

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 Committee on Governmental Oversight and Accountability

BILL: CS/SB 438

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Bullard

SUBJECT: Small Business Participation in State Contracting

DATE: January 12, 2015 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Peacock	McVaney	GO	Fav/CS
2.			AGG	
3.			AP	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 438 requires each agency of the executive branch to award at least 35 percent of its annual contracting dollars to small businesses either directly or indirectly as subcontractors. The bill requires a vendor awarded a contract pursuant to s. 287.057, F.S., relating to the purchase of commodities or contractual services, to use small businesses as subcontractors or subvendors. Executive branch agencies must take reasonable measures to avoid unnecessary “contract bundling.” The bill provides relevant definitions, and creates reporting requirements.

The bill may result in an indeterminate increase in expenditures by state agencies relating to contracts for commodities and services.

II. Present Situation:

Chapter 287, Florida Statutes

Chapter 287, F.S., regulates state agency¹ procurement of personal property and services.² Agencies may use a variety of procurement methods, depending on the cost and characteristics of the needed good or service, the complexity of the procurement, and the number of available vendors. These include the following:

- "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 proposals," 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 high complexity, customized, mission-critical services, by an agency dealing with a limited number of vendors.³

Contracts for commodities or contractual services in excess of \$35,000 must be procured utilizing a competitive solicitation process.⁴ However, specified contractual services and commodities are not subject to competitive-solicitation requirements.⁵

The chapter establishes a process by which a person may file an action protesting a decision or intended decision pertaining to contracts administered by the Department of Management Services (DMS), a water management district, or state agencies.⁶

Existing Small Business Efforts

Part IV of Chapter 288, F.S., specifies a number of efforts directed towards helping the success of small businesses. The rules ombudsmen in the Executive Office of the Governor is tasked in s. 288.7015, F.S., with reviewing state agency administrative rules that disproportionately impact small and minority businesses.

¹ As defined in s. 287.012(1), F.S., "agency" means 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 Local governments are not subject to the provisions of ch. 287, F.S. Local governmental units may look to the chapter for guidance in the procurement of goods and services, but many have local policies or ordinances to address competitive solicitations.

³ See ss. 287.012(6) and 287.057, F.S.

⁴ 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. As defined in s. 287.012(6), F.S., "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.

⁵ See s. 287.057(3)(e), F.S.

⁶ See ss. 287.042(2)(c) and 120.57(3), F.S.

Section 288.705, F.S., requires all state agencies to provide the Florida Small Business Development Center Procurement System with all formal solicitations for contractual services, supplies, and commodities. The Small Business Development Center must coordinate with Minority Business Development Centers to compile and distribute this information to small and minority businesses requesting such service for the period of time necessary to familiarize the business with the market represented by state agencies. Each year, the Small Business Development Center must report certain information to the Department of Economic Opportunity on the use of the statewide contracts register.

Section 287.0947, F.S., specifies that the Secretary of DMS may create the Florida Advisory Council on Small and Minority Business Development (Council) with the purpose of advising and assisting the secretary in carrying out the secretary's duties with respect to minority businesses and economic and business development. The Council must meet at the call of its chair, at the request of a majority of its membership, at the request of the commission or its executive administrator, or at such times as may be prescribed by rule, but not less than once a year, to offer its views on issues related to small and minority business development of concern to this state.⁷

The powers and duties of the Council include, but are not limited to: researching and reviewing the role of small and minority businesses in the state's economy; reviewing issues and emerging topics relating to small and minority business economic development; studying the ability of financial markets and institutions to meet small business credit needs and determining the impact of government demands on credit for small businesses; assessing the implementation of a state economic development comprehensive plan, as it relates to small and minority businesses; assessing the reasonableness and effectiveness of efforts by any state agency or by all state agencies collectively to assist minority business enterprises; and advising the Governor, the secretary, and the Legislature on matters relating to small and minority business development which are of importance to the international strategic planning and activities of this state.⁸

The Council must also present an annual report⁹ to the secretary that sets forth in appropriate detail the business transacted by the Council during the year and any recommendations to the secretary, including those to improve business opportunities for small and minority business enterprises.

Some of the duties of the Office of Supplier Diversity of DMS, established in s. 287.09451, F.S., include communicating on a monthly basis with the Small and Minority Business Advisory Council to keep the council informed on issues relating to minority enterprise procurement, serving as an advocate for minority business enterprises, and coordinating with the small and minority business ombudsman, as defined in s. 288.703, F.S.

