

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 Governmental Oversight and Accountability Committee

BILL: SB 0678

INTRODUCER: Senator Smith

SUBJECT: State Contracts

DATE: January 3, 2012

REVISED: 01/09/12

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

I. Summary:

This bill adds a 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 section 287.058 of the Florida Statutes.

II. Present Situation:

Chapter 287, Florida Statutes, governs public procurement of personal property and services. Section 287.058, Florida Statutes, contains the minimum requisite provisions that must be present in public procurement contracts that exceed \$35,000.¹

World Trade Organization Government Procurement Agreement

The State of Florida was one of 37 states to agree to procure in accordance with the Government Procurement Agreement (Agreement), concluded under the auspices of the World Trade Organization (WTO).² The Agreement's objective is expansion of world trade through three primary measures:

¹ § 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 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).

- 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.³

The types of purchases covered by this agreement are State of Florida executive branch agency purchases which exceed \$552,000 for commodities and services, and \$777,000 for construction.⁴

III. Effect of Proposed Changes:

The bill amends section 287.058, Florida Statutes, 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.

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.

D. Other Constitutional Issues:

Requiring domestic call-center services for state contracts may potentially implicate the Commerce Clause of the U.S. Constitution.

The Foreign Commerce Clause

The United States Constitution provides that Congress shall have the power “to regulate commerce with foreign Nations, and among the several States.”⁵ The Commerce Clause

³ 1994 Uruguay Round Agreement on Government Procurement, April 15, 1994, WTO Agreement, Annex 4(b) (hereinafter “GPA”), available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf, and see GPA Appendix I (United States), Annex 2 (Sub-Central Government Entities).

⁴ 76 F.R. 76809, Dec. 8, 2011. Federal Executive Order 12260 requires the United States Trade Representative to set the U.S. dollar thresholds for application of Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511 *et seq.*), which implements U.S. trade agreement obligation, including those under the World Trade Organization Agreement on Government Procurement. (WTO Committee on Government Procurement, Decisions on Procedural Matters Under the Agreement on Government Procurement, GPA/1 (Mar. 5, 1996), available at <http://docsonline.wto.org> (search for “Doc. No. 96-0792)).

acts not only as a positive grant of power to Congress, but also as a negative constraint upon the states.⁶ 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.⁷

Courts review state action affecting foreign commerce with heightened scrutiny.⁸ 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.'"⁹

Market Participant Exception

Because the state is acting as a "market participant" under this bill, the market participant exception to the Commerce Clause limitations on state action might be applicable.¹⁰ 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.¹¹ 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.¹² The law is unsettled regarding the applicability of the market participant exception to the Foreign Commerce Clause, however. The two Federal Courts of Appeals that have been faced with the issue reached contradictory conclusions,¹³ and neither the 11th Circuit nor the U.S. Supreme Court has spoken on the matter.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

⁵ U.S. CONST. Art. I, s. 8.

⁶ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

⁷ *Japan Line, Ltd. v. County of Las Angeles*, 441 U.S. 434 (1970), and see Shannon Klinger and Lynn Sykes, *Exporting the Law: A Legal Analysis of State and Federal Outsourcing Legislation*, National Foundation for American Policy, April 2004.

⁸ *Japan Line* at 446. ("When construing Congress' power to 'regulate commerce with foreign Nations,' a more extensive constitutional inquiry is required.")

⁹ *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).

¹⁰ *Id.*

¹¹ 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).

¹² *Id.*

¹³ *Trojan Techs. Inc. v. Pennsylvania*, 916 F. 2d 903 (3d Cir. 1990), (Law applied to all foreign steel but State was acting as market participant; statute did not violate Commerce Clause); *National Foreign Trade Counsel v. Nastios*, 181 F. 3d 38, 57 (1st Cir. 1999), (Law restricted ability of Mass. agencies to purchase goods or services from companies that do business with Burma. Court explicitly held that there is no market participant exception to the foreign affairs power; law violated the Commerce Clause).

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

This bill 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:

Florida's commitment under the World Trade Organization Government Procurement Agreement could potentially be implicated if the contracts affected by this bill exceed the applicable threshold set by the United States Trade Representative in accordance with Federal Executive Order 12260.¹⁴ This commitment appears to have arisen out of a unilateral act by the Governor,¹⁵ and therefore would not serve as a constraint upon the Legislature.¹⁶

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.

¹⁴ In 2012-2013 Florida GPA coverage includes executive branch agency purchases which exceed \$552,000 for commodities and services and \$777,000 for construction. (76 F.R. 76809, Dec. 8, 2011).

¹⁵ In a letter dated November 7, 1991, Governor Lawton Chiles authorized coverage of Florida under the GATT/WTO Government Procurement Agreement.

¹⁶ The Legislature maintains the exclusive power to establish the laws of this State. *Florida House of Representatives v. Crist*, 999 So. 2d 601, 614 (Fla. 2008), (Holding that the Governor has no authority to change or amend state law).