

**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.)

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Prepared By: The Professional Staff of the Committee on Fiscal Policy

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BILL: SB 590

INTRODUCER: Senators Altman and Bradley

SUBJECT: Flags

DATE: March 25, 2015

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stearns	Yeatman	CA	<b>Favorable</b>
2.	Peacock	McVaney	GO	<b>Favorable</b>
3.	Goedert	Hrdlicka	FP	<b>Pre-meeting</b>

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**I. Summary:**

SB 590 requires all United States and state flags purchased on or after January 1, 2016, by the state, a county, or a municipality for public use, to be made in the United States and entirely from domestically grown, produced, and manufactured materials.

**II. Present Situation:**

**Display of United States and State Flags**

Florida law requires that the United States and state flags be displayed at certain venues. The United States flag must be displayed at the state capitol and at each county courthouse,<sup>1</sup> at every public auditorium,<sup>2</sup> at each polling station on election days,<sup>3</sup> and on the grounds and in the classrooms of public K-20 educational institutions.<sup>4</sup> The Governor has the authority to adopt protocol on the display of the state flag.<sup>5</sup>

**Procurement of Commodities and Services**

Purchases made by the executive branch are regulated by the provisions of ch. 287, F.S., which provides that the Department of Management Services (DMS) is responsible for the procurement of goods and services for all state agencies.<sup>6</sup> The DMS establishes statewide purchasing rules to

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<sup>1</sup> Section 256.01, F.S.

<sup>2</sup> Section 256.11, F.S.

<sup>3</sup> Section 256.011(1), F.S.

<sup>4</sup> Sections 1000.06, and 256.032, F.S. (requiring the state flag to be displayed on the grounds of every elementary and secondary public school).

<sup>5</sup> Section 256.015, F.S.

<sup>6</sup> Section 287.042(1)(a), F.S.; *see s. 287.012(1), F.S.*, defining 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

coordinate purchases across the various agencies and negotiates contracts and purchasing agreements, utilizing the state's buying power to promote efficiency and savings in the procurement process.<sup>7</sup>

Agencies may utilize a variety of procurement methods depending on the value of the needed goods or services. Formal competitive bidding is required for all contracts in excess of \$35,000.<sup>8</sup> For contracts between \$2,500 and \$35,000, agencies should receive informal bids when practical, but may conform to "good purchasing practices," such as written quotations or written records of telephone quotations.<sup>9</sup> For contracts less than \$2,500, agencies are only required to conform to "good purchasing practices."<sup>10</sup>

Chapter 287, F.S., does not apply to the procurement processes of the legislative and judicial branches, counties, municipalities, or school districts.<sup>11</sup> The Office of Legislative Services is responsible for the procurement of goods for the Legislature. Procurement for the judicial branch falls under the control of the Office of the State Courts Administrator.<sup>12</sup> Local governments procure commodities and services pursuant to local procurement ordinances.

### **Florida Flag Procurement**

Currently, there is no specific state law on flag procurement; however, most flags purchased by the DMS are manufactured in the United States from domestically-sourced materials. Of the 772 flags purchased by agencies via MyFloridaMarketplace<sup>13</sup> in Fiscal Year 2012-2013, 682 were produced by RESPECT of Florida.<sup>14</sup> RESPECT of Florida is a non-profit organization designated by the DMS<sup>15</sup> to administer the State Use Program, designed to provide employment opportunities for handicapped individuals.<sup>16</sup> All United States and state flags sold by RESPECT of Florida are made in Florida using goods and materials made in America.<sup>17</sup>

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executive branch of state government. 'Agency' does not include the university and college boards of trustees or the state universities and colleges."

<sup>7</sup> Sections 287.042 and 287.032, F.S.

<sup>8</sup> Section 287.057(1), F.S.

<sup>9</sup> Rule 60A-1.002(3), F.A.C.

<sup>10</sup> Rule 60A-1.002(2), F.A.C.

<sup>11</sup> See s. 287.012(1), F.S. (definition of "agency" only includes units of organization under the executive branch); *Cf.* s. 287.055(2)(b), F.S. (including "a municipality, a political subdivision, a school district, or a school board" in the definition of "agency" for the purposes of procuring architectural, engineering, and surveying services in regards to acquisition of professional architectural, engineering, landscape architectural or surveying and mapping services).

<sup>12</sup> See Fla. R. Jud. Admin. 2.205(e)(2).

<sup>13</sup> The online procurement system operated by the DMS through which agencies may make certain types of purchases, available at [http://www.dms.myflorida.com/business\\_operations/state\\_purchasing/myfloridamarketplace](http://www.dms.myflorida.com/business_operations/state_purchasing/myfloridamarketplace) (last visited March 12, 2015).

<sup>14</sup> DMS, 2014 Legislative Bill Analysis HB 201, March 6, 2014.

