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 Commerce and Tourism Committee

BILL:	SB 678
INTRODUCER:	Senator Smith
SUBJECT:	State Contracts
DATE:	January 12, 2012
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Jenkins	Roberts	GO	**Favorable**
2.	Juliachs	Hrdlicka	CM	**Favorable**
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill adds the requirement that all state contracts exceeding $35,000 include a provision requiring any call-center services to be staffed by persons located within the United States.

This bill amends s. 287.058. F.S.

II. Present Situation:

Procurement laws govern the manner in which a government receives goods and services. In Florida, ch. 287, F.S., broadly, governs the public procurement of personal property and services. Of particular interest, s. 287.058, F.S., outlines the minimum requirements that must be present in public procurement contracts that exceed the amount of $35,000.[1]

Similarly, the federal government has its own body of law that regulates procurement activities. One of the most well known pieces of legislation regulating federal procurement is The Buy American Act (act), which restricts the federal government from purchasing nondomestic end products,[2] unless an enumerated exception provided in the statute is applicable.[3, 4]

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[1] Section, 287.017, F.S., sets forth purchasing categories by the threshold amount. Procurement contracts that exceed $35,000 are designated as a category two.

[2] "According to the Federal Acquisition Regulation (FAR), a domestic end product means an unmanufactured end product mined or produced in the United States, or an end product manufactured in the U.S. if the cost of its components that are mined, produced, or manufactured in the U.S. exceeds 50 percent of the cost of all its components." United States Government Accountability Office, *Federal Procurement: International Agreements Result in Waivers of Some U.S Restrictions* (January 2005), available at http://www.gao.gov/assets/250/245118.pdf (last visited January 13, 2012).

[3] 41 U.S.C. s. 10(a) (2006).

Notably, the expansion of international trade between the United States and foreign governments has also led to the proliferation of agreements that contain mutually beneficial government procurement obligations. In the spirit of promoting trade relations, governments have agreed to require that each party's goods and service be given the same treatment as domestic goods and services, irrespective of their foreign status.[5] As such, under these agreements, a government is prohibited from arbitrarily giving preferential treatment to domestic goods at the expense of foreign goods originating from a country where there is an enforceable and standing trade agreement espousing mutually beneficial government procurement obligations.

Historically, international trade agreements have been treated as congressional-executive agreements (CEA), which require the majority of both houses in Congress to be implemented,[6] as opposed to two-thirds vote of the Senate.[7] One explanation for the use of CEAs in the context of international trade agreements stems from the view that participation by the House of Representatives is appropriate in light of its constitutional role in revenue raising.[8] Moreover, congressional authorization has also been deemed necessary as trade agreements have become much more elaborate by regulating a broader spectrum of subjects ranging from subsidies, government procurement, and product standards.[9] As such, to avoid challenges that Congress was broadly delegating legislative authority to the executive branch to enter into such agreements, Congress enacted the Trade Act of 1974 and Trade Act of 2002, which provides the President with guidelines and authorization to engage in such trade negotiations.[10]

The most well-known examples of CEAs are the World Trade Organization Government Procurement Agreement (GPA), the North American Free Trade Agreement (NAFTA), and numerous other bilateral free trade agreements (FTA).[11]

World Trade Organization Government Procurement Agreement (GPA)

The agreement that established the World Trade Organization (WTO)[12] came as a result of the Uruguay Rounds of Multilateral Trade Negotiations, which also produced a series of other

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[4] *See supra*, note 2 (Exceptions include the following: "where the cost of the domestic end product would be unreasonable; where domestic end products are not reasonably available in sufficient commercial quantities of a satisfactory quality; where the agency head determines that a domestic preference would be inconsistent with the public interest; where the purchases are for use outside of the United States; where the purchases are less than the micro purchase threshold; and where the purchases are for commissary resale.").

[5] *Id.*

[6] The Congressional Research Service, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather than Treaties* (July 28, 2004), available at http://assets.opencrs.com/rpts/97-896_20040728.pdf (last visited January 13, 2012).

[7] *See* U.S. Const. art. 2, s. 2.

[8] Restatement Third of Foreign Relations Law s. 303, note 9 (1987).

[9] The Congressional Research Service, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather than Treaties* (July 28, 2004), available at http://assets.opencrs.com/rpts/97-896_20040728.pdf (last visited January 13, 2012).

