

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 Transportation

BILL: SB 544

INTRODUCER: Senator Brandes

SUBJECT: Procurement Procedures

DATE: December 5, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Price	Miller	TR	Favorable
2.			ATD	
3.			AP	

I. Summary:

SB 544 requires transportation-related entities created under Chapters 343, 348, or 349, F.S., to use the uniform rules of procedure adopted pursuant to s. 120.54(5), F.S., for resolution of protests arising from certain contract solicitations or award processes. The uniform rules would apply to any procurement exceeding the Category Five threshold amount (\$325,000), or if the term of the procurement, including the number of days specified in the initial contract and the number of days specified in any authorized contract extension or renewal, exceeds 365 days.

The identified entities and bid protesters may incur some administrative and legal expenses associated with protests of the specified procurements. With respect to the identified entities, such costs may increase or decrease. However, because the existing processes used by such entities, and their associated costs, are unknown, the amounts of any increases or decreases is unknown. The amount of such expenses is also dependent on the number of bid protests and their complexity and is therefore unknown.

The Division of Administrative Hearings (DOAH) may incur insignificant expenses for conducting expedited hearings and issuing recommended orders.

See Section V., Fiscal Impact Statement, for details.

The bill takes effect July 1, 2018.

II. Present Situation:

Entities Created Under Chapters 343, 348, and 349, F.S.

The following entities are created under Chapter 343, F.S.:

- Northeast Florida Regional Transportation Commission: The Commission is charged with improving mobility and expanding multimodal transportation operations for persons and freight throughout the six-county North Florida region, including Baker, Clay, Duval, Nassau, Putnam, and St. John Counties.¹
- South Florida Regional Transportation Authority: The Authority is granted the right to own, operate, maintain, and manage a transit system in the tri-county area of Broward, Miami-Dade, and Palm Beach Counties,² known as Tri-Rail.
- Central Florida Regional Transportation Authority: The Authority is granted the right to own, operate, maintain, and manage a public transportation system in Seminole, Orange, and Osceola Counties,³ known as Lynx.
- Northwest Florida Transportation Corridor Authority: The Authority is charged with improving mobility on the U.S. 98 corridor⁴ in the Northwest Florida counties of Escambia, Santa Rosa, Okaloosa, Walton, Bay, Gulf, Franklin, and Wakulla, to enhance traveler safety, identify and develop hurricane evacuation routes, promote economic development along the corridor, and implement transportation projects to alleviate current or anticipated traffic congestion.⁵
- Tampa Bay Area Regional Transit Authority: The Authority is charged with planning, implementing, and operating mobility improvements and expansions of multimodal transportation options for passengers and freight throughout the region of Hernando, Hillsborough, Manatee, Pasco, and Pinellas Counties; and with producing a regional transit development plan, integrating the transit development plans of participant counties, to include a prioritization of regionally significant transit projects and facilities.⁶

The following entities are created under Chapter 348, F.S.:

- Miami-Dade Expressway Authority: Created pursuant to the provisions of Part I of Chapter 348, F.S., the Authority is granted the right to acquire, hold, construct, improve, maintain, operate, and own an expressway system in Miami-Dade County.^{7, 8}

¹ Part I of Chapter 343, F.S., specifically, s. 343.1004(1), F.S.

² Part II of Chapter 343, F.S., specifically, s. 343.54(1)(a), F.S.

³ Part III of Chapter 343, F.S., specifically, s. 343.64(1)(a), F.S.

⁴ Defined in s. 343.805(9), F.S., to mean U.S. Highway 98 and any feeder roads, reliever roads, connector roads, bridges, and other transportation appurtenances, existing or constructed in the future, that support U.S. Highway 98 in the identified counties.

⁵ Part IV of Chapter 343, F.S., specifically, s. 343.82(1), F.S.

⁶ Part V of Chapter 343, F.S., specifically s. 343.922(1), F.S.

⁷ Part I of Chapter 348, F.S., the Florida Expressway Authority Act, authorizes any county or two or more contiguous counties within a single Florida Department of Transportation district, by resolution adopted by the board of county commissioners, to form an expressway authority. The Miami-Dade County Commission adopted ordinance 94-215 in 1994 creating the Miami-Dade County Expressway Authority, which is the only expressway authority created under Part I of Chapter 348, F.S.

