

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 Appropriations Subcommittee on General Government

BILL: SB 780

INTRODUCER: Senator Brandes

SUBJECT: Prohibition Against Contracting with Scrutinized Companies

DATE: February 7, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Peacock</u>	<u>Caldwell</u>	<u>GO</u>	Favorable
2.	<u>Davis</u>	<u>Betta</u>	<u>AGG</u>	Pre-meeting
3.	_____	_____	<u>AP</u>	_____

I. Summary:

SB 780 prohibits a company that is on the Scrutinized Companies that Boycott Israel List or that is engaged in a boycott of Israel from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local government entity for goods or services of any amount.

The bill also requires a contract with an agency or local governmental entity for goods or services of any amount entered into or renewed on or after July 1, 2018, to contain a provision that allows for the termination of the contract at the option of the awarding body if the company has been placed on the Scrutinized Companies that Boycott Israel List or is engaged in a boycott of Israel.

An agency or local governmental entity is authorized to make a case-by-case exception to the prohibition of contracting with companies that are on the Scrutinized Companies that Boycott Israel List or that is engaged in a boycott of Israel if certain conditions are met.

Additionally, the bill requires a company to provide certification that it is not engaging in a boycott of Israel before submitting a bid or entering into or renewing a contract with an agency or local governmental entity.

The fiscal impact on state and local governments is indeterminate.

The bill takes effect July 1, 2018.

II. Present Situation:

Procurement of Personal Property and Services

Procurement of Personal Property and Services by State Agencies

Chapter 287, F.S., regulates state agency¹ procurement of personal property and services.² The Department of Management Services (DMS) is responsible for overseeing state purchasing activity including professional and contractual services³ as well as commodities needed to support agency activities.⁴ The DMS assists state agencies and eligible users by providing uniform commodity and contractual service procurement policies, rules, procedures, and forms.⁵

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 methods include the following:

- Single source contracts,⁶ 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,⁷ which are used when an agency determines that standard services or goods will meet its needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposals (RFP),⁸ 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),⁹ 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.

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 Personal property” is not independently defined for purposes of ch. 287, F.S., but the chapter title for Chapter 287, F.S., is “Procurement of Personal Property and Services.” Additionally, the definition of “commodity” in s. 287.012(5), F.S., is “any of the various supplies, materials, goods, merchandise, food, equipment, information technology, and other personal property, including a mobile home, trailer, or other portable structure that has less than 5,000 square feet of floor space, purchased, leased, or otherwise contracted for by the state and its agencies.” This definition is used in Part I of Ch. 287, F.S., “Commodities, Insurance, and Contractual Services.”

³ As defined in s. 287.012(8), F.S. “contractual service” means the rendering by a contractor of its time and effort rather than the furnishing of specific commodities. The term applies only to those services rendered by individuals and firms who are independent contractors, and such services may include, but are not limited to, evaluations; consultations; maintenance; accounting; security; management systems; management consulting; educational training programs; research and development studies or reports on the findings of consultants engaged thereunder; and professional, technical, and social services. The term does not include a contract for the furnishing of labor or materials for the construction, renovation, repair, modification, or demolition of a facility, building, portion of building, utility, park, parking lot, or structure or other improvement to real property entered into pursuant to chapter 255 and rules adopted thereunder.

⁴ See ss. 287.032 and 287.042, F.S.

⁵ Section 287.032(2), F.S.

⁶ Section 287.057(3)(c), F.S.

⁷ Section 287.057(1)(a), F.S.

⁸ Section 287.057(1)(b), F.S.

⁹ Section 287.057(1)(c), F.S.

Criteria used to evaluate proposals received pursuant to a RFP must include, but are not limited to:

- Price;
- Renewal price, if renewal is contemplated;
- Consideration of the total cost for each year of the contract, including renewal years, as submitted by the vendor; and
- Consideration of prior relevant experience of the vendor.¹⁰

In ITNs, the criteria to be used in determining the acceptability of the reply and guiding the selection of the vendors with which the agency will negotiate must be specified in the ITN. The evaluation criteria must also include consideration of prior relevant experience of the vendor.¹¹

Contracts for commodities or contractual services in excess of \$35,000 must be procured utilizing a competitive solicitation process.¹² However, specified contractual services and commodities, such as artistic services and legal services, are not subject to competitive solicitation requirements.¹³