[10] *Id.*

[11] A list of the federal government's current procurement obligations under international agreements is available at http://www.ustr.gov/trade-topics/government-procurement.

[12] In a letter dated November 7, 1991, Governor Lawton Chiles authorized coverage of Florida under the GATT/WTO Government Procurement Agreement. (See email correspondence with Jean Grier, Senior Procurement Negotiator in the

international agreements, including the GPA.[13] As enumerated in the preamble, the GPA's objective is the expansion of world trade through three primary measures:

- Prohibition on discrimination based on national origin;
- Establishment of clear, transparent laws, regulations, procedures, and practices regarding governmental procurement; and
- Application of competitive procedural requirements related to notification, tendering (bidding), contract award, tender (bid) protest, etc.[14]

With respect to discrimination on the basis of national origin, Article III of the agreement expressly forbids the application of less favorable treatment to the products, services and suppliers of other foreign parties than that which would be accorded to domestic products, services, and suppliers or the products, services, and suppliers of another party to the GPA.[15] Moreover, the agreement further provides that all parties will ensure that the laws, regulations, procedures, and practice regulating government procurement in their home state will be executed in a nondiscriminatory manner.[16]

Accordingly, procurement provisions stipulated in the Buy American Act will yield to nondiscriminatory provisions espoused in international trade agreements. The interplay between the act and international trade agreements is described below:

> [T]he Trade Agreements Act of 1979 authorizes the President to waive any otherwise applicable "law, regulation or procedure regarding Government procurement" that would accord foreign products less favorable treatment than that given to domestic products. Article 1004 of The North American Free Trade Agreement (between the United States, Mexico, and Canada) disallows domestic protection legislation, such as the Buy-American Act, in government procurement. Other treaties and agreements also place limitations on the application of the act and must be considered when looking at any Buy American question.[17, 18]

Office of the United States Trade Representative, on file with the Senate Committee on Governmental Oversight and Accountability).

[13] Signatory countries: Armenia, Canada, Austria Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, Slovenia, Bulgaria, Romania, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, and Chinese Taipei.

[14] 1994 Uruguay Round Agreement on Government Procurement, April 15, 1994, WTO Agreement, Annex 4(b) (hereinafter "GPA"), *and see* GPA Appendix I (United States), Annex 2 (discusses sub-central government entities, such as Florida), both available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited January 16, 2012).

[15] *Id.*

[16] *Id.*

[17] Congressional Research Service, *The Buy American Act: Requiring Government Procurements to Come from Domestic Sources*, (March 13, 2009), available at http://assets.opencrs.com/rpts/97-765_20080829.pdf (last visited January 13, 2012).

[18] *See* 19 U.S.C. ss. 2511(a), 2531, 2532, and 2533 (2011); *see also* Exec. Order No. 12260, 48 C.F.R. 25.402, *reprinted as* 19 U.S.C. 2512(b)(2), available at http://www.presidency.ucsb.edu/ws/index.php?pid=44462#axzz1jXJhYUyX (last visited January 16, 2012).

As such, Florida's executive branch is covered under the GPA[19] for purchases that exceed $552,000 for commodities and services and $7,777,000 for construction services.[20] Florida was 1 of 37 states to agree to procure in accordance with the GPA.[21]

Free Trade Agreements

In addition to the GPA, the United States has also entered into several bilateral free trade agreements[22] and two multilateral free trade agreement,[23] with the most highly recognized being NAFTA. As with the GPA, all these agreements contain provisions that call for fair and non-discriminatory treatment of products, goods, and services by all state parties. When necessary, the United States has issued waivers to protect parties from discriminatory purchasing requirements found under existing law that would be contrary to the covenants embodied in such international agreements.[24]

III. Effect of Proposed Changes:

Section 1 amends s. 287.058, F.S., to require that state agency contracts in excess of $35,000 must include a provision specifying that all call center services provided by the contractor and all subcontractors must be staffed by persons located within the United States.

