

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 157 Transportation Projects

SPONSOR(S): Tourism, Infrastructure & Energy Subcommittee, Andrade

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 398

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Tourism, Infrastructure & Energy Subcommittee	13 Y, 3 N, As CS	Johnson	Keating
2) Infrastructure & Tourism Appropriations Subcommittee	12 Y, 0 N	Hicks	Davis
3) Commerce Committee			

SUMMARY ANALYSIS

The bill addresses the following matters related to transportation projects:

- The bill provides that, except as provided in the General Appropriations Act, a maximum of 25 percent of all revenues deposited into the State Transportation Trust Fund, excluding state revenues used for matching grants, may be annually committed for public transportation projects.
- The bill authorizes the Department of Transportation (DOT) to engage in progressive design-build contracting for projects, excepts certain progressive design-build contracts from an existing monetary cap on innovative contracts, and allows DOT to use design-build contracting for all types of projects.
- The bill authorizes an applicant for a contractor certificate of qualification to submit with its application a request to keep an existing certificate, with the current maximum capacity rating, in place until its expiration date.
- Removes a public records exemption for documents revealing the identity of persons that have requested or obtained a bid package, plan, or specifications relating to a DOT project.

The bill has an indeterminate fiscal impact on state government expenditures, but costs would be limited to available revenues within the Work Program. See Fiscal Analysis section for details.

The bill has an effective date of July 1, 2022.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Public Transportation Funding

Current Situation

Section 206.46, F.S., creates the State Transportation Trust Fund (STTF), which the Department of Transportation (DOT) utilizes to fund transportation projects, as provided by law. Funds in the STTF support the projects contained in DOT's five-year work program.¹

Florida law requires that DOT commit a minimum of 15 percent of all state revenues deposited into the STTF to public transportation projects for each fiscal year.² Public transportation projects include projects involving transportation facilities within seaports and airports, public transit,³ and regional transportation.⁴

In Fiscal Year 2022-2023, DOT is projected to receive over \$4.7 billion in state revenues. More than \$1.4 billion (30 percent) of that revenue is exempt from the 15 percent public transportation requirement. For example, revenues from documentary stamp taxes,⁵ rental car surcharges,⁶ initial registration fees,⁷ and local option fuel taxes⁸ are exempt.⁹

In some instances, the law exempts a revenue stream from the 15 percent requirement but specifies an amount of that revenue that must be used for public transportation. For example, s. 201.15, F.S. requires 10 percent of the documentary stamp tax proceeds deposited into the STTF to be used for the New Starts Transit Program. Similarly, s. 339.0801, F.S., requires \$10 million per year from tag and title fees to be used for the Seaport Investment Program.¹⁰

Effect of the Bill

The bill caps the percentage of state revenues deposited into the STTF that may be committed by DOT for public transportation projects. The bill provides that unless otherwise specified in the General Appropriations Act, for each fiscal year, at least 15 percent, but not more than 25 percent of all state revenues deposited into the STTF, except those revenues used for matching federal grants, must be annually committed by DOT for public transportation projects.

The following table shows actual and projected state transportation revenues for Fiscal Years 2017-2026. The table also shows those state revenues to which the 15 percent public transportation requirement does and does not apply. The last two rows on the table show the 15 percent – 25 percent range for public transportation funding in millions of dollars.¹¹

¹ DOT's work program is developed pursuant to s. 339.135, F.S.

² S. 206.46(3), F.S.

³ Public transit means the transporting of people by conveyances, or a system of conveyances, traveling on land or water, local or regional in nature, and available for use by the public, including paratransit. Eligible public transit could include projects such as a public transit capital project, a commuter assistance project, a transit corridor project, or an intercity bus service project.

⁴ Chapter 343, F.S., relating to regional transportation, establishes the South Florida Regional Transportation Authority, the Central Florida Regional Transportation Authority, the Northwest Florida Transportation Corridor Authority, and the Tampa Bay Regional Transit Authority.

⁵ S. 201.15, F.S.

⁶ S. 212.0606, F.S.

⁷ S. 320.072, F.S.

⁸ S. 215.211, F.S.

⁹ Department of Transportation (DOT), Agency Analysis of 2022 House Bill 157, p. 2 (Sep. 24, 2021).

