

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 307 Preference in Award of Governmental Contracts

SPONSOR(S): Government Operations Subcommittee; Tobia

TIED BILLS: **IDEN./SIM. BILLS:** SB 684

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	11 Y, 2 N, As CS	Harrington	Williamson
2) Local & Federal Affairs Committee			
3) Government Operations Appropriations Subcommittee			
4) State Affairs Committee			

SUMMARY ANALYSIS

Current law requires each state agency, university, college, school district, or other political subdivision of this state to award a preference to Florida based businesses 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, or political subdivision of that state. If the out-of-state bidder's home state offers an in-state preference, then the preference given to Florida based vendors is limited to the preference provided by the out-of-state bidder's home state. 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 the out of state bidder's home state does not grant a preference in competitive solicitation to vendors having a principal place of business in that state, a 5 percent preference is given to the lowest responsible and responsive vendor having a principal place of business in Florida.

The bill expands the preference provided in current law to include counties and municipalities, as well as construction services. It 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 preference preempts and supersedes any local ordinance or regulation based upon specified criteria. The bill also provides that other than the requirements imposed for solicitations involving state funds, a university, college, county, municipality, school district, or other political subdivision of the state is not prevented from awarding a contract to any vendor in accordance with the applicable state laws or local ordinances or regulations.

The bill may have an indeterminate fiscal impact on state and local governments. See Fiscal Comments section for further discussion.

This bill may be a county or municipal mandate. See Section III.A.1. of the analysis.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency¹ procurement of personal property and services. The Department of Management Services (department) is responsible for overseeing state purchasing activity, including professional and construction services, as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology.² The department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.³

Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods, which include:⁴

- 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 highly complex, customized, mission-critical services.

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.⁵ Section 287.012(6), F.S., provides that 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."

Local governmental units are not subject to the provisions of chapter 287, F.S.

Florida In-state Preference

State agencies, universities, colleges, school districts, and other political subdivisions are required to grant a preference in the award for contracts for the purchase of personal property, when competitive solicitation is required and when the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is in another state, or political subdivision of that state.⁶ The preference is mandatory and is utilized by the procuring entity to award a preference to the lowest responsible and responsive vendor having a principal place of business in this state. The preference awarded is the same preference provided by the out-of-state bidder's home state.

¹ Section 287.012(1), F.S., defines agency as "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."

² See ss. 287.032 and 287.042, F.S.

³ *Id.*

⁴ See ss. 287.012(6) and 287.057, F.S.

⁵ Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold contained in s. 287.017, F.S., to be competitively bid.

⁶ Section 287.084(1)(a), F.S.

If the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is another state, or political subdivision of that state, and that state does not award a preference for in-state vendors, state agencies, universities, colleges, school districts, and other political subdivisions must award a 5 percent preference to Florida based vendors.⁷

A vendor whose principal place of business is outside of this state must submit with the bid, proposal, or reply documents a written opinion of an attorney at law licensed to practice law in that foreign state as to the preferences, if any, granted by the law of that state to a business entity whose principal place of business is in that foreign state.⁸

Florida's preference law does not apply to transportation projects for which federal aid funds are available,⁹ or to counties or cities.¹⁰ It also does not apply in the award of contracts for the purchase of construction services.

Procurement of Construction Services

Chapter 255, F.S., specifies the procedures to be followed in the procurement of construction services for public property and publicly owned buildings. The department is responsible for establishing by rule the following:¹¹

- 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 contract modifications when such negotiations are determined to be in the best interest of the state; and
- Procedures for entering into performance-based contracts for the development of public facilities those contracts are determined to be in the best interest of the state.

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.¹² Counties, municipalities, special districts, 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 \$300,000.¹³

Section 255.0525, F.S., requires the solicitation of competitive bids or proposals for any state construction project that is projected to cost more than \$200,000 to be publicly advertised in the Florida Administrative Weekly¹⁴ at least 21 days prior to the established bid opening. If the construction project is projected to exceed \$500,000, the advertisement must be published at least 30 days prior to the bid opening in the Florida Administrative Weekly, and at least once 30 days prior to the bid opening in a newspaper of general circulation in the county where the project is located.¹⁵

Florida Preference to State Residents

Florida law provides a preference for the employment of state residents in construction contracts funded by money appropriated with state funds. Such contracts must 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 qualifications¹⁶ to those of non-residents.¹⁷ If a construction

⁷ *Id.*

⁸ Section 287.084(2), F.S.

