

**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.)

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Prepared By: The Professional Staff of the Committee on Appropriations

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BILL: CS/CS/SB 398

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

SUBJECT: Transportation Projects

DATE: March 2, 2022

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Price</u>	<u>Vickers</u>	<u>TR</u>	<u>Fav/CS</u>
2.	<u>McAuliffe/Price</u>	<u>Hrdlicka</u>	<u>ATD</u>	<u>Recommend: Fav/CS</u>
3.	<u>McAuliffe</u>	<u>Sadberry</u>	<u>AP</u>	<u>Fav/CS</u>

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 398 revises the current requirement for an annual minimum commitment by the Florida Department of Transportation (FDOT) of at least 15 percent of revenues deposited into State Transportation Trust Fund (STTF) for specified public transportation projects, by imposing a maximum commitment of no more than 25 percent of such revenues, excluding state revenues used for matching federal grants, unless otherwise specified in the General Appropriations Act.

The bill also clarifies the FDOT's authority to engage in "progressive" design-build contracting as an innovative technique of highway and bridge design and construction, exempts certain progressive design-build contracts from an existing cap on innovative contracts, and removes a limitation on design-build contracting to certain types of projects.

The bill clarifies that stipends paid by the FDOT to non-selected design-build firms that have submitted responsive proposals for construction contracts contained in the FDOT's legislatively approved work program are not subject to existing documentation and notification requirements for stipend payments made by the FDOT to resolve a bid protest through a settlement.

Additionally, the bill revises authorization for an applying contractor who desires to bid exclusively on construction contracts with proposed budget estimates of \$2 million (rather than \$1 million) to submit reviewed (rather than audited, certified) annual or reviewed interim

financial statements prepared by a certified public accountant. The bill also authorizes an applicant for an FDOT contractor certificate of qualification to submit with a timely submitted application a request to keep an existing certificate, with the current maximum capacity rating, in place until the expiration date.

Further, the bill repeals a current provision of law providing temporary confidential and exempt status from public records requirements for a document that reveals the identity of a person who has requested or obtained a bid package, plan, or specifications pertaining to any project to be let by the FDOT.

The fiscal impact of the bill is indeterminate. Please see the “Fiscal Impact Statement” for details.

The bill takes effect July 1, 2022.

## **II. Present Situation:**

For ease of organization and readability, the present situation is discussed below in conjunction with the effect of the proposed changes.

## **III. Effect of Proposed Changes:**

### **Public Transportation Funding from the State Transportation Trust Fund (Section 1)**

#### ***Present Situation***

Section 206.46(1), F.S., creates the STTF, and all moneys in the trust fund must be used for transportation purposes, as provided by law, under the direction of the FDOT. The FDOT is required to annually commit from the STTF a minimum of 15 percent of all state revenues deposited into the trust fund for public transportation projects in accordance with ch 311, F.S. (relating to seaport programs and facilities), ss. 332.003-332.007, F.S. (relating to airports), ch. 341, F.S. (relating to public transit), and ch. 343, F.S. (relating to regional transportation).

Projects eligible for funding under ch. 311, F.S., include, for example, transportation facilities (*e.g.*, roads) within the jurisdiction of a port, under the Florida Seaport Transportation and Economic Development Program.<sup>1</sup> Sections 332.003-332.007, F.S., make up the Florida Airport Development and Assistance Act, which provides funding for projects at public airports such as

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<sup>1</sup> While bus service to and from a port could qualify as an eligible project, a variety of other projects are also eligible, such as dredging or deepening of channels, turning basins, or harbors; acquisition of land to be used for port purposes; and construction of wharves, docks, and cruise terminals. *See* s. 311.07(3)(b), F.S., for a full list of projects eligible for grant funding under the Florida Seaport Transportation and Economic Development Program.

airport master planning,<sup>2</sup> airport development,<sup>3</sup> and airport discretionary capacity improvements.<sup>4</sup>

Chapter 341, F.S., relating to “public transit” (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)<sup>5</sup> could include projects such as a public transit capital project,<sup>6</sup> a commuter assistance project,<sup>7</sup> a transit corridor project,<sup>8</sup> or an intercity bus service project.<sup>9</sup>

Chapter 343, F.S., relating to regional transportation, establishes the South Florida Regional Transportation Authority, the Central Florida Regional Transportation Authority, and the Tampa Bay Regional Transit Authority. As an example of currently authorized uses of public transportation funding in the context of regional transportation, s. 343.58(4), F.S., requires specified amounts to be transferred from the STTF to the South Florida Regional Transportation Authority, which operates Tri-Rail, a passenger rail service in Broward, Palm Beach, and Miami-Dade Counties. As another example, s. 341.303, F.S., authorizes specified funding from the STTF for SunRail, a passenger rail system currently operating in Volusia, Seminole, Orange, and Osceola counties.

