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 794
INTRODUCER:	Senator Hays
SUBJECT:	Public Contracting
DATE:	January 23, 2012
REVISED:	

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

I. Summary:

This bill defines "facility" and "governmental unit" as they relate to public contracting. The bill prohibits a governmental unit that contracts for the construction, repair, remodeling, or improving of a facility from imposing certain conditions regarding collective bargaining organizations. The bill also prohibits a governmental unit from granting awards as a condition of specified contracts. The bill prohibits certain terms from being placed in bid specifications, project agreements, or other controlling documents.

The bill extends the length of time for an entity to submit a notice to protest a bid specification from 72 hours to 7 days.

The bill creates an undesignated section of law, and substantially amends s. 120.57 of the Florida Statutes.

II. Present Situation:

State and Federal Constitutional Issues

Florida is a "right to work" state. Article I, section 6 of the Florida Constitution reads:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

Employees have a fundamental right to organize for the purposes of collective bargaining, but have no federal constitutional right to mandatory collective bargaining.[1] Under the Florida Constitution, however, courts have held that the right to collectively bargain is a fundamental right which may be abridged only for a compelling state interest, and therefore a statute under review must serve that compelling state interest in the least intrusive means possible.[2]

Certain restrictions may be placed on a union's ability to collect dues or fees. In Florida, nonunion employees cannot be forced to pay union fees and dues as a condition of employment.[3] In states where employees can be required to pay dues, the exaction of fees beyond those necessary to finance collective bargaining activities has been found to violate the unions' judicially created duty of fair representation and nonunion members' First Amendment rights.[4] The Supreme Court has held that a local government's restrictions on union wage deductions would be upheld against an equal protection challenge if it was reasonably related to a legitimate government purpose.[5] In a more recent case, the Supreme Court has upheld a state statute banning public-employee payroll deductions for political activities against a First Amendment challenge.[6] The Court held that the state was under no obligation to aid unions in their political activities, and the state's decision not to do so was not abridgement of unions' free speech rights, since unions remained free to engage in such speech as they saw fit, but without enlisting the state's support.[7]

Federal Labor Law

The Federal National Labor Relations Act (NLRA) of 1935[8] and the Federal Labor Management Relations Act of 1947[9] constitute a comprehensive scheme of regulations guaranteeing to employees the right to organize, to bargain collectively through chosen representatives, and to engage in concerted activities to secure their rights in industries involved in or affected by interstate commerce. Other federal labor-relations statutes include the Labor-Management Reporting and Disclosure Act[10] and the Railway Labor Act. A number of states have statutes requiring nongovernmental employers to pay prevailing wages to workers on public works projects.[11]

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[1] *See Sikes v. Boone*, 562 F. Supp. 74 (N.D. Fla. 1983) *aff'd* 723 F.2d 918 (11th Cir. 1983).
[2] *Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030 (Fla. 1999); *Dade County School Admins Assn, Local 77, AFSA, AFL-CIO v. School Bd*., 840 So. 2d 1103 (Fla. 1st DCA 2003).
[3] *Schermerhorn v. Local 1625 of Retail Clerks Intern. Ass'n, AFL-CIO*, 141 So. 2d 269 (Fla. 1962), *judgment aff'd on other grounds*, 375 U.S. 96 (1963); AFSCME Local 3032 v. Delaney, 458 So. 2d 372 (Fla. 1st DCA 1984).
[4] *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988).
[5] *Charlotte v. Local 660, Int'l Assoc. of Firefighters*, 426 U.S. 283 (1976).
[6] *Ysursa v. Pocatello Education Assoc*, 129 S. Ct. 1093 (2009).
[7] *Id.*
[8] 29 U.S.C. §§ 151 to 169 (encouraging the practice and procedure of collective bargaining and protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection).
[9] 29 U.S.C. §§ 141 to 187 (prescribing the rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce).
[10] 29 U.S.C. §§ 401 to 531.
[11] *See generally*, 7 A.L.R. 5th 444.