⁷ Section 287.0947(4), F.S.

⁸ Section 287.0947(5), F.S.

⁹ The annual reports are available on the world-wide web at:

http://www.dms.myflorida.com/other_programs/office_of_supplier_diversity_osd/small_and_minority_business_council/annual_report

Florida Small Minority Business Assistance Act

The Florida Minority Business Assistance Act¹⁰ provides a statewide contracts register¹¹ and the Florida Minority Business Loan Mobilization Program.¹²

The Florida Minority Business Assistance Act defines the term “small business” as “an independently owned and operated business concern that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than \$5 million or any firm based in this state which has a Small Business Administration 8(a) certification. As applicable to sole proprietorships, the \$5 million net worth requirement shall include both personal and business investments.”¹³

Section 288.7031, F.S., provides that the definition of the term “small business” contained herein applies to the state and all political subdivisions of the state.

Performance Bond Requirements

Section 255.05, F.S., requires that any person entering into a formal contract with the state or any county, city, or political subdivision thereof, for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work, before commencing the work or before recommencing the work after a default or abandonment, to execute, deliver, and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety. The statute specifies some exceptions and the form for the bond.

Section 24.111(2)(i), F.S., specifies that the Department of the Lottery must require performance bonds for the duration of contracts with its vendors.

Section 153.10(4), F.S., specifies that counties must require a performance bond of 2.5 percent of the amount of bids for the construction of water system improvements or sewer improvements. Sewer system improvement contracts bid pursuant to s. 153.79, F.S., also require a performance bond.

Section 337.18, F.S., requires surety bonds from successful bidders for certain Department of Transportation contracts, though the department may waive the requirement for contracts under \$250,000, if certain conditions are met.

¹⁰ Sections 288.703-288.706, F.S., comprises the Florida Small and Minority Business Assistance Act. *See* s. 288.702, F.S.

¹¹ Section 288.705, F.S.

¹² Section 288.706, F.S.

¹³ Section 288.703(6), F.S.

Role of Rules Ombudsman in the Executive Office of the Governor

Section 288.7015, F.S., requires the Governor to appoint a rules ombudsman¹⁴ in the Executive Office of the Governor, for considering the impact of agency rules on the state's citizens and businesses. In carrying out duties as provided by law, the ombudsman must consult with Enterprise Florida, Inc., at which point this office may recommend to improve the regulatory environment of this state. The duties of the rules ombudsman are to:

- Carry out the responsibility related to rule adoption procedures with respect to small businesses;
- Review state agency rules that adversely or disproportionately impact businesses, particularly those relating to small and minority businesses; and
- Make recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to businesses.

Each state agency must cooperate fully with the rules ombudsman in identifying such rules, and take the necessary steps to waive, modify, or otherwise minimize such adverse effects of any such rules.

Prompt Payment of Invoices by Department of Financial Services

Section 215.422, F.S., governs the processing times of invoices submitted by a state agency or the judicial branch for payment to the Chief Financial Officer (CFO) with the Department of Financial Services (DFS). Invoices submitted by agencies are required to be filed with the CFO no later than 20 days after receipt of invoice and receipt, inspection, and approval of the goods or services.¹⁵ DFS must make prompt payment of an invoice no later than 10 days after an agency's filing of an approved invoice.¹⁶ If a warrant in payment of an invoice is not made within 40 days after receipt of the invoice and receipt, inspection, and approval of the goods or services, the agency or judicial branch must pay the vendor interest¹⁷ on the unpaid balance until payment is issued to the vendor.¹⁸

III. Effect of Proposed Changes:

Section 1 creates s. 287.0577, F.S., to address small business participation in state contracting, contract bundling, set-asides for small businesses, and bonding and reporting requirements.

Definitions

The bill creates definitions for "contract bundling" and "small business." The word "appropriate" contained within the definition of "contract bundling" is a subjective term that is not defined. The term "small business" means a business entity organized for profit that is

¹⁴ The ombudsman is defined in s. 288.703(5), F.S., as an office or individual whose responsibilities include coordinating with the Office of Supplier Diversity for the interests of and providing assistance to small and minority business enterprises in dealing with governmental agencies and in developing proposals for changes in state agency rules.

