

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 181 Public Works Projects

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

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	8 Y, 4 N	Moore	Williamson
2) Local Government Affairs Subcommittee	7 Y, 3 N, As CS	Darden	Miller
3) State Affairs Committee			

### SUMMARY ANALYSIS

Contracts for construction services that are projected to cost more than a specified threshold 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 estimated cost is in excess of \$300,000. The solicitation of competitive bids or proposals must be publicly advertised in the Florida Administrative Register.

The bill creates s. 255.0992, F.S., relating to public works projects and prohibited governmental actions. The bill defines the terms "political subdivision" and "public works project." It prohibits the state or a political subdivision, except when required by state or federal law, from requiring a contractor, subcontractor, or material supplier or carrier engaged in the public works project to:

- Pay employees a predetermined amount of wages or prescribe any wage rate;
- Provide employees a specified type, amount, or rate of employee benefits;
- Control, limit, or expand staffing; or
- Recruit, train, or hire employees from a designated, restricted, or single source.

Department of Transportation contracts executed under chapter 337, F.S., are excluded from this bill.

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 a bid on the project or being awarded the relevant contract, 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.

The bill provides an effective date of July 1, 2016.

# 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 or act) 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> The act also requires employers to pay time and a half to their 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 act 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 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>

The Davis-Bacon<sup>12</sup> Act (Davis-Bacon) apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works.<sup>13</sup> Contractors and subcontractors subject to Davis-Bacon are required to pay their employees at the locally prevailing wage, as determined by the Department of Labor, for similar projects in the area where construction is occurring.<sup>14</sup> The provisions

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<sup>1</sup> 29 U.S.C. ss. 151-169 (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. 141-197 (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 Sept. 30, 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 Sept. 30, 2015).

<sup>10</sup> Exec. Order 13658, 79 Fed. Reg. 9851 (Feb. 12, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors>.

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

<sup>12</sup> Davis-Bacon Act, 40 U.S.C. s. 1341, *et seq.*

<sup>13</sup> United States Department of Labor, *Wage and Hour Division: Davis-Bacon and Related Acts*, <http://www.dol.gov/whd/govcontracts/dbra.htm> (last visited Oct. 13, 2015).

<sup>14</sup> *Id.*

of Davis-Bacon apply to contractors and subcontractors performing work on federal or District of Columbia contracts, as well federally funded projects through the “related Acts.”<sup>15</sup>

### State Labor and Wage Regulations

The State Constitution protects the right for workers to bargain collectively, including public sector employees.<sup>16</sup> 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 collectively shall not be denied or abridged.” The Florida Supreme Court has held that public employees maintain the same rights to bargain collectively as do private employees.<sup>17</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>18</sup> Employers must pay employees no less than the minimum wage for all hours worked in Florida.<sup>19</sup> The current state minimum wage is \$8.05 per hour,<sup>20</sup> which is higher than the federal rate.<sup>21</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:

- Procedures for determining the qualifications and responsibility of potential bidders prior to advertising for and receiving bids for public building construction contracts;<sup>22</sup>
- Procedures for awarding each state agency construction project to the lowest qualified bidder;<sup>23</sup>
- Procedures to govern negotiations for construction contracts and contract modifications when such negotiations are determined to be in the best interest of the state;<sup>24</sup> 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.<sup>25</sup>

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.<sup>26</sup> A county, municipality, special district, or other political subdivision seeking to construct or improve a public building must competitively bid the project if the estimated cost is in excess of \$300,000.<sup>27</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

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<sup>15</sup> United States Department of Labor, *Fact Sheet #66: The Davis-Bacon and Related Acts (DBRA)*, <http://www.dol.gov/whd/regs/compliance/whdfs66.pdf>. (last visited Oct. 27, 2015). The “related Acts” include the Federal Aid Highway Acts, the Housing and Community Development Act of 1974, and the Federal Water Pollution Control Act.

<sup>16</sup> Art. I, s. 6, Fla. Const.

<sup>17</sup> See *Hillsborough Cnty. Gov’tl 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>18</sup> Art. X, s. 24(a), FLA. CONST.

<sup>19</sup> Art. X, s. 24(c), FLA. CONST.

<sup>20</sup> Department of Economic Opportunity, *Display Posters and Required Notices*, <http://www.floridajobs.org/business-growth-and-partnerships/for-employers/display-posters-and-required-notices> (last visited Sept. 30, 2015).