Section 2 provides that the bill takes effect July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None

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[19] *See* Annex 2 (Sub-Central Government Entities), *supra*, note 14.
[20] 76 F.R. 76808-01, Dec. 8, 2011.
[21] In a letter dated November 7, 1991, Governor Lawton Chiles authorized coverage of Florida under the GATT/WTO Government Procurement Agreement. (See email correspondence with Jean Grier, Senior Procurement Negotiator in the Office of the United States Trade Representative, on file with the Senate Committee on Governmental Oversight and Accountability).
[22] The United States has entered bilateral free trade agreements with the following countries: Australia, Bahrain, Canada, Chile, Israel, Morocco, Oman, Peru, and Singapore. This information is available at http://www.ustr.gov/trade-topics/government-procurement/ftas-government-procurement-obligations (last visited January 14, 2012).
[23] NAFTA (member countries: United States, Mexico, and Canada) and DR-CAFTA (El Salvador, Dominican Republic, Guatemala, Honduras, Nicaragua, and Costa Rica). This information is available at http://www.ustr.gov/trade-topics/government-procurement/ftas-government-procurement-obligations (last visited January 14, 2012).
[24] *See supra*, note 18.

D. Other Constitutional Issues:

The Foreign Commerce Clause and Market Participant Exception

That Commerce Clause found in Article I, Section 8, Clause 3 provides that Congress shall have the power "to regulate commerce with foreign Nations, and among the several States."[25] The Commerce Clause acts not only as a positive grant of power to Congress, but also as a negative constraint upon the states. [26] As such, states may not enact laws which improperly intrude upon the federal government's exclusive power to set foreign affairs policy for the nation as a whole.[27]

For this reason, courts review state action affecting foreign commerce with heightened scrutiny.[28] The U.S. Supreme Court has explained the applicable standard as follows: "It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny. It is crucial to the efficient execution of the Nation's foreign policy that the federal government … speak with one voice when regulating commercial relations with foreign governments."[29] Accordingly, requiring domestic call-center services for state contracts may potentially implicate the Commerce Clause of the U.S. Constitution.

Equally, it should also be noted that because the state is acting as a "market participant" under this bill, the market participant exception to the Commerce Clause limitations on state action may be applicable. 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 Interstate Commerce Clause.[30] 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.[31]

However, as it relates to the Foreign Commerce Clause, the law is unsettled regarding the applicability of the market participant exception. In *Trojan Techs., Inc. v. Pennsylvania*, the federal Third Circuit Court of Appeals upheld the validity of a Pennsylvania procurement statute that required suppliers contracting with a public agency for public works projects to provide products made of American steel. [32] There, the court found that the market participant exception did extend to the Foreign Commerce Clause.[33] Conversely, the federal First Circuit Court of Appeals, in *National Foreign Trade Council v. Natsios*, refused to extend the market participant exception to the Interstate Commerce Clause.[34]

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[25] U.S. CONST. Art. I, s. 8.
[26] *See Gibbons v. Ogden*, 22 U.S. 1 (1824).
[27] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 450 (1970); *see also,* Shannon Klinger and Lynn Sykes, *Exporting the Law: A Legal Analysis of State and Federal Outsourcing Legislation*, National Foundation for American Policy, April 2004.
[28] *Id.* at 446. ("When construing Congress' power to 'regulate commerce with foreign Nations,' a more extensive constitutional inquiry is required.").
[29] *South-Central Timber Develop., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (citing *Michelin Tire Corp. v. Wages*, 723 U.S. 276, 285 (1979)).
[30] *See White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983) (providing that a state may grant and enforce a preference to local residents when entering into construction projects for public projects).
[31] *Id.*
[32] *Trojan Techs., Inc. v. Pennsylvania*, 916 F. 2d 903, 912 (3d Cir. 1990), *cert denied*, 501 U.S. 1212 (1991).
[33] *Id.* at 910.
[34] *National Foreign Trade Council v. Natsios,* 181 F.3d 38, 60 (1st Cir. 1999), *cert granted* , 528 U.S. 1018 (1999).

To date, neither the federal Eleventh Circuit Court of Appeals nor the U.S. Supreme Court has spoken on the matter.

Federal Preemption

In addition to the Foreign Commerce Clause, SB 678 may also implicate federal preemption. When dealing with subject matter relating to foreign affairs, the U.S. Supreme Court (Supreme Court) has stated the following: "Our system of government is such that the interest of the people of the whole nation imperatively requires that federal power in the field of affecting foreign relations be left entirely free from local interference."[35] As such, a series of cases by the Supreme Court have struck down state laws directed at foreign conduct that have been interpreted by the Court as conflicting with federal policy and intent.