¹⁵ Section 215.422(1), F.S.

¹⁶ Section 215.422(2), F.S.

¹⁷ See Section 55.03(1), F.S.

¹⁸ Section 215.422(3)(b), F.S.

independently owned and operated, that is not dominant within the business entity's industry, and that:

- Currently is, and for at least the previous 3 years has been, domiciled in the state.
- Has a workforce of 50 or fewer permanent full-time positions, whether employees, independent contractors, or other contract personnel.
- Has had, for at least the previous 3 years, average annual gross sales that do not exceed the following:
 - For a contractor licensed under chapter 489, F.S., \$5 million per year.
 - For a sole proprietorship performing contractual services within the scope of the proprietor's professional license or certification, \$500,000 per year.
 - For any other business entity, \$1 million per year.
- Currently has, and for at least the previous 3 years has had, together with its affiliates, a net worth that does not exceed \$5 million. For a sole proprietorship, the net worth limit of \$5 million includes both personal and business investments but does not include the proprietor's primary residence.

The definition of the term "small business" contains some of the criteria used to qualify as a "small business" in s. 288.703(6), F.S., of the Florida Small and Minority Business Assistance Act. The definition of "small business" contained in the bill is more specific, and, in some respects, inconsistent with the criteria to qualify as a small business under the Florida Small and Minority Business Assistance Act. Section 288.7031, F.S., provides, in part, that the definitions of 'small business,' . . . provided in s. 288.703 apply to the state and all political subdivisions of the state." This may create confusion as to the applicability of the term "small business."

Bundling

Description of Statutory Change

The bill requires agencies, to the maximum extent practicable, to structure agency contracts to facilitate competition by Florida small businesses, taking steps to eliminate obstacles to their participation and avoiding unnecessary contract bundling that may preclude small businesses' participation as prime contractors. Before issuing a solicitation for a bundled contract, an agency must conduct market research to determine whether contract bundling is necessary. If the agency determines that contract bundling is necessary, the agency must include in the solicitation a written summary of the agency's market research and a written analysis of the research that explains why contract bundling is necessary.

Implication of Statutory Change

State agencies will be required to conduct market research to determine whether bundling is necessary and justified. More than likely, this market research will increase costs associated with the overall procurement process. In addition, it is not clear whether small businesses will have an opportunity to protest a procurement that includes bundling. If this new claim of protest is ripe under this legislation, then agency costs will increase to defend the procurement process.

Some phrases in the bill, such as "not appropriate for award to a small business" on lines 35-36, "prime contractor" on lines 36-37, and "not dominant within the business entity's industry" on lines 39-40, are not defined, which could lead to uncertainty in applying the definition of

“contract bundling.” The bill does not provide for a specific entity to determine if a business entity is dominant within that business’s industry.

It is unclear whether an agency determination on contract bundling might constitute an agency action that will give rise to administrative rights for those affected by that determination, either as a protest of a contract solicitation or award, or as a decision which affects the substantial interests of a party.

The phrase “to the maximum extent practicable” contained in the contract bundling requirement for a state agency may present unintended consequences. The term “practicable” is not always synonymous with the best choice for the situation. Florida’s Attorney General has noted that the term “practicable” means “that which is performable, feasible, possible.”¹⁹ Florida courts have noted the terms “practicable” and “practical” do not have the same meaning.²⁰ The Florida 1st District Court of Appeal stated that “*practicable* means capable of being effected or accomplished, and *practical* means adapted to actual conditions”.²¹

Set-asides

Description of Statutory Change

The bill requires each agency to annually award to small businesses, either directly or indirectly as subcontractors, at least 35 percent of the total dollar amount of contracts awarded. Each contract awarded under s. 287.057, F.S. relating to procurement of commodities or contractual services, must require the vendor to use small businesses as subcontractors or subvendors. The percentage of funds, in terms of gross contract amount and revenues that must be expended for subcontracting with small businesses must be determined by the agency before the solicitation for the contract is issued; however, the contract may not allow a vendor to expend less than 35 percent of the gross contract amount for subcontracting with small businesses.