Various projects under these programs may be eligible for use of state revenues in the STTF to match available federal funds.

The 15-percent public transportation requirement does not apply to certain STTF revenues. Current law contains a number of provisions exempting certain revenue from the 15-percent public transportation requirement, such as those from rental car surcharges under s. 212.0606, F.S.; from initial registration fees under s. 320.072, F.S.; and from local option fuel taxes under s. 215.211, F.S. The FDOT advises that while state revenues in Fiscal Year 2022-

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<sup>2</sup> Defined to mean “the development, for planning purposes, of information and guidance to determine the extent, type, and nature of development needed at a specific airport.” Section 332.004(3), F.S.

<sup>3</sup> Meaning “any activity associated with the design, construction, purchase, improvements, or repair of a public-use airport or portion thereof...” Section 332.004(4), F.S.

<sup>4</sup> Defined as “capacity improvements which are consistent, to the maximum extent feasible, with the approved local government comprehensive plans of the units of local government in which the airport is located and which enhance intercontinental capacity at [specified] airports...” Section 332.004(5), F.S.

<sup>5</sup> Section 341.031(6), F.S.

<sup>6</sup> Defined to mean “a project undertaken by a public agency to provide public transit to its constituency, and is limited to acquisition, design, construction, reconstruction, or improvement of a governmentally owned or operated transit system.” Section 341.031(7), F.S.

<sup>7</sup> Meaning “financial and technical assistance by the department to promote alternatives to the use of automobiles by a single commuter.” The term includes ridesharing, transportation demand management, and transportation management association projects. *See* s. 341.031(9), F.S.

<sup>8</sup> Defined to mean “a project that is undertaken by a public agency and designed to relieve congestion and improve capacity within an identified transportation corridor by increasing people-carrying capacity of the system through the use and facilitated movement of high-occupancy conveyances.” *See* s. 341.031(10), F.S., for additional definitional requirements.

<sup>9</sup> Defined as “regularly scheduled bus service for the general public which operates with limited stops over fixed routes connecting two or more urban areas not in close proximity...” *See* s. 341.031(11), F.S., for additional definitional requirements.

2023 are projected at over \$4.7 billion, more than \$1.4 billion (30 percent) of that revenue is exempt.<sup>10</sup>

In addition, while some revenue streams are exempt from the 15-percent requirement, a requirement for use of a given revenue stream for public transportation may still be present. For example, s. 201.15, F.S., requires 10 percent of documentary tax proceeds deposited into the STTF to be used for the New Starts Program and s. 339.0801, F.S., requires \$10 million annually from tag and title fees to be used for the Seaport Investment Program.

According to FDOT, “[i]t is important to note that some of the state funds allocated for public transportation are allocated to comply with the 15% requirement specified in s. 206.46(3), F.S., while other state funds are allocated to comply with statutory use requirements for documentary stamp taxes, tag and title fees, and initial registration fees.”<sup>11</sup>

The FDOT reports public transportation programming as of July 1, 2021 (in millions) as follows:<sup>12</sup>

**State Funds Programmed for Public Transportation**

FY	Total Public Transportation	Part of the 15-Percent Requirement	Percent Programmed Subject to the 15-Percent Requirement
2016-2017	\$648.0	\$487.6	16.8
2017-2018	\$783.6	\$530.3	17.7
2018-2019	\$878.9	\$598.8	20.0
2019-2020	\$844.0	\$568.8	19.4
2020-2021	\$852.0	\$545.0	18.4
2021-2022	\$1,060.2	\$568.0	18.0
2022-2023	\$893.7	\$619.6	18.9
2023-2024	\$862.9	\$568.9	16.8
2024-2025	\$770.8	\$551.9	15.9
2025-2026	\$877.1	\$587.3	16.6

***Effect of Proposed Changes***

**Section 1** of the bill amends s. 206.46(3), F.S., to provide a cap on the amount of state revenues deposited into the STTF that can be used for public transportation projects of 25 percent. Unless otherwise specified in the General Appropriations Act, the FDOT must commit at least 15 percent, but no more than 25 percent, of state revenues for such projects. The calculation for

<sup>10</sup> See FDOT, 2022 Agency Legislative Bill Analysis: SB 398, p. 3 (on file in the Senate Transportation Committee).