State Term Contracts

Current law authorizes the DMS to establish purchasing agreements and procure state term contracts for commodities and contractual services using the procurement methods described above.¹⁴ These contracts are generally developed for purchases of commodities and services that are ongoing and common to multiple state agencies. State agencies are required to use state term contracts when they are available.¹⁵ Other eligible users,¹⁶ such as counties, cities, and school districts, may also utilize state term contracts.¹⁷

Procurement of Personal Property and Services by Local Governments

Local governments are not subject to the provisions of ch. 287.057, F.S., which prescribe methods for agencies' procurement of commodities or contractual services.¹⁸ 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.¹⁹

¹⁰ Section 287.057(1)(b)3., F.S.

¹¹ Section 287.057(1)(c)3., F.S.

¹² 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.

¹³ See s. 287.057(3)(e), F.S.

¹⁴ Section 287.042(2)(a), F.S.

¹⁵ Section 287.056(1), F.S.

¹⁶ See s. 287.012(11), F.S., and Rule 60A-1.001(2), F.A.C.

¹⁷ Section 287.056(1), F.S.

¹⁸ See ss. 287.012(1), F.S.

¹⁹ In the absence of specific constitutional or statutory requirements, a public agency has no obligation to establish a bidding procedure and may contract in any manner not arbitrary or capricious. *Volume Servs. Div. of Interstate United Corp. v. Canteen Corp.*, 369 So. 2d 391 (Fla. 2d DCA 1979).

State and Local Government Procurement of Certain Professional Services

In 1972, Congress passed the Brooks Act (Public Law 92-582), which codified Qualifications-Based Selection (QBS) as the federal procurement method for architect and engineering services. The QBS process entails first soliciting statements of qualifications from licensed architectural and engineering providers, selecting the most qualified respondent, and then negotiating a fair and reasonable price. The vast majority of states currently require a QBS process when selecting the services of architectural and engineering professionals.²⁰

In 1973, the Florida Legislature enacted the Consultants' Competitive Negotiation Act (CCNA),²¹ which specifies the necessary procedures when procuring professional services²² by an agency.²³

Currently, the CCNA, codified in s. 287.055, F.S., specifies the process that state and local government agencies must follow when procuring the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper. The CCNA requires that state agencies publicly announce, in a consistent and uniform manner, each occasion when professional services must be purchased for one of the following:²⁴

- A project, when the agency estimates the basic construction cost to exceed \$325,000.
- A planning or study activity, when the fee for professional services exceeds \$35,000.

The public notice must provide a general description of the project and describe how the interested consultants may apply for consideration.

The CCNA provides a two-phase selection process.²⁵ In the first phase, the “competitive selection,” the agency evaluates the qualifications and past performance of no fewer than three bidders. The agency selects the bidders, ranked in order of preference, and considers the most highly qualified to perform the required services. The CCNA requires consideration of several factors in determining the most highly qualified bidders.²⁶

²⁰ Forty-six states use this process. American Council of Engineering Companies, Qualifications-Based Selection Resource Center, available at <http://www.acec.org/advocacy/qbs/> (last visited Jan. 11, 2018).

²¹ Chapter 73-19, L.O.F.

²² Section 287.055(2)(a), F.S., defines “professional services” as those within the scope of the practice of architecture, professional engineering, landscape architecture, or registered surveying and mapping, as defined by the laws of the state, or those performed by any architect, professional engineer, landscape architect, or registered surveyor and mapper in connection with his or her professional employment or practice.

²³ Section 287.055(2)(b), F.S., defines “agency” as the state, a state agency, a municipality, a political subdivision, a school district, or a school board. The term “agency” does not extend to a nongovernmental developer that contributes public facilities to a political subdivision under s. 380.06, F.S., or ss. 163.3220-163.3243, F.S.

²⁴ Section 287.055(3)(a)1., F.S.

²⁵ Sections 287.055(4) and (5), F.S.

²⁶ Section 287.055(4)(b), F.S., requires agencies to consider the following factors: the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the firms; and, the volume of work previously awarded to each firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms.