⁹ Section 287.084(1)(b), F.S.

¹⁰ Section 287.084(1)(c), F.S.

¹¹ Section 255.29, F.S.

¹² See chapters 60D-5.002 and 60D-5.0073, F.A.C.; see also s. 255.0525, F.S.

¹³ See s. 255.20(1), F.S. For electrical work, local governments must competitively bid projects estimated to cost more than \$75,000.

¹⁴ The Florida Administrative Weekly was renamed the Florida Administrative Register during the 2012 Session. Chapter 2012-63, L.O.F.

¹⁵ For counties, municipalities, and political subdivisions, similar publishing provisions apply. Section 255.0525(2), F.S.

¹⁶ 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."

¹⁷ Section 255.099(1), F.S.

contract is funded by local funds, the contract may contain such a provision.¹⁸ In addition, the contractor required to employ state residents must contact the Department of Economic Opportunity to post the contractor's employment needs in the state's job bank system.¹⁹

Effect of the Bill

Preferences for Construction Services

The bill creates s. 255.0991, F.S., which provides comparable preference provisions for construction services to those in chapter 287, F.S. Currently, the preference is required only when personal property is required to be purchased through competitive solicitation by an agency, university, college, school district, or other political subdivision of the state.

The bill requires agencies, universities, colleges, school districts, or other political subdivisions of the state to grant a preference to in-state vendors when construction services are required to be purchased through competitive solicitation.²⁰ The preference is mandatory and is utilized by the procuring entity to award a preference to the lowest responsible and responsive vendor having a principal place of business in this state. The preference awarded is the same preference provided by the out-of-state bidder's home state. If the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is another state, or political subdivision of that state, and that state does not award a preference for in-state vendors, state agencies, universities, colleges, school districts, and other political subdivisions must award a 5 percent preference to Florida based vendors.

When payment for the purchase of construction services is to be made in whole or in part from state appropriated funds, the bill provides a preemption of any local ordinance or regulation that restricts a contractor certified under s. 489.105(8), F.S.,²¹ from competing for an award based upon:

- The vendor maintaining an office or place of business within a particular local jurisdiction;
- The vendor hiring employees or subcontractors from within a particular local jurisdiction; or
- The vendor's prior payment of local taxes, assessments, or duties within a particular local jurisdiction.

When payment for the purchase of construction services is to be made in whole or in part from state appropriated funds, a university, college, county, municipality, school district, or other political subdivision must disclose in the solicitation document the funding source as well as the amount of such funds or the percentage of such funds as compared to the anticipated total cost of the purchase.

The bill provides that except for when state appropriated funds are used for the purchase of construction services, a university, college, county, municipality, school district, or other political subdivision is not prevented from awarding a contract to any vendor in accordance with applicable state laws or local ordinances or regulations.

A vendor whose principal place of business is outside of this state must submit with the bid, proposal, or reply documents a written opinion of an attorney at law licensed to practice law in that foreign state as to the preferences, if any, granted by the law of that state to a business entity whose principal place of business is in that foreign state.²²

Preference for Commodities and Services

The bill expands the preference provided for in chapter 287, F.S., to include counties and municipalities. When payment for the purchase of personal property is to be made in whole or in part from state appropriated funds, the bill provides a preemption of any local ordinance or regulation that grants preference to vendors based upon:

¹⁸ *Id.*

¹⁹ Section 255.099(1)(b), F.S.

²⁰ The preference granted to in-state construction vendors is identical to the preference granted in chapter 287, F.S., when the lowest bidder's principal place of business is another state. *See* s. 287.084(1), F.S.

²¹ Section 489.105(8), F.S., defines certified contractor as a contractor who possesses a certificate of competency issued by the Department of Business and Professional Regulation, and who is authorized to contract statewide.

²² This requirement is identical to the provision found in s. 287.084(2), F.S.

- The vendor maintaining an office or place of business within a particular local jurisdiction;
- The vendor hiring employees or subcontractors from within a particular local jurisdiction; or
- The vendor's prior payment of local taxes, assessments, or duties within a particular local jurisdiction.

When payment for the purchase of personal property is to be made in whole or in part from state appropriated funds, a university, college, county, municipality, school district, or other political subdivision must disclose in the solicitation document the funding source as well as the amount of such funds or the percentage of such funds as compared to the anticipated total cost of the purchase.