<sup>11</sup> FDOT, 2022 Agency Legislative Bill Analysis: SB 398, p. 3

<sup>12</sup> *Id.*

purposes of determining the allowable funding range for the specified projects would not include the amount of state revenues used for federal grant matching.

### **Design-Build, Progressive Design-Build, and Innovative Contracting (Sections 2 and 3)**

#### ***Present Situation***

The FDOT is generally authorized to enter into construction and maintenance contracts and must ensure that all project descriptions, including design plans, “are complete, accurate, and up to date prior to the advertisement for bids on such projects.”<sup>13</sup>

Current law also authorizes the FDOT, 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.<sup>14</sup>

The FDOT is also authorized to establish a program for transportation projects that demonstrate innovative techniques of highway and bridge design, construction, maintenance, and finance. The innovations must intend 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; accelerated construction procedures; and techniques that have the potential to reduce project life cycle costs.<sup>15</sup>

To the maximum extent practical, the FDOT must use existing processes to award and administer construction and maintenance contracts. If the FDOT intends to use specific innovative techniques, it must document the need for any exceptions to current law that would otherwise prohibit use of the techniques.

The FDOT is limited to \$120 million annually for the purposes of contracting for innovative transportation projects. However, the annual cap currently does not apply to:

- Turnpike Enterprise projects, and
- Low-bid design-build milling and resurfacing contracts.<sup>16</sup>

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.”<sup>17</sup> As described by the DBIA, the “progressive” type of design-build contract “uses a qualifications-based or best value selection,

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<sup>13</sup> Section 337.11(1) and (2), F.S.

<sup>14</sup> Section 337.11(7)(a), F.S.

<sup>15</sup> Section 337.025(1), F.S.

<sup>16</sup> Section 337.025(2), F.S.

<sup>17</sup> See DBIA, *What is Design-Build*, available at <https://dbia.org/what-is-design-build/> (last visited December 15, 2021).

followed by a process whereby the owner then ‘progresses’ towards a design and contract price with the team (thus the term ‘Progressive’).”<sup>18</sup>

The Florida Transportation Builders’ Association (FTBA) advises that traditional design-build contracting has produced nearly two decades of successful projects and that progressive design-build contracting represents an evolution from traditional design-build, allowing better allocation and management of unforeseen conditions and risks<sup>19</sup> encountered during the design of the project. Once the design-build firm is selected based on qualifications, including past performance, the firm then works collaboratively with the FDOT to “progress or advance” the design until the design contains sufficient detail to competitively bid the work.<sup>20</sup> As opposed to the FDOT’s general contracting authority, under which design plans must be complete, accurate, and up to date prior to advertising for bids, pricing in a progressive design-build contract is delayed until design is closer to completion.

The FTBA further advises that progressive design-build contracting is already being used by the Greater Orlando Aviation Authority and the Tampa International Airport Authority.<sup>21</sup> According to the DBIA, at least two other states are currently authorized to engage in some form of progressive design-build contracting.<sup>22</sup>

Based on a review of the FDOT’s Work Program Instructions for development of the Tentative Work Program for Fiscal Years 2022-2023 – 2026-2027, the FDOT, if not already in use under its existing design-build authority, appears to be contemplating the use of “progressive” design-build contracts under its authorization to undertake transportation projects that demonstrate innovative techniques of highway and bridge design, construction, maintenance, and finance.<sup>23</sup> Such contracting under current law would be subject to the \$120 million statutory cap.

### *Effect of Proposed Changes*

**Section 2** of the bill amends s. 337.025, F.S., relating to the FDOT’s authority to undertake innovative transportation projects, to expressly authorize the FDOT to use progressive design-build contracts for such projects.

The bill authorizes the FDOT, if it determines that doing so is in the best interests of the public, to 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 refers to such a contract as a progressive design-build contract.

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<sup>18</sup> 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 December 15, 2021).

<sup>19</sup> E.g., variable and unsuitable soils beneath a roadway or bridge foundations, utility relocation issues, and other unforeseen conditions.

