

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 527 Public Works Projects

**SPONSOR(S):** Local Government Affairs Subcommittee; Van Zant and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 934

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	10 Y, 2 N	Harrington	Williamson
2) Local Government Affairs Subcommittee	8 Y, 4 N, As CS	Darden	Miller
3) Appropriations Committee			
4) State Affairs Committee			

### SUMMARY ANALYSIS

Contracts for construction services over a specified, projected threshold cost must be competitively awarded. Specifically, state contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid. 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. The solicitation of competitive bids or proposals must be publicly advertised in the Florida Administrative Register. In addition, working Floridians are guaranteed a minimum wage and the right to collectively bargain. However, such workers cannot be required to participate in a labor union or labor organization.

The bill creates an unnumbered section of law relating to public works projects. The bill defines the terms "political subdivision," "project labor agreement," and "public works." It prohibits the state or a political subdivision, except when required by state or federal law, from requiring that a contractor, subcontractor, or material supplier or carrier engaged in the public works:

- Pay employees a predetermined amount of wages or wage rate;
- Provide employees a specified type, amount, or rate of employee benefits;
- Control or limit staffing;
- Recruit, train, or hire employees from a designated or single source;
- Designate any particular assignment of work for employees, unless such training is a condition of a product warranty or guarantee;
- Participate in proprietary training programs; or
- Enter into any type of project labor agreement.

The bill prohibits the state or a political subdivision that contracts for the construction, maintenance, repair, or improvement of public works from requiring a contractor, subcontractor, or material supplier or carrier to become a party to any agreement with employees, their representatives, or any labor organization, including any area-wide, regional, or state building or construction trade or crafts council, organization, association, or similar body, as a condition of bidding, negotiating, being awarded any bid or contract, or performing work on a public works project.

In addition, the bill provides that the state or a political subdivision that contracts for a public works project may not prohibit a contractor, subcontractor, or material supplier or carrier from submitting bids, being awarded a bid or contract, or performing work on a public works project if such individual is otherwise qualified to do the work described.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Federal Labor and Wage Laws

The National Labor Relations Act of 1935<sup>1</sup> and the Labor Management Relations Act of 1947<sup>2</sup> constitute a comprehensive scheme of regulations guaranteeing 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.

The Fair Labor Standards Act (FLSA) establishes a federal minimum wage, which is the lowest hourly wage that can be paid in the United States.<sup>3</sup> A state may set the rate higher than the federal minimum, but not lower.<sup>4</sup> It also requires employers to pay time and a half to its employees for overtime hours worked,<sup>5</sup> and establishes standards for recordkeeping<sup>6</sup> and child labor.<sup>7</sup> Over 135 million workers are covered under the act;<sup>8</sup> most, but not all, jobs are covered by the FLSA. In addition, some jobs covered by the FLSA are considered “exempt” from the FLSA overtime requirements.<sup>9</sup>

On February 12, 2014, the President signed Executive Order 13658, which establishes a minimum wage for certain federal contractors.<sup>10</sup> The Executive Order requires parties who contract with the federal government to pay workers performing work on or in connection with covered federal contracts at least \$10.10 per hour beginning on January 1, 2015. Beginning January 1, 2016, and annually thereafter, such workers must be paid an amount determined by the Secretary of Labor in accordance with the Executive Order. The order stated that “[r]aising the pay of low-wage workers increases their morale and the productivity and quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs.”<sup>11</sup>

##### State Labor and Wage Regulations

Article I, s. 6 of the State Constitution creates a constitutional right to collectively bargain for all workers, including public sector employees. It provides, in pertinent part, that “[t]he 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

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<sup>1</sup> 29 U.S.C. ss. 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).

<sup>2</sup> 29 U.S.C. ss. 401 to 531 (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).

<sup>3</sup> 29 U.S.C. s. 206.

<sup>4</sup> 29 U.S.C. s. 218(a).

<sup>5</sup> 29 U.S.C. s. 207(a)(1).

<sup>6</sup> 29 U.S.C. s. 211.

<sup>7</sup> 29 U.S.C. s. 212.

<sup>8</sup> United States Department of Labor, *Wage and Hour Division: Resources for Workers*, <http://www.dol.gov/whd/workers.htm> (last visited March 5, 2015).

<sup>9</sup> 29 U.S.C. s. 213; United States Department of Labor, *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, [www.dol.gov/whd/regs/compliance/whdfs14.pdf](http://www.dol.gov/whd/regs/compliance/whdfs14.pdf) (last visited March 5, 2015).

<sup>10</sup> Exec. Order 13658, 79 Fed. Reg. 9851 (Feb. 12, 2014). A copy of the Executive Order can be found online at: <http://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors> (last visited March 5, 2015).