The bill provides that except for when state appropriated funds are used for the purchase of personal property, a university, college, county, municipality, school district, or other political subdivision is not prevented from awarding a contract to any vendor in accordance with applicable state laws or local ordinances or regulations.

Effective Date

The bill provides an effective date of July 1, 2013.

B. SECTION DIRECTORY:

Section 1. creates s. 255.0991, F.S., authorizing an agency, university, college, school district, or other political subdivision of the state to provide preferential consideration to a Florida business in awarding competitively bid contracts to purchase construction services; providing that for specified competitive solicitations the authority to grant preference supersedes any local ordinance or regulation which grants preference to specified vendors; requiring an agency, university, college, school district, or other political subdivision to make specified disclosures in competitive solicitation documents; requiring legal written opinions to accompany specified bids, proposals, and reply documents.

Section 2. amends s. 287.084, F.S., expanding provisions that require an agency, university, college, school district, or other political subdivision of the state to provide preferential consideration to a Florida business in awarding competitively bid contracts to purchase personal property to require counties and municipalities to provide such preferential consideration; providing that for specified competitive solicitations the authority to grant a preference supersedes any local ordinance or regulation which grants preference to specified vendors; requiring a university, college, county, municipality, school district, or other political subdivision to make specified disclosures in competitive solicitation documents.

Section 3. provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

The bill may have an unknown negative fiscal impact on both the state and local governments. The bill may have a negative effect as the state and local governments may experience increased expenditures with the possibility of higher contract prices for construction services as a result of the preference. The bill may also have an operational impact as the statute would preempt local ordinances or regulations in certain circumstances.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The mandates provision of Art. VII, s. 18 of the State Constitution may apply because this bill requires cities and counties to spend money or take an action that requires the expenditure of money; however, an exemption may apply if the bill results in an insignificant fiscal impact to county or municipal governments. The exceptions to the mandates provision of Art. VII, s. 18 of the State Constitution appear to be inapplicable because the bill does not articulate a threshold finding of serving an important state interest.

2. Other:

Equal Protection Clause

The United States Constitution provides that “[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws.”²³ The expansion of 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.²⁴

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.²⁵

²³ U.S. Const. amend. XIV, s. 1; *see also* FLA. Const. art. I, s. 2.

²⁴ *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.”)

²⁵ *Id.*

Commerce Clause

The U.S. Constitution provides that Congress shall have the power to “regulate commerce...among the states.”²⁶ The Commerce Clause acts not only as a positive grant of powers to Congress, but also as a negative constraint upon the states.²⁷ 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.²⁸ 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.²⁹ 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.

B. RULE-MAKING AUTHORITY:

The bill does not provide rulemaking authority for the Department of Management Services; however, the department may need to adopt rules for purposes of implementing the bill. The department does not appear to have a general grant of rulemaking authority in chapter 287, F.S., which may be needed if the department determines that rulemaking is necessary.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Principal Place of Business

Current law does not provide for a definition of “principal place of business.” There are two competing tests to determine where a company’s principal 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.³⁰

The second test is the “nerve center test.” Under this test, a company’s principal places of business refers to the place where the corporation’s high level officers direct, control, and coordinate the corporation’s activities.³¹ The Department of Management Services has previously utilized the “nerve center” test to determine the company’s principal place of business.³²

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 6, 2013, the Government Operations Subcommittee adopted a strike-all amendment and reported HB 307 favorable with committee substitute. The committee substitute:

- Amends the relating to clause to reflect that this bill relates to preferences in the award of governmental contracts, not solely state contracts;
- Moves the Florida business preference provision that pertains to the purchase of construction services to chapter 255, F.S., which is the chapter that regulates the purchase of construction services; and
- Makes other technical and clarifying changes.

²⁶ U.S. Const. art. I, s. 8, cl. 3.

²⁷ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

²⁸ *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).

²⁹ *Id.*

³⁰ *Ghaderi v. United Airlines, Inc.*, 136 F.Supp.2d 1041, 1044-46 (N.D. Cal 2001).

³¹ *Hertz Corp v. Friend et al.*, 130 S.Ct. 1181 (2010).

³² In a 2010 memorandum to purchasing directors, the department indicated it intended to use the nerve center test when applying the Florida based business preference found in s. 49 of ch. 2010-151, L.O.F., to both state term contracts and other department issued solicitations. Memorandum to Purchasing Directors, Department of Management Services, September 2, 2010 at 3 (on file with the Government Operations Subcommittee).