⁸ Section 348.0004(12)(a), F.S.

- Tampa-Hillsborough County Expressway Authority: The Authority is granted the power to construct, reconstruct, improve, extend, repair, maintain and operate an expressway system in the metropolitan area of the City of Tampa or within any area of Hillsborough County.⁹
- Central Florida Expressway Authority: The Authority is granted the right to acquire, hold, construct, improve, maintain, operate, own, and lease the Central Florida Expressway System, serving Orange, Seminole, Lake, Brevard, and Osceola Counties.¹⁰
- Santa Rosa Bay Bridge Authority: The Authority is granted the right to acquire, hold, construct, improve, maintain, operate, own, and lease a bridge between Red Fish Point and Garcon Point in Santa Rosa County, known as the Garcon Point Bridge.¹¹
- Osceola County Expressway Authority: The Authority is granted the right to acquire, hold, construct, improve, maintain, operate, and own an expressway system in Osceola County.¹²

The following entity is created under Chapter 349, F.S.:

- Jacksonville Transportation Authority: The Authority is granted the right to acquire, hold, construct, improve, maintain, operate, own, and lease the Jacksonville Expressway System in the Jacksonville, Duval County, metropolitan area.¹³

The Administrative Procedure Act (APA or Act)

Located in Chapter 120, F.S., the APA “provides uniform procedures for the exercise of specified authority.”¹⁴ It sets up “a comprehensive administrative process by which agencies exercise the authority granted by the Legislature while offering opportunities for citizen involvement.” It also provides a “process [that] subjects state agencies to a uniform procedure in enacting rules and issuing orders and allows citizens to challenge an agency’s decision.”¹⁵

The Act’s central purpose is “to provide that basic fairness that should surround all governmental activity, such as:

- (1) The opportunity for adequate and full notice of agency activities;
- (2) The right to present viewpoints and to challenge the views of others;

⁹ Part II of Chapter 348, F.S., specifically, s. 348.53, F.S.

¹⁰ Part III of Chapter 348, F.S., specifically, s. 348.754, F.S.

¹¹ Part IV of Chapter 348, F.S., specifically s. 348.968, F.S. According to the Florida Transportation Commission’s Transportation Authority Monitoring and Oversight Report for 2016, the Authority last met in June of 2014 and is currently inactive, with toll operations provided by Florida’s Turnpike Enterprise and maintenance performed by the Department of Transportation’s District Three. See the Commission’s report at p. 71, available at:

<http://www.ftc.state.fl.us/documents/reports/TAMO/FY2016OversightReport.pdf>. (Last visited November 7, 2017.)

¹² Part V of Chapter 348, F.S., specifically s. 348.9953, F.S. The Osceola County Expressway Authority Law is repealed “on the same date that the Osceola County Expressway System is transferred to the Central Florida Expressway Authority,” per ch. 2014-171, L.O.F. According to the Transportation Commission’s 2016 Monitoring and Oversight Report, the Osceola County Expressway System will be transferred to the Central Florida Expressway Authority sometime after December 31, 2018. The Authority transferred the lead for its 2040 Master Plan development to the Central Florida Expressway Authority, which began feasibility studies on the unbuilt Master Plan projects in April of this year. *Supra* note 11 at p. 7. Section 348.9961, F.S., provides that if, before January 2, 2020, the Authority has not encumbered any funds to further its authorized purposes and powers, the Authority is dissolved.

¹³ Chapter 349, F.S., specifically s. 349.04.

¹⁴ Section 120.515, F.S.

¹⁵ See the Joint Administrative Procedures Committee’s publication, *A Primer on Florida’s Administrative Procedure Act*, available at: <http://www.japc.state.fl.us/Documents/Publications/PocketGuideFloridaAPA.pdf>. (Last visited November 3, 2017.)