<sup>11</sup> *Id.*

collectively shall not be denied or abridged.” The Florida Supreme Court has held that public employees maintain the same rights to collectively bargain as do private employees.<sup>12</sup>

In addition, the State Constitution provides that “[a]ll 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.”<sup>13</sup> The State Constitution requires employers to pay employees no less than the minimum wage for all hours worked in Florida.<sup>14</sup> The current state minimum wage is \$8.05 per hour,<sup>15</sup> which is higher than the federal rate.<sup>16</sup>

### 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 of Management Services is responsible for establishing by rule the following:<sup>17</sup>

- 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 when 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.<sup>18</sup> 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.<sup>19</sup>

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 Register (FAR) 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 FAR, 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.<sup>20</sup>

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 qualifications<sup>21</sup> to those of non-residents.<sup>22</sup> If a construction contract is funded by local funds, the contract may contain such a provision.<sup>23</sup> In addition, a contractor

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<sup>12</sup> See *Hillsborough Cnty. Gov't Emps. Ass'n, Inc. v. Hillsborough Cnty. Aviation Auth.*, 522 So.2d 358 (Fla. 1988); *City of Tallahassee v. Public Employees Relations Comm'n*, 410 So.2d 487 (Fla. 1981); *Dade Cnty. Classroom Teachers Ass'n v. Legislature of Fla.*, 269 So.2d 684 (Fla. 1972).

<sup>13</sup> Article X, s. 24(a), FLA. CONST. and s. 448.110, F.S.

<sup>14</sup> Article X, s. 24(c), FLA. CONST.

<sup>15</sup> Department of Economic Opportunity, *Display Posters and Required Notices*, available at <http://www.floridajobs.org/business-growth-and-partnerships/for-employers/display-posters-and-required-notices> (last visited February 11, 2015).

<sup>16</sup> The federal minimum wage is \$7.25 per hour. The Florida minimum wage for 2015 is \$8.05 per hour. For more information about federal minimum wage provisions, see <http://www.dol.gov/whd/minimumwage.htm> (last visited February 11, 2015).

<sup>17</sup> S. 255.29, F.S.

<sup>18</sup> See ch. 60D-5.002 and 60D-5.0073, F.A.C.; see also s. 255.0525, F.S.

<sup>19</sup> S. 255.20(1), F.S. For electrical work, local governments must competitively bid projects estimated to cost more than \$75,000.

<sup>20</sup> For counties, municipalities, and political subdivisions, similar publishing provisions apply. S. 255.0525(2), F.S.

<sup>21</sup> S. 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>22</sup> S. 255.099(1), F.S.

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

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.<sup>24</sup>

### Federal Project Labor Agreements

In 2009, the President signed Executive Order 13502 authorizing the use of project labor agreements for federal construction projects.<sup>25</sup> The Executive Order defines "project labor agreement" as "a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f)." The Executive Order provides that executive agencies may, on a project-by-project basis, require the use of a project labor agreement by a contractor where such an agreement will advance the federal government's goal of achieving economy and efficiency in the procurement, produce labor-management stability, and ensure compliance with laws and regulations concerning safety and health, equal employment opportunity, and labor and employment standards.

### Federal Prevailing Wage Requirements

The Davis-Bacon Act applies to contractors and subcontractors performing work on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair of public works projects or public buildings.<sup>26</sup> The United States Department of Labor, Wage and Hour Division, issues two types of wage determinations: general determinations (also known as area determinations) and project determinations. The wage and fringe benefits<sup>27</sup> in the applicable Davis-Bacon wage determination must be the minimum paid by contractors and subcontractors to laborers and mechanics.<sup>28</sup>

### **Effect of Proposed Changes**

The bill creates an unnumbered section of law relating to public works projects. It defines the following terms:

- "Political subdivision" means a separate agency or unit of local government created or established by law or ordinance and the officers thereof. The term includes, but is not limited to, a county; a city, town, or other municipality; or a department, commission, authority, school district, tax district, water management district, board, public corporation, institution of higher education, or other public agency or body authorized to expend public funds for construction, maintenance, repair, or improvement of public works.
- "Project labor agreement" means an arrangement mentioned, detailed, or outlined within the project plans, the specifications, or any bidding document of a public works project that:
  - Imposes requirements, controls, or limitations on staffing, sources of employee referrals, assignments of work, sources of insurance or benefits, including health, life, and disability insurance and retirement pensions, training programs or standards, or wages; or
  - Requires a contractor to enter into any sort of agreement as a condition of submitting a bid that directly or indirectly limits or requires the contractor to recruit, train, or hire employees from a particular source to perform work on public works or a public works project.
- "Public works" or "public works project" means a building, road, street, sewer, storm drain, water system, site development, irrigation system, reclamation project, gas or electrical distribution system, gas or electrical substation, or other facility, project, or portion thereof, including repair, renovation, or remodeling, owned, in whole or in part, by any political subdivision that is to be paid in whole or in part with state funds.

