

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 Appropriations

BILL: PCS/SB 1044 (434036)

INTRODUCER: Appropriations Committee (Recommended by Appropriations Subcommittee on Transportation, Tourism, and Economic Development); Infrastructure and Security Committee; and Senator Albritton

SUBJECT: Department of Transportation

DATE: April 17, 2019

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Price	Miller	IS	Fav/CS
2. McAuliffe	Hrdlicka	ATD	Recommend: Fav/CS
3. McAuliffe	Kynoch	AP	Pre-meeting

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

PCS/SB 1044 addresses various issues relating to the Florida Department of Transportation (FDOT). Specifically, the bill:

- Revises the FDOT's authorization for innovative highway projects to include innovative transportation projects demonstrating innovative techniques of bridge design.
- Prohibits a local government from adopting standards and specifications for aggregate materials that are contrary to the FDOT's standards or specifications.
- Prohibits a local government from adopting standards and specifications that are contrary to FDOT standards or specification for permissible use of reclaimed asphalt in construction.
- Prohibits a contractor who has not satisfactorily completed two projects, each in excess of \$25 million, from bidding on FDOT contracts in excess of \$50 million.
- Increases the dollar value of claim amounts for additional compensation arising out of a construction or maintenance contract that may be submitted to the State Arbitration Board to up to \$1 million per contract at the claimant's option or up to \$2 million per contract if the parties agree.

The bill has an indeterminate fiscal impact to FDOT expenditures.

The bill takes effect July 1, 2019.

II. Present Situation:

This bill revises various provisions relating to the FDOT. For ease of organization and readability, the Present Situation for the provisions in each section of the bill is discussed in conjunction with the Effect of Proposed Changes.

III. Effect of Proposed Changes:

FDOT Regulation of Construction Aggregate Materials

Present Situation

Construction aggregate materials are a critical need with respect to construction of the state's transportation system.¹ The FDOT has a standardized method for producers² of construction aggregate materials to apply for, receive, and maintain the FDOT's approval of construction aggregate sources for use on FDOT projects. According to the FDOT:

Source and product approval, and maintenance of an on-going effective Quality Control Program, as monitored by the Department, comprise the Department's primary methods of determining acceptability of aggregate on Department projects. The Quality Control Program requires producers of construction materials to be responsible for their products; to establish, maintain, and implement their own individualized process control system; and to certify to the Department compliance of their product with applicable standards and contract specifications.

In this context, "certify" means that the producer affixes the statement "CERTIFIED FOR FDOT" or "CERT. FOR FDOT" to a shipping ticket to attest that this specific aggregate shipment was produced and shipped under a Department approved Quality Control Program and for which Quality control tests indicate that the specific aggregate meets Department specifications and Department quality and uniformity requirements set out in Section 2.2 of the Construction Aggregates Manual.³

Currently, no provision in state law requires local governments to accept aggregates certified pursuant to the FDOT rules.⁴ The extent to which local governments have not allowed transportation contractors to use FDOT-approved aggregates in construction of local government transportation facilities is unknown.

¹ Section 337.0261, F.S., defines these materials as "crushed stone, limestone, dolomite, limerock, shell rock, cemented coquina, sand for use as a component of mortars, concrete, bituminous mixtures, or underdrain filters, and other mined resources providing the basic material for concrete, asphalt, and road base."

² A "producer" is any business or individual seeking to supply aggregate to the FDOT or to FDOT contractors. *See* the FDOT, 2019 Agency Legislative Bill Analysis of SB 1044, at p. 3 (On file in the Senate Infrastructure and Security Committee).

³ *Id.* The Manual is available at <https://www.fdot.gov/materials/administration/resources/library/publications/aggregates/index.shtm> (last viewed March 15, 2019).

⁴ Chapter 14-103, F.A.C.

Effect of Proposed Changes

Section 1 of the bill creates s. 334.179, F.S., to prohibit a local government from adopting standards or specifications that are contrary to the FDOT standards or specifications for permissible use of aggregate materials that have been certified for use. “Certified for use” means that the aggregate materials have been approved for use by the FDOT through its certification process. To the extent that a local government currently does not allow transportation contractors to use FDOT-approved aggregates in construction of local government transportation facilities, that practice would be prohibited by the bill.

Reclaimed Asphalt

Present Situation

Section 336.044, F.S., authorizes the FDOT to find alternative ways to use recyclable materials and to determine the feasibility of using certain recyclable materials such as ground tire rubber, ash residue, and construction steel as material in road construction. The statute directs the FDOT to review and revise bid procedures and specifications for the purchase or use of products and materials to eliminate any procedures and specifications that explicitly discriminate against such products. The statute also requires all agencies to cooperate with the FDOT in expanding the current use of recovered materials in road construction projects.