- (3) The right to develop a record which is capable of court review;
- (4) The right to locate precedent and have it applied; and
- (5) The right to know the factual bases and policy reasons for agency action.”¹⁶

Agencies subject to the APA are required to use the uniform rules of procedure adopted by the Administration Commission establishing procedures for each agency subject to the Act, unless the Administration Commission grants an exception. Those procedures specifically include uniform rules for the filing of notice of protests and formal written protests.¹⁷

“Agencies” Subject to the APA

The APA defines “agency” to mean the following officers or governmental entities:¹⁸

- The Governor; each state officer and state department, and each departmental unit described in s. 20.04, F.S.; the Board of Governors of the State University System; the Commission on Ethics; the Fish and Wildlife Conservation Commission; a regional water supply authority; a regional planning agency; a multicounty special district, but only if a majority of its governing board is comprised of nonelected persons; educational units; and each entity described in chapters 163, 373, 380, 582, and s. 186.504, F.S.;
- Each officer and governmental entity in the state having statewide jurisdiction or jurisdiction in more than one county; and
- Each officer and governmental entity in the state having jurisdiction in one county or less than one county, to the extent they are expressly made subject to chapter 120, F.S., by general or special law or existing judicial decisions.

However, among other entities, an expressway authority pursuant to chapter 348, F.S., or any transportation authority or commission under chapters 343 or 349, F.S., is expressly excluded from the definition of “agency” and is therefore excluded from the requirements of the APA, including s. 120.57(3), F.S., containing procedures specifically applicable to protests to contract solicitations or awards; and from the uniform rules of procedure adopted by the Administration Commission¹⁹ pursuant to s. 120.54(5), F.S., including Chapter 28-110, F.A.C., relating specifically to bid protests.

Bid Protest Procedures

Aside from the general provisions of Chapter 120, F.S., current law provides additional procedures specifically applicable to protests to contract solicitations or awards. Section 120.57(3), F.S., requires agencies subject to that chapter to use the uniform rules, which must provide at least that:

- The agency shall provide notice of a decision or intended decision concerning a solicitation, contract award, or exceptional purchase by electronic posting. The notice must include the following statement: “Failure to file a protest within the time prescribed in s. 120.57(3),

¹⁶ 2 Fla. Jur 2d *Administrative Law*, s. 1 (2014), *citations omitted*. Section 120.52(2), F.S., defines “agency action” to mean the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order, including any denial of a request to initiate rulemaking under s. 120.52(7), F.S.

¹⁷ Section 120.54(5), F.S. and specifically s. 120.54(5)(b)3., F.S.

¹⁸ If they are acting pursuant to powers other than those derived from the constitution.

¹⁹ The Governor and Cabinet compose the Administration Commission, created under s. 14.202, F.S.

Florida Statutes, or failure to post the bond²⁰ or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes.”²¹

- Any person adversely affected by the decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision. If the protest is to the terms, conditions, and specifications contained in a solicitation, the notice shall be filed in writing within 72 hours after the posting of the solicitation. A formal written protest shall be filed within 10 days after the date the notice of protest is filed, particularly stating the facts and law upon which the protest is based.²² Saturdays, Sundays, and holidays are excluded from the computation of the 72-hour time period.
- Upon receipt of a timely filed formal written protest, the agency is required to stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances requiring the continuance of the solicitation or contract award process without delay, to avoid an immediate and serious danger to the public health, safety, or welfare.²³
- The agency is required to provide an opportunity to resolve the protest by mutual agreement between the parties within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of a formal written protest.
 - If the subject of a protest is not resolved within the specified 7 days, and if there is no disputed issue of material fact, an informal proceeding must be conducted in accordance with s. 120.57(2), F.S., and applicable agency rules before a person whose qualifications have been prescribed by rules of the agency.
 - If the protest is not resolved within the specified 7 days, and if there is a disputed issue of material fact, the agency is required to refer the protest to the DOAH for a formal hearing in accordance with s. 120.57(1), F.S.²⁴
- Upon receipt of a referred formal written protest, DOAH must expedite the hearing and assign an administrative law judge, who must commence a hearing within 30 days after receipt of the protest and enter a recommended order within 30 days after the hearing or within 30 days after receipt of the hearing transcript by the judge, whichever is later. Each party must be allowed 10 days in which to submit written exceptions to the recommended

²⁰ Chapter 28-110.005, F.A.C., describes required bid protest bonds, when bonds are not required, which bonds must be filed with the formal written protest or within the 10-day period allowed for filing the formal written protest, and sets out the bond form. If a required bond is not posted, the rule requires the agency to dismiss the petition. The rule also addresses disposition of the bond at the conclusion of the proceeding or any appellate proceeding.