<sup>15</sup> See Rule 60E-1.003, F.A.C. (authorizing the DMS to designate a "Central, Non-Profit Agency" to provide services specified in ss. 413.032-413.037, F.S.).

<sup>16</sup> *Id.* See also RESPECT of Florida website at <http://www.respectofflorida.org/category/295/About-Us.html> (last visited March 13, 2015).

<sup>17</sup> RESPECT of Florida February 2014 Newsletter, available at [http://www.respectofflorida.org/assets/pdf/Shopping-Respect/9\\_ShoppingRESPECT\\_Feb14.pdf](http://www.respectofflorida.org/assets/pdf/Shopping-Respect/9_ShoppingRESPECT_Feb14.pdf) (last visited March 12, 2015).

The Department of State is authorized to provide state flags to schools, governmental agencies, and other organizations at no cost, up to an annual cost for the department of \$15,000 per year.<sup>18</sup>

While it is possible that some of the flags purchased by state and local governments are foreign-made, the quantity is likely to be small. The Flag Manufacturers Association of America estimates that 95 percent of United States flags are manufactured entirely in the United States.<sup>19</sup> According to the U.S. Census Bureau, \$302.7 million worth of “shipments of fabricated flags, banners, and similar emblems” were produced in the United States in 2007,<sup>20</sup> while \$4 million worth of flags were imported in 2013.<sup>21</sup>

### **Procurement of Commodities and Services by the Federal Government and Other States**

The Buy American Act requires that goods acquired by the federal government for public use must be domestically manufactured if a contract amount exceeds a specific threshold.<sup>22</sup> These requirements can be waived by the President of the United States under the Trade Agreements Act of 1979 for the purpose of entering into trade agreements with other countries.<sup>23</sup> According to the Congressional Research Service, waivers under the Trade Agreements Act of 1979 are heavily used, resulting in little remaining scope for the Buy American Act provisions.<sup>24</sup>

Other provisions of federal law require the purchase of domestically produced goods, including flags. The Berry Amendment requires that certain items purchased by the Department of Defense be exclusively grown, reprocessed, reused, or produced within the United States.<sup>25</sup> Federal law prohibits the Department of Veterans Affairs from procuring burial flags that were not wholly produced in the United States.<sup>26</sup>

Several states have existing statutes requiring the use of domestically manufactured flags. Oklahoma requires all flags purchased by the state and political subdivisions to be manufactured in the United States.<sup>27</sup> Massachusetts has a similar law that applies to all public institutions and agencies.<sup>28</sup> Arizona requires a domestically-manufactured United States flag to be displayed in all public school classrooms.<sup>29</sup> Tennessee requires any United States or state flag purchased

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<sup>18</sup> Section 256.031(1)(a), F.S.

<sup>19</sup> Flag Manufacturers Association of America, FAQ's, available at <http://fmaa-usa.com/info/FAQ.php> (last visited March 13, 2015).

<sup>20</sup> U.S. Census Bureau News, Profile America Facts for Features, The Fourth of July 2013, available at <http://www.census.gov/newsroom/facts-for-features/2013/cb13-ff14.html> (last visited March 13, 2015).

<sup>21</sup> U.S. Census Bureau News, Profile America Facts for Features, The Fourth of July 2014, available at <http://www.census.gov/newsroom/facts-for-features/2014/cb14-ff16.html> (last visited March 13, 2015).

<sup>22</sup> 41 U.S.C. s. 8302.

<sup>23</sup> 19 U.S.C. s. 2511.

<sup>24</sup> Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law, Congressional Research Service, p. 7, January 6, 2014, available at <http://www.hsdl.org/?view&did=749327> (last visited March 13, 2015).

<sup>25</sup> 10 U.S.C. s. 2533a.

<sup>26</sup> 38 U.S.C. s. 2301(h)(1).

<sup>27</sup> OKLA. STAT. tit. 25, s. 158.

<sup>28</sup> MASS. GEN. LAWS ch. 2, s. 6.

<sup>29</sup> ARIZ. REV. STAT. ANN. s. 15-1626(A)(17).

under a state contract to be manufactured in the United States.<sup>30</sup> Minnesota prohibits the sale of a United States flag manufactured outside the United States.<sup>31</sup>

### III. Effect of Proposed Changes:

**Section 1** provides that the act may be cited as the “All-American Flag Act.”

**Section 2** requires any United States or state flag purchased for public use by the state, a county, or a municipality, on or after January 1, 2016, to be wholly manufactured in the United States from materials grown and/or produced domestically.

**Section 3** provides an effective date of July 1, 2015.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

This bill requires a county or municipality, when purchasing United States or state flags, to purchase flags made in the United States from domestically grown, produced, and manufactured materials. This bill applies to all persons similarly situated, including the state and local governments, and it is likely to have an insignificant fiscal impact on counties and municipalities.<sup>32</sup>

#### B. Public Records/Open Meetings Issues:

None.