<sup>20</sup> See FTBA email to Transportation Committee staff, November 30, 2021 (on file in the Senate Transportation Committee).

<sup>21</sup> *Id.*

<sup>22</sup> See DBIA, *2021 State Statute Report*, available at <https://dbia.org/wp-content/uploads/2021/01/2021-DBIA-State-Statute-Report.pdf> (last visited December 15, 2021).

<sup>23</sup> See FDOT, *Work Program Instructions, FY 22/23-26/27*, September 10, 2021, available at <https://fdotwp1.dot.state.fl.us/fmsupportapps/Documents/development/WorkProgramInstructions.pdf> (last visited December 15, 2021).

The bill requires the selection and award processes for a progressive design-build contract to involve a two-phase process. In the first phase, the FDOT 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 subcontractor packages and, based upon these bids, negotiate with the FDOT for a fixed price or a guaranteed maximum price that meets the project budget and scope as advertised in the request for qualifications.

In addition, the bill exempts progressive design-build contracts for complex, high-risk projects with a minimum contract value of \$400 million from the annual \$120 million cap on innovative contracting.

**Section 3** of the bill amends s. 337.11(7), F.S., relating to the FDOT's authority to engage in design-build contracting, to allow the FDOT to combine the design and construction phases of any project into a single contract, not just for a building, a major bridge, a limited access facility, or a rail corridor project.

Though the bill repeals the exemption for low-bid design-build milling and resurfacing contracts from the \$120 million cap on innovative transportation project, by removing the limitation on design-build contracting to the design and construction phases of a building, a major bridge, a limited access facility, or a rail corridor project, "traditional" low-bid design-build milling and resurfacing contracts would not be subject to the cap. The FDOT would be authorized to use "traditional" design-build contracting for any type of project. These "traditional" (or non-innovative) contracts would not be included in the \$120 million annual cap on innovative contracting, as is the case under current law for certain projects as discussed above.

Under the bill, the FDOT would be authorized to use progressive design-build contracting as an innovative contracting technique, subject to the \$120 million annual cap. The annual cap on innovative contracting would continue to be inapplicable to Turnpike Enterprise projects and would be inapplicable to progressive design-build contracts for complex, high-risk projects with a minimum contract value of \$400 million.

#### **FDOT Contracting and Procurement Authority/Settlements and Stipends (Section 4)**

##### ***Present Situation***

When the FDOT determines that doing so is in the best interest of the public and intends, *through a settlement*, to pay a non-selected responsive bidder a total sum of \$1 million or more, including any amount paid pursuant to s. 334.049, F.S. (patents, copyrights, trademarks, and trade secrets), s. 337.11(8), F.S. (stipends to non-selected, responsive design-build firms), or any other law, current law requires the FDOT to:<sup>24</sup>

- Document in a written memorandum by the FDOT secretary the specific reasons that such settlement and payment to a non-selected responsive bidder is in the best interest of the state. The written memorandum must be included and maintained in the permanent procurement files of the FDOT and must include:

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<sup>24</sup> Section 337.1101(1), F.S.

- A description of the property rights, patent rights, copyrights, trademarks, or the engineering design or other design work that the department will acquire or retain as a result of such settlement; and
- The specific appropriation in the existing General Appropriations Act which the department intends to use to provide such payment.
- Provide prior written notification to the President of the Senate, the Speaker of the House of Representatives, the Senate and House of Representatives minority leaders, the chair and vice chair of the Legislative Budget Commission, and the Attorney General at least 5 business days, or as soon thereafter as practicable, before the FDOT makes the settlement agreement final. Such written notification must include the written memorandum described above.
- Provide written notification of such discussions to the same individuals at the time settlement discussions regarding any such payment have begun in earnest.

The FDOT is separately authorized, when the FDOT determines that doing so is in the best interest of the public, to pay a stipend to non-selected design-build firms that have submitted responsive proposals to the FDOT for construction contracts.<sup>25</sup> These projects are included in the FDOT's legislatively approved work program. The decision and amount of a stipend must be based on the FDOT's analysis of the estimated proposal development costs and the anticipated degree of engineering design during the procurement process. The FDOT retains the right to use the designs in the proposals from responsive non-selected design-build firms that accept a stipend.

