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:	SB 864
INTRODUCER:	Senator Smith
SUBJECT:	State Contracts
DATE:	January 29, 2016
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Little	McKay	CM	**Favorable**
2.	Peacock	McVaney	GO	**Pre-meeting**
3.			AGG	
4.			AP	

I. Summary:

SB 864 requires that any state agency contract for services exceeding $35,000 must specify that all call-center services provided pursuant to the contract must be staffed by persons located within the United States.

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

II. Present Situation:

Chapter 287, F.S., governs the public procurement of personal property and services. The Florida Department of Management Services (DMS) is responsible for overseeing state purchasing activity, including professional and commodity and contractual services needed to support agency activities.[1] The Division of State Purchasing, in the DMS, establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.[2]

Contracts for commodities or contractual services in excess of $35,000 must be procured through a competitive solicitation process.[3] Section 287.058, F.S., outlines the provisions and conditions that must be present in contractual agreements for competitively procured services. The section also provides that a contract may be renewed for a period of time upon satisfactory performance evaluations by the agency and subject to the availability of funds.[4]

[1] *See* ss. 287.032 and 287.042, F.S.
[2] Division of Purchasing rules are published under Chapter 60A of the Florida Administrative Code.
[3] Section 287.057(1), F.S., requires a competitive solicitation process for contracts that exceed the Category Two threshold. Category thresholds are listed in s. 287.017, F.S., which identifies contracts exceeding $35,000 as Category Two.
[4] Section 287.058(h), F.S.

Federal law also regulates procurement activities. The most well-known international agreements are the World Trade Organization Government Procurement Agreement (GPA), the North American Free Trade Agreement (NAFTA), and numerous other bilateral free trade agreements (FTA).[5] The expansion of international trade between the United States and foreign governments has resulted in many agreements that contain mutually beneficial government procurement obligations. In the spirit of promoting trade relations, governments have agreed to require that each party's goods and services be given the same treatment as domestic goods and services. As such, a government is prohibited from arbitrarily giving preferential treatment to domestic goods at the expense of foreign goods originating from a country where there is an enforceable and standing trade agreement espousing mutually beneficial government obligations.

World Trade Organization Government Procurement Agreement (GPA)

The agreement that established the World Trade Organization (WTO) came as a result of the Uruguay Rounds of Multilateral Trade Negotiations, which also produced a series of other international agreements, including the GPA.[6] As enumerated in the preamble, the GPA's objective is the expansion of world trade through three primary measures:

- Prohibition on discrimination based on national origin;
- Establishment of clear, transparent laws, regulations, procedures, and practices regarding governmental procurement; and
- Application of competitive procedural requirements related to notification, tendering (bidding), contract award, tender (bid) protest, etc.[7]

With respect to discrimination on the basis of national origin, Article III of the agreement expressly forbids the application of less favorable treatment to the products, services, and suppliers of other foreign parties than that which would be accorded to domestic products, services, and suppliers.[8] The agreement further provides that all parties will ensure that the laws, regulations, procedures, and practice regulating government procurement in their home state will be executed in a nondiscriminatory manner.[9]

[5] A list of the federal government's current procurement obligations under international agreements is available at https://ustr.gov/issue-areas/government-procurement (last visited Jan. 13, 2016).
[6] Signatory countries: Armenia, Canada, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, Slovenia, Bulgaria, Romania, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, and Chinese Taipei.
[7] 1994 Uruguay Round Agreement on Government Procurement, April 15, 1994, WTO Agreement, Annex 4(b) (hereinafter "GPA"), *and see* GPA Appendix I (United States), Annex 2 (discusses sub-central government entities, such as Florida), both available at https://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Jan. 13, 2016).
[8] *Id.*
[9] *Id.*

The State of Florida was one of 37 states to agree to procure in accordance with the GPA.[10] Presently, Florida's executive branch is covered under the GPA[11] for purchases that exceed $552,000 for commodities and services and $7,777,000 for construction services.[12]

Free Trade Agreements

In addition to the GPA, the United States has also entered into several bilateral free trade agreements13 and two multilateral free trade agreements,14 with the most highly recognized being NAFTA. Similar to the GPA, these agreements contain provisions that call for fair and non-discriminatory treatment of products, goods, and services by all state parties. When necessary, the United States has issued waivers to protect parties from discriminatory purchasing requirements found under existing law that would be contrary to the covenants embodied in such international agreements.15

III. Effect of Proposed Changes:

Section 1 amends s. 287.058, F.S., to require state agency contracts for services in excess of $35,000 to include a provision in the contractual document, stating that any call center services provided pursuant to the contract must be staffed by persons located within the United States.