The number of local governments that have adopted standards or specifications for reclaimed asphalt in construction that are contrary to FDOT standards or specifications is unknown.

Effect of Proposed Changes

Section 2 of the bill amends s. 336.044, F.S., to prohibit a local government from adopting standards or specifications that are contrary to FDOT standards or specifications for permissible use of reclaimed asphalt in construction. The bill further provides that reclaimed asphalt may not be considered solid waste.

Innovative Transportation Projects and Techniques

Present Situation

Section 337.025, F.S., entitled *innovative highway projects*, authorizes the FDOT to establish a program for highway projects demonstrating innovative techniques of highway construction, maintenance, and finance which controls time and cost increases on construction projects. Such techniques may include, but are not limited to, state-of-the-art technology for pavement, safety, and other aspects of highway construction and maintenance; innovative bidding and financing techniques; accelerated construction procedures; and those techniques that have the potential to reduce project life cycle costs. The FDOT may annually enter into up to \$120 million in contracts for innovative transportation projects. However, the annual cap does not apply to turnpike enterprise projects and to certain transportation projects funded in the past by the federal government.

Effect of Proposed Changes

Section 3 of the bill amends s. 337.025, F.S., revising its title to innovative *transportation* projects and authorizing the FDOT to establish a program for such projects, including those demonstrating innovative techniques of bridge design (along with those of highway, construction, maintenance, and finance), to control time and cost increases and also measure resiliency and structural integrity.

Qualification to Bid on FDOT Contracts

Present Situation

Section 337.14(1), F.S., requires any person⁵ desiring to bid on any construction contract in excess of \$250,000 which the FDOT proposes to let to first be certified by the FDOT pursuant to s. 337.14, F.S., and applicable rules.⁶ The rules must address the qualification of persons to bid on construction contracts in excess of \$250,000 and must include requirements with respect to the equipment, past record, experience, financial resources, and organizational personnel of the applicant necessary to perform the specific class of work for which the person seeks certification. The FDOT may limit the dollar amount of any contract upon which a person is qualified to bid, or limit the aggregate total dollar volume of contracts such person is allowed to have under contract at any one time.

For purposes of ch. 337, F.S., relating to contracting by the FDOT, the term “contractor” is only defined in s. 337.165(1)(d), F.S., relating to contract crime. In that provision, the term “contractor” is defined as any person who bids or applies to bid on work let by the FDOT or any counterpart agency of any other state or of the federal government or who provides professional services to the FDOT or other such agency.

Effect of Proposed Changes

Section 4 of the bill amends s. 337.14(1), F.S., revising references to “person” to instead be references to “contractor.” The bill requires any contractor desiring to bid on contracts in excess of \$50 million to have satisfactorily completed two projects, each in excess of \$25 million, for the FDOT or for any other state department of transportation. The FDOT would be required to amend its rule with respect to contractors desiring to bid on contracts in excess of \$50 million to incorporate the bill’s revisions. Contractors who currently qualify to bid on such FDOT contracts but who have not satisfactorily completed two projects, each in excess of \$25 million for the FDOT or any other state department of transportation, will no longer be qualified to bid on FDOT construction contracts in excess of \$50 million.

⁵ Section 334.03(19), F.S., defines “person” to mean any person described in s. 1.01, F.S., or any unit of government in or outside the state. Section 1.01(3), F.S., provides that “person” includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

⁶ The FDOT’s rules regarding qualification to bid on highway projects are in Chapter 14-22, F.A.C.

State Arbitration Board

Present Situation

Section 337.185, F.S., establishes a State Arbitration Board to facilitate the prompt settlement of claims⁷ for additional compensation arising out of construction and maintenance contracts between the FDOT and the various contractors with whom it contracts. The statute requires every contractual claim in an amount up to \$250,000 per contract or, at the claimant's option, up to \$500,000 per contract or, upon agreement of the parties, up to \$1 million per contract that cannot be resolved by negotiation between the FDOT and the contractor be arbitrated by the board, with the exception that either party may request the claim be submitted to binding private arbitration. The process benefits both the FDOT and its contractors by facilitating prompt claim settlement and reducing or eliminating litigation costs. These claim amounts were last revised in 1999.⁸

Effect of Proposed Changes

Section 5 of the bill amends s. 337.185(1), F.S., increasing the dollar value of claims per contract that may be arbitrated using the State Arbitration Board. Under the bill, the board may arbitrate, at the claimant's option to up to \$1 million per contract or up to \$2 million per contract if the parties agree. The requirement that all claims of up to \$250,000 be arbitrated by the State Arbitration Board remains. These changes may increase the number of claims submitted to the board for arbitration.