#### C. Trust Funds Restrictions:

None.

#### D. Other Constitutional Issues:

##### **Impairment of Contract**

Both the U.S.<sup>33</sup> and Florida<sup>34</sup> constitutions prohibit the state from passing laws impairing existing contractual rights. Contractual rights are impaired to the extent the law changes the substantive rights of the parties in the existing contract.<sup>35</sup> Whether an impairment of contractual rights is constitutionally valid depends on “whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state’s objective, or whether it unreasonably intrudes into the parties’ bargain to a degree greater than is necessary to achieve that objective.”<sup>36</sup> The ability of the state to modify

<sup>30</sup> TENN. CODE ANN. s. 4-1-301(d).

<sup>31</sup> MINN. STAT. s. 325E.65.

<sup>32</sup> FLA. CONST. art. VII, s. 18.

<sup>33</sup> U.S. CONST. art. I, s. 10. (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”)

<sup>34</sup> FLA. CONST. art. I, s. 10. (“No . . . law impairing the obligation of contracts shall be passed.”)

<sup>35</sup> *Manning v. Travelers Ins. Co.*, 250 So. 2d 872, 874 (Fla. 1971).

<sup>36</sup> *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 780 (Fla. 1979).

contractual obligations is most limited when a final agreement has been reached between a party and the state.<sup>37</sup>

While the bill only applies to purchases of flags by state or local governments after January 1, 2016, it is possible the state or a local government may have existing contracts that extend beyond that date and therefore will not be in compliance with the bill.

### **Federal Treaties**

State law may be preempted directly or by implication if the state law conflicts with a federal law or the federal government has fully occupied the field it has chosen to regulate.<sup>38</sup> The U.S. has entered into various free trade agreements that address government procurement policies and, in some cases, require that governments treat goods from other contracting parties similarly to nationally produced goods for the purpose of government procurement.<sup>39</sup> A court may find that the bill is preempted under the U.S. Constitution if the bill requires procurement practices that violate these trade agreements.

### **Commerce Clause**

The U.S. Constitution grants Congress the exclusive power to regulate commerce between the states,<sup>40</sup> which limits the power of states to enact laws that impose burdens on commerce. A state law that facially discriminates against interstate commerce is invalid unless the state can prove that the statute serves a legitimate state purpose that cannot be served by nondiscriminatory means.<sup>41</sup> State statutes that burden interstate transactions only incidentally do not violate the Commerce Clause unless the burdens are “clearly excessive in relation to the putative local benefits.”<sup>42</sup>

Further, when a state is acting as a “market participant” rather than a “market regulator,” it is not subject to the limitations of the Commerce Clause. 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.<sup>43</sup> While the U.S. Eleventh Circuit Court of Appeals has not yet opined on the application of the market participant exception to regulation of foreign commerce, the U.S. First Circuit Court of Appeals recently held that “a state may discriminate against foreign commerce when it participates in the free market.”<sup>44</sup>

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<sup>37</sup> *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 672 (Fla. 1993).

<sup>38</sup> U.S. CONST. art. VI. *State v. Harden*, 938 So.2d 480, 486 (Fla. 2006) (stating that “[u]nder the Supremacy Clause, a federal law may expressly or impliedly preempt state law. A state cannot assert jurisdiction where Congress clearly intended to preempt a field of law.”).

<sup>39</sup> For example the Agreement on Government Procurement addresses access to government procurement markets. See World Trade Organization, Agreement on Government Procurement, Art. I, Art. XXII, and Annex 2 – United States, available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (last visited March 20, 2015).

<sup>40</sup> U.S. CONST. art. I, s. 8. *Gibbons v. Ogden*, 22 U.S. 1 (1822).

<sup>41</sup> *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984).

<sup>42</sup> *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citations omitted).

<sup>43</sup> *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983).

<sup>44</sup> *Antilles Cement Corp. v. Futuno*, 670 F.3d 310, 328 (1st Cir. 2010).

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The bill could have a positive economic impact on businesses selling United States and state flags that are domestically-produced and sourced. The bill could have a negative impact on businesses selling United States and state flags that are either imported or produced domestically from foreign materials.

**C. Government Sector Impact:**

This bill may have an indeterminate negative fiscal impact on state and local governments, depending on the extent to which state and local governments are currently purchasing flags produced outside of the United States or made from foreign materials and the cost difference between those flags and domestically-produced and sourced flags.

**VI. Technical Deficiencies:**

The bill does not contain a method of verification to ensure the flags purchased by state and local governments are manufactured in the United States from domestic materials.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 256.041 of the Florida Statutes:

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.