Each contract must include specific requirements for the timely payment of subcontractors by the prime contractor and specific terms and conditions applicable if a prime contractor does not pay a subcontractor within the time limits specified in the contract. The bill also requires that prompt payment by an agency to the prime contractor be made within 12 calendar days after receipt of a proper pay application or invoice for payment. Payment by a prime contractor of a subcontractor, subvendor, or sub-consultant must be made within 2 calendar days after receipt of a proper pay application or invoice for payment. Additionally, all contracts must include twice a month billing. Each contract must conform to these requirements by no later than July 1, 2019.

Implication of Statutory Change

State agencies may be required to conduct more procurements or require contractors to engage small businesses as subcontractors. With an increase in the number of procurements, the state agencies will incur greater costs. If the set aside thresholds are met through subcontracting, the overall costs of the services procured may increase, along with the aggregated profits and administrative costs of the contractors. The bill also doesn’t provide for a single entity to confirm

¹⁹ Op. Att’y Gen. Fla. 81-69 (1981).

²⁰ *Hoffman v. Laffitte*, 564 So.2d 170, 171 (Fla. 1st DCA 1990).

²¹ *Id.* at 172.

whether small businesses meet the definition supplied in the bill. As a result, individual agencies will need to make the determinations of whether a small business qualifies for the required set-asides. The Legislature may wish to consider whether it would be more efficient for a single entity to determine whether a business qualifies under the provisions of the bill, in order to avoid duplication of effort by businesses and agencies.

It is unclear whether lines 83-84 require the use of subvendors on all contracts, or only those contracts which would already use subcontractors.

Prompt Payment

Description of Statutory Change

The bill requires payment by an agency to prime contractor within 12 calendar days, and payment by prime contractor of a subcontractor, subvendor, or sub-consultant within 2 calendar days after receipt of a proper pay application or invoice.

Implication of Statutory Change

Section 287.0585(1), F.S., however, requires a contractor to make payments to subcontractors and suppliers within 7 working days of receipt of payment from a state agency for contractual services. If timely payment is not made to the subcontractor, penalty provisions apply.²² This modification may place a substantial financial burden on prime contractors doing business with the state and using subcontractors. Additionally, s. 215.422, F.S., provides processing time limits for invoices submitted by state agencies.²³

It is unclear whether this provision is intended to supersede the general provision of the prompt pay law and s. 287.0585(1), F.S. If it does supersede the current law provisions, the state and its prime contractors may have difficulty complying while continuing the same level of accountability prior to the payment of subcontractor invoices.

Bonding

Description of Statutory Change

Notwithstanding any provision of law, an agency, general contractor, or prime contractor may not require a vendor to post a bid bond, performance bond, or other surety for a contract that does not exceed \$500,000. This subsection does not apply to any requirement for posting a bond pending the protest of a solicitation; the protest of a rejected bid, proposal, or reply; or the protest of a contract award.

This provision might act to override some of the performance bond requirements currently specified in Florida law.

²² Section 287.0585(1), F.S., provides for “a penalty in the amount of one-half of 1 percent of the amount due, per day, from the expiration of the period allowed . . . for payment.” The penalty cannot exceed 15 percent of the outstanding balance owed. This section also authorizes attorney’s fees and costs as ordered by the court for proceedings brought under this section.

²³ Section 215.422(2), F.S., requires the Department of Financial Services to approve payment of an invoice no later than 10 days after an agency’s filing of an approved invoice.

Implications of Statutory Change

State agencies may bear greater risk for non-performance by the small businesses. Any uninsured default may increase the costs to the state agencies. This greater risk may be offset through the purchase of surety bonds by the state agencies on behalf of the small businesses. As a result, the state agency may have to choose between bearing the risk of default by the small business and incurring additional costs associated with contracting with the small business.

Reporting

The bill requires the rules ombudsman in the executive office of the Governor to establish a system to measure and report the use of small businesses in state contracting. This system must maintain information and statistics on small business participation, awards, dollar volume of expenditures, and other appropriate types of information to analyze progress in small businesses' access to state contracts and to monitor agency compliance with this section. An agency must report its compliance with the reporting system at least annually and at the request of the rules ombudsman. All agencies must cooperate with the rules ombudsman in establishing this reporting system. The rules ombudsman must also report agency compliance for the preceding fiscal year to the Governor and Cabinet, the President of the Senate, and the Speaker of the House of Representatives by February 1 of each year.

Section 2 provides an effective date of July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shares with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The establishment of state preference laws may potentially implicate the Equal Protection Clause and the Commerce Clause of the U.S. Constitution.