Project Labor Agreements

There appears to be no unified definition of project labor agreement (PLA). A case[12] sometimes cited for a definition specifies a project legal agreement as:

> an agreement between a construction project owner and a labor union that a contractor must sign in order to perform work on the project. The union is designated the collective bargaining representative for all employees on the project and agrees that no labor strikes or disputes will disrupt the project. The contractor must abide by certain union conditions, such as hiring through union hiring halls and complying with union wage rules.

New York law[13] defines a PLA as a "pre-hire collective bargaining agreement between a contractor and a bona fide building and construction trade labor organization establishing the labor organization as the collective bargaining representative for all persons who will perform work on a public work project, and which provides that only contractors and subcontractors who sign a pre-negotiated agreement with the labor organization can perform project work."

In 2009, President Obama signed Executive Order 13502 allowing federal executive agencies to require contractors on large-scale government construction projects to enter into PLAs as a condition of being awarded a contract.

Federal Wage Regulation

Both federal[14] and state laws provide protection to workers who are employed by private and governmental entities. These protections include workplace safety, anti-discrimination, anti-child labor, workers' compensation, and wage protection laws.[15] Examples of federal laws include:

- **The Davis-Bacon and Related Acts**[16] - Applies to federal or District of Columbia construction contracts or federally assisted contracts in excess of $2,000; requires all contractors and subcontractors performing work on covered contracts to pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits for corresponding classes of laborers and mechanics employed on similar projects in the area.
- The **McNamara-O'Hara Service Contract Act**[17] - Applies to federal or District of Columbia contracts in excess of $2,500; requires contractors and subcontractors performing work on these contracts to pay service employees in various classes no less than the monetary wage rates and to furnish fringe benefits found prevailing in the locality, or the

[12] *Associated Builders and Contractors, Inc. v. Southern Nevada Water Authority*, 115 Nev. 151, 979 P. 2d 224 (Nev., 1999).
[13] N.Y. LAB. LAW § 222: NY Code - Section 222.
[14] A list of examples of federal laws that protect employees is located at: United States Department of Labor, Employment Laws Assistance, http://www.dol.gov/compliance/laws/main.htm (last visited Jan. 18, 2012).
[15] *See* United States Department of Labor, A Summary of Major DOL Laws, http://www.dol.gov/opa/aboutdol/lawsprog.htm (last visited Jan. 18, 2012).
[16] Pub. L. No. 107-217, 120 Stat. 1213 (codified as amended at 40 U.S.C. §§ 3141-48; the Davis-Bacon Act has also been extended to approximately 60 other acts).
[17] Pub. L. No. 89-286, 79 Stat. 1034 (codified as amended at 41 U.S.C. §§ 351-58).

rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement.

- **The Migrant and Seasonal Agricultural Workers Protection Act**[18] - Covers migrant and seasonal agricultural workers who are not independent contractors; requires, among other things, disclosure of employment terms and timely payment of wages owed.
- **The Contract Work Hours and Safety Standards Act**[19] - Applies to federal service contracts and federal and federally assisted construction contracts over $100,000; requires contractors and subcontractors performing work on covered contracts to pay laborers and mechanics employed in the performance of the contracts one and one-half times their basic rate of pay for all hours worked over 40 in a workweek.
- **The Copeland "Anti-Kickback" Act**[20] - Applies to federally funded or assisted contracts for construction or repair of public buildings; prohibits contractors or subcontractors performing work on covered contracts from inducing an employee to give up any part of the compensation to which he or she is entitled under his or her employment contract.