The CCNA prohibits the agency from requesting, accepting, and considering, during the competitive selection process, proposals for the compensation to be paid.²⁷

Section 287.055(2)(d), F.S., defines the term “compensation” to mean the amount paid by the agency for professional services regardless of whether stated as compensation or as other types of rates.

In the second phase, the “competitive negotiation,” the agency negotiates compensation with the most qualified of the minimum three selected firms for professional services at compensation, which the agency determines, is “fair, competitive, and reasonable.”²⁸ If the agency cannot negotiate a satisfactory contract, the agency must formally terminate negotiations with that firm and must then negotiate with the second most qualified firm.²⁹ The agency must negotiate with the third most qualified firm if the negotiation with the second most qualified firm fails to produce a satisfactory contract.³⁰ If the agency cannot negotiate a satisfactory contract with any of the three selected, the agency must select additional firms in order of their competence and qualifications and continue negotiations until it reaches a contract.³¹ Once negotiations with a firm are terminated, the agency cannot resume negotiations with that firm for the project.

In October 2011, the Attorney General opined that local governments could not create a hybrid procurement process for awarding projects and are limited to utilizing statutorily defined procedures.³²

Procurement of Construction Services for Public Property and Publicly Owned Buildings

Chapter 255, F.S., specifies the procedures to be followed in the procurement of construction services for public property and publicly owned buildings. Section 255.29, F.S., requires the DMS to establish, by rule,³³ the following construction contract procedures for:

- Determining the qualifications and responsibility of potential bidders prior to advertisement for and receipt of bids for building construction contracts, including procedures for the rejection of bidders who are reasonably determined from prior experience to be unqualified or irresponsible to perform the work required by a proposed contract.
- Awarding each state agency construction project to the lowest qualified bidder. Additionally, the DMS must provide procedures for cases in which the DMS declares a valid emergency to exist, which would necessitate the waiver of the rules governing the award of state construction contracts to the lowest qualified bidder.
- Governing negotiations for construction contracts and modifications to contract documents when the DMS Secretary determines that such negotiations are in the best interest of the state.

²⁷ *Id.*

²⁸ Section 287.055(5)(a), F.S.

²⁹ Section 287.055(5)(b), F.S.

³⁰ *Id.*

³¹ Section 287.055(5)(c), F.S.

³² Op. Att’y Gen. Fla. 2011-21 (2011).

³³ See Chapter 60D-5, F.A.C., that establishes the procedures for s. 255.29, F.S. Rule 60D-5.001, F.A.C., requires procedures be followed in advertising for bids for construction contracts; in determining the eligibility of potential bidders to submit proposals for construction contracts; in awarding construction contracts; for waiver of non-material bid deviations; for rejection of bids; for disqualification of contractors; in requesting authority to negotiate contracts, and in negotiating contracts.

- Entering into performance-based contracts for the development of public facilities when the DMS determines the use of such contracts to be in the best interest of the state.

These procedures must include, but are not limited to:³⁴

- Prequalification of bidders;
- Criteria to be used in developing requests for proposals which may provide for singular responsibility for design and construction, developer flexibility in material selection, construction techniques, and application of state-of-the-art improvements;
- Accelerated scheduling, including the development of plans, designs, and construction simultaneously; and
- Evaluation of proposals and award of contracts considering such factors as price, quality, and concept of the proposal.

The state must competitively bid contracts for construction projects that it projects to cost in excess of \$200,000.³⁵ County, municipal, or other political subdivision contracts for construction projects that are projected to cost in excess of \$200,000 also must be bid competitively.³⁶ Counties, municipalities, special districts, or other political subdivisions seeking to construct or improve a public building must bid the project competitively if the projected cost is in excess of \$300,000.³⁷

The solicitation of competitive bids or proposals for any state construction project with anticipated costs of more than \$200,000 must be advertised publicly in the Florida Administrative Register (FAR) at least 21 days prior to the established bid opening.³⁸ If the state construction project is projected to exceed \$500,000, the advertisement must be published in the FAR at least 30 days prior to the bid opening and at least once in a newspaper of general circulation in the county where the project is located 30 days prior to the bid opening, and at least five days prior to any scheduled prebid conference.³⁹

Scrutinized Companies

Current law limits state and local governments from contracting for goods or services with scrutinized companies⁴⁰ and companies that are engaged in a boycott of Israel.⁴¹ Specifically, companies on the Scrutinized Companies that Boycott Israel List⁴² or engaged in a boycott of Israel⁴³ or on the Scrutinized Companies with Activities in Sudan List or on the Scrutinized

³⁴ Section 255.29(4)(a)-(d), F.S.