The Equal Protection Clause

The United States Constitution provides that “no State shall . . . deny to any person within its jurisdiction, the equal protection of law.”²⁴ The in-state preference provisions in this bill may constitute an equal protection violation. If such legislation is challenged, the court would most likely use a rational basis test to determine the constitutionality of the alleged discriminatory treatment.²⁵ 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.²⁶

The Commerce Clause

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

Courts have used a two-tiered analysis to determine whether a statutory scheme violates the Commerce Clause:

1. “If a statute ‘directly regulates or discriminates against interstate commerce, or [if] its effect is to favor in-state economic interests over out-of-state interests,’ the court may declare it unconstitutional as applied, without further inquiry.”²⁹
2. “. . . if the statute regulates evenhandedly and if it has only an indirect effect on interstate commerce, the court must determine whether the state’s interest is legitimate and, if so, whether the burden on interstate commerce exceeds the local benefits.”³⁰

However, 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.³¹ 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.³² 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.

²⁴ U.S. CONST. amend. XIV, § 1. See also FLA. CONST. art. I, s. 2.

²⁵ *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (stating that “unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification *rationality* further a legitimate state interest.”).

²⁶ *Id.*

²⁷ U.S. CONST. art. I, s. 8, cl. 3.

²⁸ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

²⁹ *National Collegiate Athletic Ass’n v. Associated Press*, 18 So. 3d 1201, 1211 (Fla. 1st DCA 2009) (citing *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-579 (1986)).

³⁰ *Id.* at 1211-1212 (citations omitted); See *Bainbridge v. Turner*, 311 F.3d 1104, 1108-1109 (11th Cir. 2002).

³¹ See *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983) (providing that a state may grant and enforce a preference to local residents when entering into construction projects for public projects); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984) (stating that “[t]he precise contours of the market-participant doctrine have yet to be established.”); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

³² *Id.*

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

None.

B. Private Sector Impact:

The bill may shift some contracting dollars towards smaller businesses. In addition, prime contractors may be required to pay subcontractors prior to receiving payment from the state. This may require prime contractors to borrow money to pay its subcontractors. Such costs may be passed onto the state through the overall costs of the project.

C. Government Sector Impact:

This bill may increase the costs incurred by state agencies in contracting for goods and services. State agencies may see costs increase in an indeterminate amount due to required market research and possible legal challenges to contract awards. State agencies may see costs increase in an indeterminate amount due to the increase in number of procurements. The Florida Department of Law Enforcement (FDLE) estimated that the impact of this bill would require one FTE position at a total cost of \$61,504.³³ If other agencies' costs for implementing this bill are similar to FDLE, the impact on the state could be substantial.

State agencies may also see costs increase in an indeterminate amount for the purchase of surety bonds on behalf of the small business or the risk of default of the small business.

It is unclear whether the rules ombudsman will incur additional costs to create the reporting system required by the bill.

VI. Technical Deficiencies:

The proposed payment requirements conflict with existing statutory provisions. Section 287.0585(1), F.S., requires payment by contractor within 7 working days after the contractor receives payment from the government entity. The bill requires payment within 12 or 2 days of the small business submitting an invoice to the government entity or contractor. Also, s. 215.422, F.S., requires prompt payment of an invoice no later than 10 days after an agency's filing of an approved invoice.

The proposed definition of "small business" contained in section 1 of the bill potentially creates a conflict with the definition of "small business" contained in the Florida Small and Minority Business Assistance Act.

³³ See FDLE Legislative Bill Analysis dated October 7, 2015 (a copy on file with the Governmental Oversight and Accountability Committee).

VII. Related Issues:

For clarity, the existing duties of the rules ombudsman specified in s. 288.7015, F.S., should be cross-referenced to the new duties specified by this bill.

Additionally, for agencies that use federal funding sources to pay for contracted services and goods, there may be requirements that do not permit subcontracting.

VIII. Statutes Affected:

This bill creates section 287.0577 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight Committee on January 11, 2016:

- Prompt payment by an agency to the prime contractor is required within 12 calendar days after receipt of a proper pay application or invoice; and
- Each contract must comply with the prompt payment provisions and the new “twice a month” billing requirement no later than July 1, 2019.

- B. **Amendments:**

None.