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<sup>24</sup> S. 255.099(1)(b), F.S.

<sup>25</sup> Exec. Order 13502, 74 Fed. Reg. 6985 (Feb. 6, 2009). A copy of the Executive Order can be found online at: [http://www.whitehouse.gov/the\\_press\\_office/ExecutiveOrderUseofProjectLaborAgreementsforFederalConstructionProjects](http://www.whitehouse.gov/the_press_office/ExecutiveOrderUseofProjectLaborAgreementsforFederalConstructionProjects) (last visited March 5, 2015); the Executive Order is codified in subpart 22.5 of the Federal Acquisition Regulation.

<sup>26</sup> 40 U.S.C. s. 3142(a).

<sup>27</sup> United States Department of Labor, *Davis-Bacon and Related Acts Frequently Asked Questions*,

<http://www.dol.gov/whd/programs/dbra/faqs/fringes.htm#Fringe> (last visited March 5, 2015) (examples of fringe benefits include life insurance, health insurance, pension, vacation, holidays, sick leave, and other "bona fide" fringe benefits).

<sup>28</sup> 40 U.S.C. s. 3142(b).

The bill provides that except if the payment of prevailing or minimum wages is required under federal law, or except as required by federal or state law, the state or any political subdivision that contracts for the construction, maintenance, repair, or improvement of public works may not require specified employment provisions. Specifically, the state or any political subdivision may not require a contractor, subcontractor, or material supplier or carrier engaged in the construction, maintenance, repair, or improvement of public works to:

- Pay employees a predetermined amount of wages or wage rate;
- Provide employees a specified type, amount, or rate of employee benefits;
- Control or limit staffing;
- Recruit, train, or hire employees from a designated or single source;
- Designate any particular assignment of work for employees;
- Participate in proprietary training programs, unless such training is a condition of a product warranty or guarantee; or
- Enter into any type of project labor agreement.

The bill prohibits the state or a political subdivision that contracts for the construction, maintenance, repair, or improvement of public works from requiring a contractor, subcontractor, or material supplier or carrier to become a party to any agreement with employees, their representatives, or any labor organization, including any area-wide, regional, or state building or construction trade or crafts council, organization, association, or similar body, as a condition of bidding, negotiating, being awarded any bid or contract, or performing work on a public works project.

In addition, the bill provides that the state or a political subdivision that contracts for a public works project may not prohibit a contractor, subcontractor, or material supplier or carrier from submitting bids, being awarded a bid or contract, negotiating a contract upon being awarded, or performing work on a public works project if such individual is otherwise qualified to do the work described.

#### B. SECTION DIRECTORY:

Section 1 creates an unnumbered section of law relating to public works projects.

Section 2 provides an effective date of upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to impact state revenues.

##### 2. Expenditures:

The bill does not appear to impact state expenditures.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to impact local government revenues.

##### 2. Expenditures:

The bill does not appear to impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take 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 state tax shared with counties or municipalities.

2. Other:

Right to Work

Florida is a “right to work” state. Article I, s. 6 of the State Constitution protects Florida citizens from employers’ actions relating to their membership, or non-membership, in a labor union. This section also protects an employees’ right to collectively bargain and prohibits public employees from striking. The Florida Supreme Court has stated that “[t]here is little question that Article I, section 6 was intended to, and does, benefit all employees, public or private.”<sup>29</sup> The right to collectively bargain is a fundamental right vested in all Florida employees by the State Constitution and any government action attempting to restrict the enjoyment thereof is subject to strict scrutiny and must be justified by a compelling state interest.<sup>30</sup>

B. RULE-MAKING AUTHORITY:

The bill neither provides rulemaking authority nor requires implementation by executive branch rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 10, 2015, the Local Government Affairs Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment provides an exemption that allows the state or any political subdivision to require a contractor, subcontractor, or material supplier or carrier to participate in a proprietary training program, if participation in the program is a condition of a product warranty or guarantee. The amendment also clarifies the bill’s protections for contractors, subcontractors, or material suppliers or carriers who are qualified, licensed, or certificated apply to those qualified licensed, or certified as required by state law and that protections apply at all stages of the bidding process.

This analysis is drawn to the bill as amended.

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<sup>29</sup> *Hillsborough Cty. Governmental Emps. Ass’n, Inc. v. Hillsborough Cty. Aviation Auth.*, 522 So.2d 358 (Fla. 1988).

<sup>30</sup> *Coastal Fla. Police Benevolent Ass’n, Inc. v. Williams*, 838 So.2d 543 (Fla. 2003).