Effective Date

The bill is effective July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

⁷ For the purpose of s. 337.185, F.S., the term "claim" means the aggregate of all outstanding claims by a party arising out of a construction or maintenance contract.

⁸ Section 22, ch. 99-385, L.O.F.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Section 5: To the extent that increasing the dollar value of claims per contract that may be arbitrated using the State Arbitration Board results in more claims being submitted to the Board, which claims are promptly settled, contractors may experience reduced or eliminated litigation costs.

C. Government Sector Impact:

Sections 1 and 2: The impact to local governments who may have previously adopted standards or specifications contrary to those of the FDOT is unknown. The impact of the bill on local governments is not known at this time.

Section 4: Requiring contractors to have completed two projects, each in excess of \$25 million, to be eligible to bid on FDOT contracts in excess of \$50 million may limit the pool of eligible contractors according to FDOT, thereby decreasing competition and potentially leading to increased costs.⁹ However, the number of contractors that would qualify to bid on projects in excess of \$50 million is unknown. Therefore, whether this provision will provide a more experienced pool of qualified bidders or limit competition cannot be determined.

Section 5: The FDOT advises that increasing the dollar value of claims per contract that may be arbitrated using the State Arbitration Board “may better align arbitration thresholds with current contract costs, but it does qualify more claims as able to go before the board.”¹⁰ To the extent that a higher number of claims submitted to the board are promptly settled, the FDOT may experience reduced or eliminated litigation costs.

VI. Technical Deficiencies:

None.

⁹ FDOT, 2019 Agency Legislative Bill Analysis: SB 1044, March 13, 2019, at p. 6 (On file in the Senate Infrastructure and Security Committee).

¹⁰ FDOT, 2019 Agency Legislative Bill Analysis: SB 1044, March 13, 2019, at p. 6 (On file in the Senate Infrastructure and Security Committee). The board’s expenses are covered by administrative fees received by the board through payment of fees to the board by the party requesting the arbitration, or as apportioned among the parties in accordance with the board’s finding of liability. Section 337.185(7), (8), and (9), F.S.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 336.044, 337.025, 337.14, and 337.185.

This bill creates section 334.179 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.)

Recommended CS/CS by Appropriations Subcommittee on Transportation, Tourism, and Economic Development on April 4, 2019:

The committee substitute:

- Removes the provisions in the bill repealing the Florida Transportation Commission's responsibility to nominate three persons for appointment by the Governor as secretary of the FDOT and requiring the FDOT secretary be a licensed professional engineer or, instead, to hold an advanced degree in an appropriate related discipline and have five years of relevant transportation experience; or to have ten years of relevant transportation experience.
- Amends s. 336.044, F.S., to prohibit local governments from adopting standards or specifications contrary to FDOT standards or specifications for permissible use of reclaimed asphalt.

CS by Infrastructure and Security on March 20, 2019:

The CS revises the bill's requirements relating to qualification for appointment by the Governor of the FDOT secretary and incorporates in the bill provisions revising the FDOT's current authorization for innovative highway projects to innovative transportation projects demonstrating innovative techniques of bridge design.

The CS also removes the following provisions of the bill:

- Requiring the FDOT to consist of a central office that establishes policies and procedures and districts that carry out projects as authorized under those policies and procedures.
- Requiring mileage for official state travel to be calculated using the most commonly used maps, instead of the FDOT's current highway map.
- Requiring that 80 percent of the pavement in each of the FDOT's districts (instead of statewide) meets the FDOT's standards by the end of Fiscal Year 2023.
- Requiring the liquidated damages schedule incorporated into FDOT construction and maintenance contracts to include a reduction of the daily liquidated damage charges to construction engineering and inspection costs when traffic is in its final configuration and the project is functional for its intended use.

- Prohibiting the FDOT from using toll revenue from a high-occupancy toll (HOT) lane or express lane to offset funding that the facility would receive if the facility were not a HOT lane or express lane.
- Requiring 75 percent of transportation capacity funds, with certain exceptions, to be spent on the Strategic Intermodal System.
- Requiring certain projects on Strategic Intermodal System Highway Corridors to be given priority based on high accident rates.

B. Amendments:

None.