¹⁰ *Id.*

¹¹ *Id.*

Actual and Projected State Revenues (\$ in millions)										
Information for HB 157 Relating to Public Transportation										
	FY17	FY18	FY19	FY20	FY21	FY22	FY23	FY24	FY25	FY26
Transportation REC	\$ 3,575.2	\$ 3,664.4	\$ 3,808.1	\$ 3,757.8	\$ 3,831.5	\$ 4,094.1	\$ 4,257.9	\$ 4,370.1	\$ 4,461.4	\$ 4,549.7
Doc Stamps - GR REC	\$ 281.8	\$ 297.6	\$ 315.8	\$ 349.5	\$ 466.8	\$ 466.8	\$ 461.7	\$ 453.7	\$ 451.4	\$ 456.0
Total All State Revenues	\$3,857.0	\$3,962.0	\$4,123.9	\$4,107.3	\$4,298.3	\$4,560.9	\$4,719.6	\$4,823.8	\$4,912.8	\$5,005.7
State Revenues Exempt from 15% PTO Requirement	\$ 946.5	\$ 972.2	\$ 1,130.2	\$ 1,173.3	\$ 1,340.7	\$ 1,406.4	\$ 1,434.3	\$ 1,441.9	\$ 1,452.5	\$ 1,469.0
State Revenues to which the 15% Requirement Applies	\$2,910.5	\$2,989.8	\$2,993.7	\$2,934.0	\$2,957.6	\$3,154.5	\$3,285.3	\$3,381.9	\$3,460.3	\$3,536.7
15% of Non-Exempt (Minimum Requirement)	\$ 436.6	\$ 448.5	\$ 449.1	\$ 440.1	\$ 443.6	\$ 473.2	\$ 492.8	\$ 507.3	\$ 519.0	\$ 530.5
25% of Non-Exempt (Maximum Allowed)	\$ 727.6	\$ 747.5	\$ 748.4	\$ 733.5	\$ 739.4	\$ 788.6	\$ 821.3	\$ 845.5	\$ 865.1	\$ 884.2

Source: DOT Agency Bill Analysis of 2021 HB 157, p.2.

The following table shows the amount of state funds that DOT has programmed for public transportation projects. The last row in the table shows the additional amount that could be programmed for public transportation projects with discretionary state funds before reaching the proposed 25 percent limit.¹²

Programming for Public Transportation as of July 1, 2021 (\$ in millions)										
	FY17	FY18	FY19	FY20	FY21	FY22	FY23	FY24	FY25	FY26
State Funds Programmed for Public Transportation	\$ 648.0	\$ 783.6	\$ 878.9	\$ 844.0	\$ 852.0	\$ 1,060.2	\$ 893.7	\$ 862.9	\$ 770.8	\$ 877.1
State Funds Programmed for PTO which are not part of the 15% Requirement (New Starts Transit, Seaport Investment Program, etc.)	\$ 160.4	\$ 253.3	\$ 280.1	\$ 275.2	\$ 307.0	\$ 492.2	\$ 274.1	\$ 294.0	\$ 218.9	\$ 289.8
State Funds Programmed for PTO which are part of the 15% PTO Requirement	\$ 487.6	\$ 530.3	\$ 598.8	\$ 568.8	\$ 545.0	\$ 568.0	\$ 619.6	\$ 568.9	\$ 551.9	\$ 587.3
% of State Funds Programmed for PTO which are subject to the 15% PTO Requirement	16.8%	17.7%	20.0%	19.4%	18.4%	18.0%	18.9%	16.8%	15.9%	16.6%
Potential Additional PTO Programming Before Reaching the Proposed 25% Cap	\$ 240.0	\$ 217.2	\$ 149.6	\$ 164.7	\$ 194.4	\$ 220.6	\$ 201.7	\$ 276.6	\$ 313.2	\$ 296.9

Source: DOT Agency Bill Analysis of 2021 HB 157, p.2.

Progressive Design-Build and Innovative Contracting

Current Situation

Current law authorizes DOT, if it determines that doing so is in the public interest, to combine the design and construction phases of a building, a major bridge, a limited access facility, or a rail corridor project into a single contract, referred to as a “design-build” contract.¹³ DOT must adopt by rule procedures for administering design-build contracts. Such procedures must include, but are not limited to:

- Prequalification requirements.
- Public announcement procedures.
- Scope of service requirements.
- Letters of interest requirements.
- Short-listing criteria and procedures.
- Bid proposal requirements.
- Technical review committee.
- Selection and award processes.
- Stipend requirements.¹⁴

Under Florida law, DOT is authorized to establish a program for transportation projects that demonstrate innovative techniques of highway and bridge design, construction, maintenance, and finance. The innovations must be intended to measure resiliency and structural integrity and control time and cost increases on construction projects. These techniques may include state-of-the-art technology for pavement, safety, and other aspects of:

- Highway and bridge design, construction, and maintenance;
- Innovative bidding and financing techniques;

¹² *Id.*

¹³ S. 337.11(7)(a), F.S.

¹⁴ S. 337.11(7)(b), F.S.

- Accelerated construction procedures; and
- Techniques that have the potential to reduce project life cycle costs.