²¹ Section 120.57(3)(a), F.S. Chapter 28-110.003(1), F.A.C., supplements the statute by requiring the notice to be addressed to the office that issued the solicitation or made a decision intended to be protested, to identify the solicitation by number and title or any other language that enables identification, and to state that the person intends to protest the decision. If a bond is required, the rule prohibits filing the bond with the notice unless otherwise required by law.

²² Section 120.57(3)(b), F.S. Chapter 28-110.00(2) and (3), F.A.C., supplement the statute by prohibiting the filing of a notice of protest before the 72-hour period begins. It begins upon electronic posting of a decision or intended decision. The notice must be received before the 72-hour period expires and must be filed with the agency clerk unless otherwise designated by the solicitation. The 72-hour period is not extended by service of the notice of protest by mail. Chapter 28-110.0004, F.A.C., describes a “formal written protest,” sets out the form of a petition, requires inclusion of specified information, and specifies conditions under which the formal written protest will also constitute the notice of protest, after which all time limits relative to formal written protests apply.

²³ Section 120.57(3)(c), F.S.

²⁴ Section 120.57(3)(d), F.S.

order, and a final order must be entered by the agency within 30 days of the entry of a recommended order. These provisions may be waived upon stipulation by all parties.²⁵

Research suggests that some of the statutorily created entities impacted by this bill adhere to some extent to the provisions of the APA, but because these entities are not currently subject to the bid protest procedures of Chapter 120, F.S., those protesting any such entity's solicitation or contract award decisions must directly seek judicial remedies.

Purchasing Category Threshold Amounts

Chapter 287, F.S., regulates state agency procurement of personal property and services. Agencies may use a variety of procurement methods, depending on factors such as 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 (ITB)," 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 (RFP)," 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 (ITN)," 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.²⁶

With respect to cost, section 287.017, F.S., sets out five purchasing categories, the thresholds of which may trigger a required contract procurement method. The categories are:

- CATEGORY ONE: \$20,000.
- CATEGORY TWO: \$35,000.
- CATEGORY THREE: \$65,000.
- CATEGORY FOUR: \$195,000.
- CATEGORY FIVE: \$325,000.

III. Effect of Proposed Changes:

Section 1 amends s. 120.57(3), F.S., requiring transportation-related entities created under chapters 343, 348, or 349, F.S., to use the uniform rules of procedure for resolution of protests arising from the contract solicitation or award process for any procurement exceeding the Category Five threshold amount (\$325,000), or if the term of the procurement, including the number of days specified in the initial contract and the number of days specified in any authorized contract extension or renewal, exceeds 365 days.

²⁵ Section 120.57(3)(e), F.S.

²⁶ See ss. 287.012(6) and 287.057, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Bid protesters may incur administrative and legal expenses associated with protests of the specified procurements; *e.g.*, notice and bond requirements, potential settlement negotiations, participating in formal and informal hearings, and submitting written exceptions to DOAH recommended orders. The amount of such expenses is dependent on the number of bid protests and their complexity and is therefore unknown.

C. Government Sector Impact:

The identified entities may incur administrative and legal expenses associated with protests of the specified procurements; *e.g.*, notice requirements, potential settlement negotiations, conducting and participating in informal hearings, participating in formal hearings, submitting exceptions to recommended orders, issuing final orders, and defending potential appeals. The extent to which the identified entities incur expenses for their existing procurement protest processes is unknown. Because the costs associated with the entities' existing protest processes are unknown, whether these entities will experience an increase or a decrease in such costs is unknown. The amount of such expenses is also dependent on the number of bid protests and their complexity and is therefore unknown.

The DOAH may incur expenses for conducting expedited hearings and issuing recommended orders, which are expected to be insignificant.²⁷

²⁷ Telephone conversation with DOAH staff, November 8, 2017.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill amends the following section of the Florida Statutes: 120.57.

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.