<sup>21</sup> The federal minimum wage is \$7.25 per hour. For more information about federal minimum wage provisions, see <http://www.dol.gov/whd/minimumwage.htm> (last visited Sept. 30, 2015).

<sup>22</sup> Section 255.29(1), F.S.

<sup>23</sup> Section 255.29(2), F.S.

<sup>24</sup> Section 255.29(3), F.S.

<sup>25</sup> Section 255.29(4), F.S.

<sup>26</sup> Section 255.0525, F.S.; see also Rules 60D-5.002 and 60D-5.0073, F.A.C.

<sup>27</sup> Section 255.20(1), F.S. For electrical work, local governments must competitively bid projects estimated to cost more than \$75,000.

Administrative Register (FAR) at least 21 days prior to the established bid opening. If the cost of 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>28</sup>

Florida law provides a preference for the employment of state residents in construction contracts funded with state funds. Such contracts must contain a provision requiring the contractor to give preference to employing state residents to perform the work if such residents have substantially equal qualifications<sup>29</sup> to those of non-residents.<sup>30</sup> If a construction contract is funded by local funds, the contract may contain such a provision.<sup>31</sup> In addition, a 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.<sup>32</sup>

Several counties and municipalities have adopted ordinances requiring companies bidding on contracts to pay their employees a "living wage,"<sup>33</sup> while others have adopted ordinances requiring apprenticeship programs.<sup>34</sup>

### Department of Transportation Construction Projects

Chapter 337, F.S., governs contracting by the Department of Transportation (DOT). Any person who wants to bid for a construction contract in excess of \$250,000 must be certified by DOT as qualified.<sup>35</sup> Certification is also required to bid on road, bridge, or public transportation construction projects of more than \$250,000.<sup>36</sup> The purpose of certification is to ensure professional and financial competence relating to the performance of construction contracts by evaluating bidders "with respect to the equipment, past record, experience, financial resources, and organizational personnel of the applicant necessary to perform the specific class of work for which the person seeks certification."<sup>37</sup>

### **Effect of Proposed Changes**

The bill creates s. 255.0992, F.S., 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, taxing 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.
- "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 for which a project for construction, maintenance, repair, or improvement of public works is to be paid for in

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<sup>28</sup> For counties, municipalities, and political subdivisions, similar publishing provisions apply. See Section 255.0525(2), F.S.

<sup>29</sup> 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."

<sup>30</sup> Section 255.099(1), F.S.

<sup>31</sup> *Id.*

<sup>32</sup> Section 255.099(1)(b), F.S.

<sup>33</sup> E.g. Broward County Code of Ordinances s. 26-102, Palm Beach County Code of Ordinances s. 2-147 to 2-250.1, Miami-Dade County Code of Ordinances s. 2-8.9.

<sup>34</sup> See Charlie Frago, *St. Pete council approves mandatory apprentice program for city projects*, Tampa Bay Times (May 7, 2015), <http://www.tampabay.com/news/localgovernment/st-pete-council-approves-mandatory-apprentice-program-for-city-projects/2228783>.

<sup>35</sup> Section 337.14(1), F.S. and ch. 14-22, F.A.C.

<sup>36</sup> Section 337.14(2), F.S.

<sup>37</sup> Section 337.14(1), F.S.

whole or in part with state funds. Contracts executed by the Department of Transportation under chapter 337, F.S. are excluded from this definition.

The bill provides that 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 prescribe any wage rate;
- Provide employees a specified type, amount, or rate of employee benefits;
- Control, limit, or expand staffing; or
- Recruit, train, or hire employees from a designated, restricted, or single source.

In addition, the bill provides that the state or any political subdivision that contracts for the construction, maintenance, repair, or improvement of a public works project may not prohibit a contractor, subcontractor, or material supplier or carrier from submitting a bid on the project or being awarded the relevant contract, if such individual is able to perform the work described and is qualified, licensed, or certified as required by state law.

**B. SECTION DIRECTORY:**

Section 1: Creates 255.0992, F.S., relating to public works projects.

Section 2: Provides an effective date of July 1, 2016.

**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:

None.

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 November 4, 2015, the Local Government Affairs Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment added a provision stating the provision would not apply to Department of Transportation contracts under ch. 337, F.S. The amendment also provided a section number for the proposed changes, removed redundant terminology, and clarified that state or local governments shall not prohibit bidding by, or the awarding of a contract to, a qualified entity.

This analysis is drawn to the bill as amended.