, F.S.

<sup>3</sup> See s. 553.73, F.S.

<sup>4</sup> See s. 633.0215, F.S.

<sup>5</sup> See s. 255.31(1), F.S.

<sup>6</sup> See 60D-5.0073, F.A.C.; see also s. 255.0525, F.S.

<sup>7</sup> Section 255.0525(1), F.S.

<sup>8</sup> State construction projects that are projected to exceed \$500,000 are required to be published 30 days prior to bid opening in the Florida Administrative Weekly, and at least once in a newspaper of general circulation in the county where the project is located. See s. 255.0525, F.S.(1).

<sup>9</sup> As defined in s. 189.403(1), F.S., “special district” means a local unit of special purpose, as opposed to general-purpose, government within a limited boundary, created by general law, special act, local ordinance, or by rule of the Governor and Cabinet. The special purpose or purposes of special districts are implemented by specialized functions and related prescribed powers. For the purpose of s. 196.199(1), F.S., special districts must be treated as municipalities. The term does not include a school district, a community college district, a special improvement district created pursuant to s. 285.17, F.S., a municipal service taxing or benefit unit as specified in s. 125.01, F.S., or a board which provides electrical service and which is a political subdivision of a municipality or is part of a municipality.

<sup>10</sup> See s. 255.20(1), F.S.

qualifications<sup>11</sup> to those of non-residents.<sup>12</sup> If a construction contract is funded by local funds, the contract is not required to contain such provision.<sup>13</sup>

### Procurement of Personal Property and Services

Chapter 287, F.S., regulates state agency<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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 high complexity, customized, mission-critical services, by an agency dealing with a limited number of vendors.<sup>17</sup>

Current law requires contracts for commodities or contractual services in excess of \$35,000 to be procured utilizing a competitive solicitation process.<sup>18,19</sup>

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, counties<sup>20</sup>, 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

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<sup>11</sup> Section 255.099(1)(a), F.S., defines "substantially equal qualifications" as, the qualifications of two or more persons among whom the employer cannot make a reasonable determination that the qualifications held by one person are better suited for the position than the qualifications held by the other person or persons.

<sup>12</sup> Section 255.099(1), F.S.

<sup>13</sup> *Id.*

<sup>14</sup> 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.

<sup>15</sup> See ss. 287.032 and 287.042, F.S.

<sup>16</sup> 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.

<sup>17</sup> See ss. 287.012(6) and 287.057, F.S.

<sup>18</sup> Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold provided in s. 287.017, F.S., to be competitively bid.

<sup>19</sup> 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.

<sup>20</sup> Thirty three of the 67 Florida counties currently have a local procurement preference. (Testimony from Representative Brodeur, Government Operations Subcommittee meeting, January 18, 2012.)

by a vendor whose principal place of business is another state, or political subdivision of that state.<sup>21</sup> 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.<sup>22</sup> The preference available is limited to the preference provided for by an out-of-state bidder's home state.<sup>23</sup> 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.<sup>24</sup>

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 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.<sup>25</sup>

Florida's preference law does not apply to transportation projects for which federal aid funds are available.<sup>26</sup>

### **Effect of Proposed Changes**

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.

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.

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

#### **B. SECTION DIRECTORY:**

Section 1 creates s. 255.0991, F.S., relating to preference to Florida business.

Section 2 amends s. 287.084, F.S., relating to preference to Florida business.

Section 3 provides an effective date of July 1, 2012.

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<sup>21</sup> Section 287.084(1), F.S.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Currently, 38 states offer reciprocal procurement preferences. It is unknown whether the preferences are for commodities, construction, or both. 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).

<sup>25</sup> Section 287.084(2), F.S.

<sup>26</sup> 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.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

### D. FISCAL COMMENTS:

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.<sup>27</sup>

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared in the aggregate with counties or municipalities.

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.”<sup>28</sup> 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.<sup>29</sup> Under

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<sup>27</sup> Substantive Analysis of HB 427, Department of Management Services, February 24, 2011 (on file with the Government Operations Subcommittee). HB 673 is identical to HB 427 which was filed during the 2011 Legislative Session.

<sup>28</sup> U.S. CONST. amend. XIV, § 1. See also FLA. CONST. art. I, s. 2.

<sup>29</sup> *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.”)

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.<sup>30</sup>

### The Commerce Clause

The United States Constitution provides that Congress shall have the power “to regulate commerce . . . among the states.”<sup>31</sup> The Commerce Clause acts not only as a positive grant of power to Congress, but also as a negative constraint upon the states.<sup>32</sup>

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.”<sup>33</sup>
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.”<sup>34</sup>

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.<sup>35</sup> 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.<sup>36</sup>

### B. RULE-MAKING AUTHORITY:

The bill does not appear to require additional rulemaking authority; however, the Department of Management Services may need to adopt rules for purposes of implementing the changes to the reciprocal preference found in the bill.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

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.<sup>37</sup>

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.<sup>38</sup>

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

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<sup>30</sup> *Id.*

<sup>31</sup> U.S. CONST. art. I, s. 8, cl. 3.

<sup>32</sup> See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>33</sup> *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).

<sup>34</sup> *Id.* (citations omitted); See *Bainbridge v. Turner*, 311 F.3d 1104, 1108-1109.

<sup>35</sup> 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).

<sup>36</sup> *Id.*

<sup>37</sup> *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).

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

preference found in section 49 of Chapter 2010-151, Laws of Florida, to both state term contracts and other department issued solicitations.<sup>39</sup>

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 18, 2012, the Government Operations Subcommittee adopted a strike-all amendment and passed HB 673 as a committee substitute. The amendment moves the construction services in-state preference from Chapter 287, F.S., which relates to personal property and services, to Chapter 255, F.S., which regulates construction services.

The strike-all amendment also corrects a drafting error in the title of the bill.

The analysis is drafted to the committee substitute as passed by the Government Operations Subcommittee.

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