The Fair Labor Standards Act (FLSA)[21] establishes a federal minimum wage and requires employers to pay time and half to its employees for overtime hours worked. The FLSA establishes standards for minimum wages,[22] overtime pay,[23] recordkeeping,[24] and child labor.[25] Over 130 million workers are covered under the act, as the FLSA applies to most classes of workers.[26] The Act entails two types of coverage:

- Enterprises engaged in interstate commerce, producing goods for interstate commerce, or handling, selling, or working on goods or materials that have been moved in or produced in interstate commerce and have an annual volume of sales or business of $500,000, as well as hospitals, schools, and public agencies;
- Individuals engaged in interstate commerce, the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production.[27]

The FLSA provides that:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.[28]

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[18] Pub. L. No. 97-470, 96 Stat. 2583 (codified as amended at 29 U.S.C. §§1801-72).
[19] Pub. L. No. 87-581, 76 Stat. 357 (codified as amended at 40 U.S.C. §§ 3701-08).
[20] 18 U.S.C. § 874.
[21] 29 U.S.C. Ch. 8.
[22] 29 U.S.C. § 206.
[23] 29 U.S.C. § 207.
[24] 29 U.S.C. § 211.
[25] 29 U.S.C. § 212.
[26] United States Department of Labor, Employment Law Guide – Minimum Wage and Overtime Pay, http://www.dol.gov/compliance/guide/minwage.htm (last visited Jan. 18, 2012).
[27] 29 U.S.C. § 203(r), (s); U.S. DEPT. OF LABOR, WH PUBLICATION 1282, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT 2-3 (2010); United States Department of Labor, *supra* note 26.
[28] 29 U.S.C. § 207(a)(1).

Thus, if a covered employee works more than forty hours in a week, then the employer must pay at least time and half for those hours over forty. A failure to pay is a violation of the FLSA.[29] The FLSA also establishes a federal minimum wage in the United States.[30] The federal minimum wage is the lowest hourly wage that can be paid in the United States. A state may set the rate higher than the federal minimum, but not lower.[31]

The FLSA also provides for enforcement in three separate ways:

- Civil actions or lawsuits by the federal government;[32]
- Criminal prosecutions by the United States Department of Justice;[33] or
- Private lawsuits by employees, or workers, which includes individual lawsuits and collective actions.[34]

The FLSA provides that an employer who violates section 206 (minimum wage) or section 207 (maximum hours) is liable to the employee in the amount of the unpaid wages and liquidated damages equal to the amount of the unpaid wages.[35] The employer who fails to pay according to law is also responsible for the employee's attorney's fees and costs.[36]

State Wage Regulation

Under the Florida Constitution, all working Floridians are entitled to be paid a minimum wage that is sufficient to provide a decent and healthy life for them and their families, that protects their employers from unfair low-wage competition, and that does not force them to rely on taxpayer-funded public services in order to avoid economic hardship.[37] Article X, s. 24(c) of the Florida Constitution provides that, "Employers shall pay Employees Wages no less than the minimum wage for all hours worked in Florida." The current state minimum wage is $7.67 per hour, which is the federal rate, as of January 1, 2012.[38] Federal law requires the payment of the higher of the federal or state minimum wage.[39]

Local Bids and Contracts for Public Construction Works

Section 255.20, F.S., describes the process for bids and contracts for public construction works undertaken by counties, municipalities, special districts and other political subdivisions of the state to award contracts for construction projects. Typically, any construction project with a cost in excess of $300,000, and any electrical project costing more than $75,000, must be

[29] There are several classes of exempt employees from the overtime requirement of the FLSA. For examples of exempt employees see http://www.dol.gov/compliance/guide/minwage.htm (last visited Jan. 18, 2012).
[30] 29 U.S.C. § 206.
[31] 29 U.S.C. § 218(a).
[32] 29 U.S.C. § 216(c).
[33] 29 U.S.C. § 216(a).
[34] 29 U.S.C. § 216(b).
[35] 29 U.S.C. § 216(b).
[36] 29 U.S.C. § 216(b).
[37] *See* FLA. CONST. art. X, s. 24 (adopted in 2004); s. 448.110, F.S.
[38] *See* Agency for Workforce Innovation Website for information regarding the current minimum wage in the State of Florida. http://www.floridajobs.org/minimumwage/index.htm (Last visited Jan. 18, 2012).
[39] 29 U.S.C. § 218(a).

competitively awarded. However, s. 255.20, F.S., lists 11 types of projects where a competitive award is not required, such as emergency repair of facilities damaged by hurricanes, riots, or other "sudden unexpected turn of events."