³⁵ Section 255.0525(1), F.S. Also, see Rules 60D-5.002(2) and 60D-5.0073, F.A.C.

³⁶ Section 255.0525(2), F.S.

³⁷ Section 255.20(1), F.S. (Special district as defined in ch. 189, F.S.). For electrical work, local governments must competitively award projects estimated to cost more than \$75,000 to an appropriately licensed contractor.

³⁸ Section 255.0525(1), F.S.

³⁹ *Id.* Similar publishing provisions apply to construction projects projected to cost more than \$200,000 for counties, municipalities, and other political subdivisions. See Section 255.0525(2), F.S.

⁴⁰ Sections 215.473(1)(v) and 215.4725(1)(f), F.S.

⁴¹ See s. 287.135, F.S.

⁴² The Israel List is a list of companies that boycott Israel that is compiled by the State Board of Administration. Section 215.4725(2), F.S.

⁴³ The term “boycott of Israel” means refusing to deal, terminating business activities, or taking other actions to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a

Companies with Activities in the Iran Petroleum Energy Sector List or engaged in business operations in Cuba or Syria are prohibited from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity⁴⁴ for goods or services of \$1 million or more.⁴⁵ In addition, any contract with an agency or local governmental entity for goods or services of \$1 million or more, entered into or renewed on or after specified dates, must contain a provision that allows for the termination of the contract, at the option of the awarding body, if the company is found to have submitted a false certification or is engaged in a boycott of Israel or has been placed on the Scrutinized Companies that Boycott Israel List or the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List or engaged in business operations in Cuba or Syria.⁴⁶

A company that submits a bid or proposal for, or that otherwise proposes to enter into or renew a contract with an agency or local governmental entity for goods or services of \$1 million or more must certify that it is not participating in a boycott of Israel, on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List, or that it does not have business operations in Cuba or Syria.⁴⁷ The certification must be submitted at the time a bid or proposal is submitted or before a contract is executed or renewed.⁴⁸

If an agency or local governmental entity determines that a company has submitted a false certification, it must provide the company with written notice, and the company has 90 days to respond in writing to such determination.⁴⁹ If the company fails to demonstrate that the determination of false certification was made in error, the awarding body must bring a civil action against the company.⁵⁰ If a civil action is brought and the court determines that the company submitted a false certification, the company must pay all reasonable attorney fees and costs (including costs for investigations that led to the finding of false certification).⁵¹ In addition, a civil penalty equal to the greater of \$2 million or twice the amount of the contract for which the false certification was submitted must be imposed.⁵² The company is ineligible to bid on any contract with an agency or local governmental entity for three years after the date the agency or local governmental entity determined that the company submitted a false

discriminatory manner. A statement by a company that it is participating in a boycott of Israel or in Israeli-controlled territories, or that it has initiated a boycott in response to a request for a boycott of Israel or in compliance with, or in furtherance of, calls for a boycott of Israel, may be considered by the State Board of Administration to be evidence that a company is participating in a boycott of Israel. The term does not include restrictive trade practices or boycotts fostered or imposed by foreign countries against Israel. Sections 287.135(1)(b) and 215.4725(1)(a), F.S.

⁴⁴ The term "local governmental entity" means a county, municipality, special district, or other political subdivision of the state. Section 287.135(1)(d), F.S.

⁴⁵ Section 287.135(2), F.S.

⁴⁶ Section 287.135(3), F.S.

⁴⁷ Section 287.135(5), F.S.