In *Zschernig v. Miller,* the Supreme Court struck down an Oregon probate law that restricted the right of an alien not residing within the United States or its territories to take either real or personal property by succession or testamentary disposition was dependent upon the existence of a reciprocal right in that alien's home country.[36] While the law did not explicitly direct its application to any particular county, the Supreme Court, nevertheless, held that the statute did constitute an "intrusion by the state into the field of foreign affairs which the Constitution entrusts to the President and Congress" and was therefore unconstitutional.[37]

Similarly, in *American Insurance Association v. Garamendi*, the Supreme Court concluded that a California law that required insurance companies doing business in California and who had sold policies in Europe to Holocaust victims during World War II to disclose information concerning those policies was preempted under federal law.[38] During the time that California enacted that law, the federal government was engaging in international discussions with Germany and other international stakeholders with the aim of establishing a comprehensive framework for identifying and resolving such outstanding insurance claims.[39] As such, the state law was held unconstitutional for impermissibly conflicting with the federal government's foreign relation power.[40]

Additionally, the Supreme Court in *Garamendi* also addressed the weight to be given to executive agreements when it held that "valid executive agreements are fit to preempt state law, just as treaties are."[41] To this end, the Court relied on its previous holding in *Zschernig* when it stated that "state action with more than an incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict."[42]

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[35] *Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 418 (2003) (citing *Hines v. Davidowitz,* 312 U.S. 52, 63 (1941)).
[36] *Zschernig v. Miller*, 389 U.S. 429, 441 (1968).
[37] *Id.* at 433 (finding that Department of Justice's acquiescence to the Oregon statute did not justify upholding the statute seeing the potential for great diplomatic disruption).
[38] *Garamendi*¸539 U.S. at 420.
[39] *Id.* at 406-408.
[40] *Id.* at 420.
[41] *Id.* at 416.
[42] *Id. at* 418 ("Our system of government is such that the interest of cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.").

Lastly, with respect to state government procurement activity, the Supreme Court, in *Crosby v. National Foreign Trade Council,* concluded that a Massachusetts' law prohibiting its agencies from purchasing goods and services from companies that did business with Burma, with some limited exceptions, was unconstitutional.[43] Similar to *Garamendi,* the federal government had acted and was reassessing its current foreign relations status with Burma in light of reports of human rights violations by the government. As such, Congress passed a statute that imposed a set of mandatory and conditional sanctions on Burma, as well as authorized the President to impose such sanctions subject to the limitation that they would only limit United States persons from conducting *new* business in Burma.[44]

The existence of both the state and federal law created a direct conflict, seeing that Massachusetts' ban restricted all contracts between the state and companies doing business in Burma, making the state law more overreaching than the prohibitions imposed by the President through congressional authorization. Accordingly, the Supreme Court concluded the following:

> [T]he state act undermines the President's capacity, in this instance, for effective diplomacy. It is not merely that the differences between the state and federal acts in scope and type of sanctions threaten to complicate discussions; they comprise the very capacity of the President to speak for the Nation with one voice in dealing with other governments. We need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics. When such exceptions do quality his capacity to present a coherent position on behalf of the national economy, he is weakened, of course, not only in dealing with the Burmese regime, but in working together with other nations in hopes of reaching common policy and "comprehensive" strategy.[45]

Accordingly, because SB 678 implicates foreign relations by requiring that state agency contracts in excess of $35,000 must include a provision specifying that all call center services provided by the contractor and all subcontractors must be staffed by persons located within the United States it may be subject to a federal preemption challenge for the reasons described above. While the statute does not appear to target any specific country, as was the case in *Crosby,* it does implicate foreign relations in a manner similar to that described in *Garamendi* and *Zschernig,* seeing that the SB 678's requirement may conflict with existing government procurement obligations as enumerated in the international agreements entered into by the United States with other nations, which this state is subject to comply with.

[43] *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 388 (2000).
[44] *Id.* at 378-382; *See also, Id.* at 375 ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").
[45] *Id.* at 381-382.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

SB 678 could limit the number of private companies qualified to enter into procurement contracts with the state.

C. Government Sector Impact:

SB 678 could have fiscal implications if the cost of domestic labor is higher than the cost of labor in foreign markets.

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.