Section 2 provides that the bill takes effect July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[10] In a letter dated November 7, 1991, Governor Lawton Chiles authorized coverage of Florida under the GATT/WTO Government Procurement Agreement.
[11] *See* Annex 2 (Sub-Central Government Entities), *supra*, note 7.
[12] 76 F.R. 76808-01, December 8, 2011.
[13] The United States has entered bilateral free trade agreements with the following countries: Australia, Bahrain, Canada, Chile, Israel, Morocco, Oman, Peru, and Singapore. This information is available at http://www.ustr.gov/trade-topics/government-procurement/ftas-government-procurement-obligations (last visited Jan. 13, 2016).
[14] NAFTA (member countries: United States, Mexico, and Canada) and DR-CAFTA (El Salvador, Dominican Republic, Guatemala, Honduras, Nicaragua, and Costa Rica). This information is available at https://ustr.gov/trade-agreements/free-trade-agreements (last visited Jan. 13, 2016).
[15] *See* 19 U.S.C. ss. 2511(a), 2532, 2533; *see also* Exec. Order No. 12260, available at http://www.archives.gov/federal-register/codification/executive-order/12260.html (last visited Jan. 13, 2016).

D. Other Constitutional Issues:

Requiring call-center services provided pursuant to a contract for services to be staffed by persons within the United States may potentially implicate the Supremacy Clause and the Commerce Clause of the U.S. Constitution.

The Federal Commerce Clause and Market Participant Exception

The Commerce Clause states that Congress shall have the power "to regulate commerce with foreign Nations, and among the several States."[16] This clause speaks to Congress' power to regulate both interstate and foreign commerce and acts as a negative constraint upon the states.[17]

The standard for determining whether state action violates the Commerce Clause requires courts to consider whether the state law facially discriminates against foreign commerce, whether the law interferes with the ability of the federal government to speak with one voice, or whether the law attempts to regulate conduct beyond its borders. For this reason, state laws affecting interstate and foreign commerce are reviewed with heightened scrutiny.[18]

The market participant exception may allow state laws to withstand such judicial review under particular circumstances. The exception permits a state to permissibly discriminate against non-residents so long as the state is acting as a "market participant," rather than a "market regulator."[19] 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.[20]

However, the law is unsettled regarding the applicability of the market participant exception to the Commerce Clause. Under the market participant exception, the United States Court of Appeals for the First Circuit upheld the validity of a Pennsylvania procurement statute that required suppliers contracting with a public agency for public works projects to provide products made of American steel. [21] Conversely, the United States Court of Appeals for the Third Circuit refused to extend the market participant exception and invalidated a Massachusetts law that placed restrictions on the ability of state agencies and authorities to purchase goods or services from individuals or companies that engaged in business with Burma.[22]

[16] U.S. *Const.* Art. I, s. 8, c. 3.
[17] The constraint is often referred to as the dormant Commerce Clause. *See Gibbons v. Ogden*, 22 U.S. 1 (1824).
[18] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446 (1970) ("When construing Congress' power to 'regulate commerce with foreign Nations,' a more extensive constitutional inquiry is required.").
[19] *See White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983) (providing that a state may grant and enforce a preference to local residents when entering into construction projects for public projects).
[20] *Id.*
[21] *Trojan Techs., Inc. v. Pennsylvania*, 916 F. 2d 903, 912 (3d Cir. 1990), *cert denied*, 501 U.S. 1212 (1991).
[22] *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 (1st Cir. 1999), *cert granted*, 528 U.S. 1018 (1999).

The Supremacy Clause

The Supremacy Clause grants Congress the power to preempt state law by deeming the United States Constitution and the laws of the United States as the "Law of the Land."[23] Preemption may occur under three primary circumstances: when Congress expressly preempts the state legislation, when Congress intends to occupy the field, or when a state law is in conflict with federal law.[24]

In *Crosby v. National Foreign Trade Council*, the United States Supreme Court unanimously concluded that a Massachusetts' law prohibiting state agencies from buying goods or services from companies doing business with Burma was unconstitutional.[25] At the time, the federal government was reassessing its foreign relations status with Burma and Congress had enacted a statute that imposed a set of mandatory and conditional sanctions on Burma. The existence of both the federal and state law created a direct conflict since the Massachusetts law banned all contracts between the state and companies doing business with Burma.

In 2013, using the formula prescribed under *Crosby*, the United States Court of Appeals for the 11th Circuit upheld a challenge to the constitutionality of an amendment to a provision under ch. 287, F.S.[26] The challenged law in *Odebrecht* required a company entering into a procurement contract for goods or services exceeding $1 million to certify that it did not have business operations in Cuba.[27] The Court held that federal law preempted the state law under the circumstances because the state law swept more broadly than federal legislation.[28]

Similarly, SB 864 may implicate foreign relations by requiring that state agency contracts in excess of $35,000 include a provision that all call-center services must be staffed by persons located within the United States. Notably different from the courts' reasoning in *Crosby* and *Odebrecht*, is that the language of this bill does not appear to be in direct conflict with any federal law. However, federal treaties and executive agreements supporting free trade may still provide a basis for preemption.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

SB 864 could limit the number of private companies qualified to enter into procurement contracts with the state.

[23] U.S. Const. art. VI, s. 1, c.2.
[24] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).
[25] *Id.* at 366.
[26] *Odebrecht Constr. v. Sec'y, Fla. DOT*, 715 F.3d 1268 (11th Cir. 2013).
[27] Section 287.135(5), F.S. (2012). *See also Odebrecht*, 715 F.3d at 1272.
[28] *Id.* at 1281.

C. Government Sector Impact:

SB 864 could have fiscal implications if the cost of domestic labor is higher than the cost of labor in foreign markets.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 287.058 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.