⁴⁸ *Id.*

⁴⁹ Section 287.135(5)(a), F.S.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Section 287.135(5)(a)1., F.S.

certification.⁵³ A civil action to collect the penalties must commence within three years after the date the false certification is submitted.⁵⁴

An agency or local governmental entity is authorized to make a case-by-case exception to the contracting prohibition for a company on the Israel List if all of the following occur:

- The boycott of Israel was initiated before October 1, 2016.
- The company certifies in writing that it has ceased its boycott of Israel.
- The agency or local governmental entity determines that it is in the best interest of the state or local community to contract with the company.
- The company has adopted, has publicized, and is implementing a formal plan to cease scrutinized business operations⁵⁵ and to refrain from engaging in any new scrutinized business operations.⁵⁶

An agency or local governmental entity is also authorized to make an exception to the contracting prohibition for a company on the Israel List if one of the following occurs:

- The local governmental entity makes a public finding that, absent such an exemption, the local governmental entity would be unable to obtain the goods or services for which the contract is offered.
- For a contract with an executive agency, the Governor makes a public finding that, absent such an exemption, the agency would be unable to obtain the goods or services for which the contract is offered.
- For a contract with an office of a state constitutional officer other than the Governor, the state constitutional officer makes a public finding that, absent such an exemption, the office would be unable to obtain the goods or services for which the contract is offered.⁵⁷

III. Effect of Proposed Changes:

Section 1 amends section 287.135, F.S., to prohibit a company that is on the Scrutinized Companies that Boycott Israel List or that is engaged in a boycott of Israel from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local government entity for goods or services of any amount, rather than only contracts of \$1 million or more.

The bill updates the time frames for contracts with an agency or local governmental entity for goods or services of \$1 million or more entered into or renewed after October 1, 2016, through June 30, 2016, and after July 1, 2018, that must contain a provision that allows for the termination of the contract, at the option of the awarding body, if the company is found to have submitted a false certification or has been placed on the Scrutinized Companies with Activities in Sudan List or the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector List or engaged in business operations in Cuba or Syria.

⁵³ Section 287.135(5)(a)2., F.S.

⁵⁴ Section 287.135(5)(b), F.S.

⁵⁵ Section 215.473(1)(u), F.S., defines “scrutinized business operations” to mean business operations that result in a company becoming a scrutinized company.

⁵⁶ Section 287.135(4), F.S.

⁵⁷ *Id.*

The bill requires a contract with an agency or local governmental entity for goods or services of any amount entered into or renewed on or after July 1, 2018, to contain a provision that allows for the termination of the contract at the option of the awarding body if the company has been placed on the Scrutinized Companies that Boycott Israel List or is engaged in a boycott of Israel.

The bill authorizes an agency or local governmental entity to make a case-by-case exception to the contracting prohibition for a company on the Scrutinized Companies that Boycott Israel List for contracts for goods or services of any amount based on the same conditions currently applicable to contracts of \$1 million or more.

The bill requires a company that submits a bid or proposal, or that otherwise proposes to enter into or renew a contract with an agency or local governmental entity, for goods or services of any amount to certify that it is not participating in a boycott of Israel.

The bill preempts any ordinance or rule of any agency or local governmental entity involving public contracts for goods or services for any amount with a company that has been placed on the Scrutinized Companies that Boycott Israel List or is engaged in a boycott of Israel.

Section 2 provides that the bill is effective July 1, 2018.

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 shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The U.S. Constitution grants the federal government various powers related to foreign affairs, such as the power to declare war,⁵⁸ maintain a military,⁵⁹ enter into treaties and other international agreements,⁶⁰ regulate foreign commerce,⁶¹ and to hear cases involving foreign states and citizens.⁶² These grants of power have been interpreted to

⁵⁸ Section 8, Art. I, U.S. Constitution.

⁵⁹ *Id.*

⁶⁰ Section 2, Art. II, U.S. Constitution.

⁶¹ Section 8, Art. I, U.S. Constitution.

⁶² Section 2, Art. III, U.S. Constitution.

grant the federal government the exclusive power to act in the area of foreign affairs.⁶³ When a state law operates in the field of foreign affairs without federal authorization, a reviewing court might find the state law to be invalid.⁶⁴

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Companies that choose to boycott Israel may not be eligible to contract with state and local governmental entities in Florida.

C. Government Sector Impact:

State agencies and local governments will not be permitted to contract with certain companies that boycott Israel in certain instances. This may eliminate contractors that may otherwise have been a less expensive source for certain goods and services.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 287.135 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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

⁶³ *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (Stating that the “Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.”).

⁶⁴ *Zschernig v. Miller*, 389 U.S. 429 (1968); *American Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).