To the maximum extent practical, DOT must use existing processes to award and administer construction and maintenance contracts.¹⁵

DOT's authority for utilizing innovative techniques is limited to \$120 million annually for the purposes of contracting for innovative transportation projects. The \$120 million annual cap does not apply to:

- Turnpike Enterprise projects, and
- Low-bid design-build milling and resurfacing contracts.¹⁶

According to the Design-Build Institute of America (DBIA), design-build projects enable the project owner to manage only one contract, with the designer and contractor working together from the beginning and providing consensus project recommendations to fit the owner's schedule and budget. The entire team addresses any necessary changes, which leads "to collaborative problem-solving and innovation...." This method of project delivery, the DBIA asserts, creates an inherent "culture of collaboration."¹⁷ As described by the DBIA, the "progressive" type of design-build contract "uses a qualifications-based or best value selection, followed by a process whereby the owner then 'progresses' towards a design and contract price with the team."¹⁸

Effect of the Bill

The bill allows DOT to engage in design-build contracting for all types of projects. The bill amends DOT's authority to undertake innovative transportation projects, expressly authorizing DOT to use progressive design-build contracts for such projects. If determined to be in the best interest of the public, a progressive design-build approach would combine the design and construction phases of a project into a single contract and select the design-build firm in the early stages of a project to ensure that the firm is part of the collaboration and development of the design as part of a step-by-step progression through construction.

The bill requires the selection and award processes for a progressive design-build contract to involve a two-phase process. In the first phase, DOT must competitively award the contract to a design-build firm based upon the firm's qualifications. In phase two, the selected firm must competitively bid construction trade and subcontractor packages and, based upon these bids, negotiate with DOT for a fixed price or a guaranteed maximum price that meets the project budget and scope.

In addition, the bill revises DOT's \$120 million cap on innovative contracting to eliminate the exception for low-bid design-build milling and resurfacing contracts, and to create an exception for progressive design-build contracts for complex, high-risk projects with a minimum contract value of \$400 million. DOT would still be authorized to continue using "traditional" design-build contracting provided that all innovative project contracts do not exceed the \$120 million annual cap.

Contractor Certificate of Qualification

Current Situation

¹⁵ S. 337.025(1), F.S.

¹⁶ S. 337.025(2), F.S.

¹⁷ See DBIA, *What is Design-Build*, available at <https://dbia.org/what-is-design-build/> (last visited Jan. 5, 2022).

¹⁸ See DBIA, *Progressive Design-Build, Design-Build Procured with a Progressive Design and Price*, at p. 3, available at <https://dbia.org/wp-content/uploads/2018/05/Primer-Progressive-Design-Build.pdf> (last visited Jan. 5, 2022).

A contractor desiring to bid on any DOT construction contract in excess of \$250,000 must obtain a certificate of qualification from DOT.¹⁹ Each application for certification must be accompanied by the contractor's latest audited annual financial statements. If the application or the annual financial statement shows the contractor's financial condition more than four months prior to the date on which DOT receives the application, the contractor must also submit audited interim financial statements and an updated application.²⁰

DOT's rules include requirements with respect to the equipment, past record, experience, financial resources, and organizational personnel of the applying contractor, which are necessary to perform the specific class of work for which the contractor seeks certification. DOT verifies and evaluates whether an applicant is competent and responsible and possesses the necessary financial resources to perform the requested work.²¹

Part of DOT's inquiry involves whether an applicant has the financial resources sufficient to establish a maximum capacity rating, which is the total aggregate dollar amount of *uncompleted* work an applicant may have under contract at any one time as a prime contractor and/or subcontractor, regardless of the work location and with whom the applicant contracted.²² According to DOT's rules, the maximum capacity rating is established by a formula, one element of which is the "ability factor."²³ DOT's rules require an applicant's maximum capacity rating to be reduced by the total value of their current uncompleted work, producing the applicant's "current capacity," or bidding capacity. Under the rule, the current capacity must be amended immediately upon issuance of a new certificate of qualification, regardless of whether the existing certificate has expired.²⁴

Currently, if an applicant for a certificate of qualification is found to possess the prescribed qualifications, DOT must issue the applicant a certificate, which, unless revoked by DOT for good cause, is valid for a period of 18 months after the date of the applicant's financial statement, or such shorter period as DOT prescribes. Submission of an application does not affect expiration of an existing certificate, the ability factor of the applicant, or the maximum capacity rating of the applicant.²⁵

Effect of the Bill

The bill removes current provisions providing that submission of an application does not affect the ability factor or the maximum capacity rating of an applicant for DOT certificate of qualification. Instead, the bill authorizes an applicant to submit a written request to DOT, along with its timely submitted application, to keep an existing certificate in place until its expiration date. If DOT approves the request, the applicant's current maximum capacity rating must remain in place until expiration of the current certification. In the absence of DOT's approval and in accordance with DOT's existing rules, the current capacity rating must be amended immediately upon issuance of a new certificate of qualification, regardless of whether the existing certificate has expired.