Preference to State Residents

Section 255.099, F.S., requires that all contracts for construction funded by the state contain a provision requiring the contractor to give preference to the employment of Florida residents in the performance of the work on the project if the residents have substantially equal qualifications to those of non-residents. Local construction contracts funded with local funds have the option to require such provisions. Contractors required to hire Floridians must contact the Agency for Workforce Innovation to post the jobs on the state's job bank system (www.employflorida.com). However, for work involving federal aid funds, the contract provision may not be enforceable to the extent it conflicts with federal law.

Administrative Protests of Contract Solicitations or Awards

Section 120.57(3), F.S., specifies the procedures to be followed in administrative protests of agency bid actions.[40] If an entity wishes to protest the specifications contained in a bid solicitation, or if an entity wishes to protest a bid decision by an agency, the entity must provide notice to the agency within 72 hours after the posting of the solicitation or decision.[41] The entity then has 10 days after the date of the notice of protest to file a formal written protest.[42]

III. Effect of Proposed Changes:

Section 1 creates an undesignated section of law which defines the term "facility" and "governmental unit" for the purpose of public contracting. This section prohibits a governmental unit from entering into or expending funds under a contract for the construction, repair, remodeling, or demolition of a facility if the contract or a subcontract under the contract contains a term that:

> (a) Requires, prohibits, encourages, or discourages bidders, contractors, or subcontractors from entering into or adhering to agreements with a collective bargaining organization relating to the construction project or other related construction projects.
> (b) Discriminates against bidders, contractors, or subcontractors based on the status as a party or nonparty to, or the willingness or refusal to enter into, an agreement with a collective bargaining organization relating to the construction project or other related construction projects.

A governmental unit may not award a grant, tax abatement, or tax credit that is conditioned upon a requirement that the awardee include a term described in the above paragraphs (a) or (b) in a contract document for any construction, improvement, maintenance, or renovation to real property or fixtures that are the subject of the grant, tax abatement, or tax credit.

[40] Rule 28-110.001, F.A.C., lists those provisions governed by these bid protest regulations: Chapters 24, 255, 287, 334 through 349, and Sections 282.303 through 282.313, F.S.
[41] Section 120.57(3)(b), F.S.; Rule 28-110.003, F.A.C.
[42] Section 120.57(3)(b), F.S.; Rule 28-110.004, F.A.C.

The bill prohibits the terms included in the above paragraphs (a) and (b) from being placed in bid specifications, project agreements, or other controlling documents relating to the construction, repair, remodeling, or demolition of a facility. Any such included term is void and of no effect.

This section does not:

- Apply to construction contracts executed before the effective date of this act.
- Prohibit employers or other parties from entering into agreements or engaging in any other activity protected by the National Labor Relations Act, 29 U.S.C. ss. 151-169.
- Interfere with labor relations of parties that are protected under the National Labor Relations Act, 29 U.S.C. ss. 151-169.

Section 2 amends s. 120.57(3)(b), F.S., to increase the period for the notice of protest for bid specifications from 72 hours to 7 days. The bill also provides that Saturdays, Sundays, and state holidays are excluded from the computation of all time periods in the paragraph, not just 72 hour time periods.

The effect of these provisions together means that agencies may not know a competitive solicitation is being protested for up to ten days, and formal written protests could potentially be filed 14 days after the initial notice, instead of 10. Extending these deadlines may make it easier for affected vendors to assert their claims; it will also increase the uncertainty and time required to complete an agency competitive solicitation process.

Section 3 provides that the bill shall take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The changes to s. 120.57(3), F.S., would necessitate the Administration Commission to adopt rules.

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.