Identities of Potential Bidders on DOT Contracts

Current Situation

Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record

¹⁹ S. 337.14, F.S., and R. 14-22, F.A.C.

²⁰ The interim financial statements must cover the period from the end date of the annual statement and must show the financial condition of the applying contractor no more than four months prior to the date DOT receives the interim statement but, upon request of the applicant, an application and accompanying annual or interim financial statement received by the DOT within 15 days after either four-month period is considered timely.

²¹ R. 14.22-003(1), F.A.C.

²² R. 14.22-003(1)(d) and (2), F.A.C.

²³ The ability factor is a performance score which a contractor receives from DOT upon completion of a project. The initial ability factor is based on the applicant's organization, management, work experience, and letters of recommendation. R. 14-22-003, F.A.C.

²⁴ R. 14-22.006(1), F.A.C.

²⁵ S. 337.14(4), F.S.

of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, section 24(a) of the Florida Constitution.²⁶

Current law provides that a document revealing the identity of persons who have requested or obtained bid packages, plans, or specifications pertaining to any project to be let by DOT is confidential and exempt from the public records law for the period which begins two working days before the deadline for obtaining bid packages, plans, or specifications and ends with the letting of the bid. A document that reveals the identity of such persons more than the two working days before the deadline for obtaining bid packages, plans, or specifications remains a public record.²⁷

Effect of the Bill

The bill eliminates the public records exemption for documents revealing the identity of a person who has requested or obtained a bid package, plan, or specifications pertaining to any project to be let by DOT for the period that begins two working days before the deadline for obtaining bid packages plans, or specifications, and ends with the letting of the bid. These documents will now be public records.

Effective Date

The bill has an effective date of July 1, 2022.

B. SECTION DIRECTORY:

- Section 1** Amends s. 206.46, F.S., relating to the State Transportation Trust Fund.
- Section 2** Amends s. 337.025, F.S., relating to innovative transportation projects.
- Section 3** Amends s. 337.11, F.S., relating to contracting authority of the department.
- Section 4** Amends s. 337.14, F.S., relating to application for qualification; certificate of qualification; restrictions; request for hearing.
- Section 5** Amends s. 337.168, F.S., relating to confidentiality of official estimates, identities of potential bidders, and bid analysis and monitoring system.
- Section 6** Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The fiscal impact of this bill is limited to available transportation revenues within the confines of the Work Program. However, to the extent that funding for public transportation projects is increased above the currently programmed levels within the cap, other projects in the Work Program may be impacted.

²⁶ Art. I, s. 24(c), Fla. Const.

²⁷ S. 336.168(2), F.S.

The fiscal impact of the revisions relating to design-build, progressive design-build, and innovative contracting is indeterminate because the number and details of any such contracts to be undertaken by DOT is unknown.

The fiscal impact of the revisions relating to DOT contractor certificates of qualification is indeterminate.

Any expenses incurred by DOT associated with rulemaking can be absorbed within existing resources.

In addition, DOT may incur expenditures related to public records requests for documents that identify a potential bidder on a transportation project. These costs are indeterminate but likely insignificant.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Capping STTF funds that can be used on public transportation projects could have an impact on projects currently planned in any of the five years of the Work Program, if the aggregate combined amount for public transportation projects exceeds the proposed cap.²⁸

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill grants rulemaking authority for the administration of progressive design-build contracts.

C. DRAFTING ISSUES OR OTHER COMMENTS:

According to DOT, the repeal of the public records exemption may have a negative impact on procurement by eliminating confidentiality of potential bidders and by allowing bid documents, such as letters of interest, be produced as public record during the procurement process.²⁹

²⁸ Department of Transportation, Agency Analysis of 2022 House Bill 157, p. 8. September 24, 2021.

²⁹ *Id.*

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 12, 2022, the Tourism, Infrastructure & Energy Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Provided that the amount of state revenues in the STTF that must be committed for public transportation is subject to change in the General Appropriations Act.
- Included progressive design-build contracting as an authorized innovative technique for transportation projects.
- Excluded certain progressive design-build contracts from the annual \$120 million cap on innovative transportation projects.
- Made low-bid design-build milling and resurfacing contracts subject to the \$120 million cap on design-build transportation projects.
- Authorized DOT to enter into design-build contracts for any type of project.
- Authorized DOT to use progressive design-build contracts and provides how these contracts operate.
- Authorized an applicant for a certificate of qualification to keep an existing certificate until its expiration date and keep its current maximum capacity rating until the expiration of its current certificate.
- Repealed a public records exemption for certain documents revealing the identity of persons who have requested certain bid-related documents from DOT.
- Removed from the bill the authorization for DOT to use moneys in the STTF to pay for work zone speed enforcement by agreement with the Florida Highway Patrol.

This analysis is drafted to the committee substitute as approved by the Tourism, Infrastructure & Energy Subcommittee.