A review of the FDOT's work program instructions suggests that the amount of a stipend to be paid is noted in the request for proposals for a design-build project. The FDOT enters into a stipend agreement with each firm after the proposals are "shortlisted,"<sup>26</sup> and each agreement states that the firm that receives the project contract award will not get the stipend. The non-selected firms then submit an invoice within two weeks after the project contract is executed and are paid the stipend amount noted in the request for proposals.<sup>27</sup>

While the FDOT might settle a bid protest through payment of a stipend, in contrast to any amounts paid by the FDOT that would trigger the documentation and notice requirements *for a settlement*, stipends paid by the FDOT pursuant to its separate authority are authorized payments arrived at by contract *during the procurement process*.

### *Effect of Proposed Changes*

**Section 4** of the bill amends s. 337.1101(1), F.S., to clarify that stipends paid by the FDOT to non-selected design-build firms that have submitted responsive proposals for construction contracts contained in the FDOT's legislatively approved work program are not subject to existing documentation and notification requirements for stipend payments made by the FDOT to resolve a bid protest through a settlement. If the FDOT pays a stipend to *settle* a bid protest in an amount that triggers the requirements, the FDOT must continue to comply with the documentation and notification requirements.

<sup>25</sup> Section 337.11(8), F.S.

<sup>26</sup> A "shortlist" is a list of selected candidates from which a final choice is to be made.

<sup>27</sup> See FDOT, *Work Program Instructions FY 22/23 – 26/27*, p. 370 of 847.



## Contractor Certificates of Qualification (Section 5)

### *Present Situation*

Current law requires any contractor desiring to bid on any FDOT construction contract in excess of \$250,000 to first be certified by the FDOT as qualified pursuant to s. 337.14, F.S., and the FDOT's rules.<sup>28</sup> When applying to the FDOT, each application for certification must be accompanied by the contractor's latest annual financial statement, which must have been completed within the last 12 months. If the application or the annual financial statement shows the contractor's financial condition more than four months prior to the date on which the FDOT receives the application, the contractor must also submit an interim financial statement and an updated application.<sup>29</sup> Each required annual or interim financial statement must be audited and accompanied by the opinion of a certified public accountant (CPA). However, an applying contractor who desires to bid exclusively for the performance of construction contracts with proposed budget estimates of less than \$1 million may submit reviewed annual or reviewed interim financial statements prepared by a CPA.<sup>30</sup>

The FDOT'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. In so doing, the FDOT verifies and evaluates whether an applicant is competent and responsible and possesses the necessary financial resources to perform the requested work.<sup>31</sup>

Part of the latter inquiry involves whether an applicant has the financial resources sufficient to establish a maximum capacity rating (MCR), which is defined as 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.<sup>32</sup> According to the FDOT's rules, the MCR is established by a formula, one element of which is the "ability factor." The FDOT'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.<sup>33</sup>

Currently, if an applicant for a certificate of qualification is found to possess the prescribed qualifications, the FDOT must issue the applicant a certificate, which, unless revoked by the FDOT 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 the FDOT prescribes. Submission of an application

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<sup>28</sup> Rule Chapter 14-22, F.A.C.

<sup>29</sup> The interim 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 the FDOT receives the interim statement but, upon request of the applicant, an application and accompanying annual or interim financial statement received by the FDOT within 15 days after either four-month period is considered timely.

<sup>30</sup> A reviewed annual or reviewed interim financial statement is less expensive than an audited, certified annual or interim financial statement.

<sup>31</sup> Rule 14-22.003(1), F.A.C.

<sup>32</sup> Rule 14.22-003(1)(d) and (2), F.A.C.

<sup>33</sup> Rule 14-22.006(1), F.A.C.

does not affect expiration of the certificate and, as of July 1, 2021, does not affect the ability factor of the applicant or the maximum capacity rating of the applicant.<sup>34</sup>

The FTBA advises the FDOT has requested revision of the current language to address overlapping certificates of qualification and any changes in the amount of new work that a firm can bid, due to a revised maximum capacity rating. As an example, the FTBA describes a potential situation in which a firm is allowed to bid on a \$1 million contract under its existing certificate of qualification and then is later found nonresponsive when a new certificate is issued to the firm during the time leading up to the submission of a bid, due to a revised (lower) capacity rating.<sup>35</sup>

### *Effect of Proposed Changes*

**Section 5** of the bill amends s. 337.14, F.S., to increase from \$1 million to \$2 million the proposed budget estimate amount for triggering authorization of an applying contractor to submit reviewed annual or reviewed interim financial statements prepared by a CPA, instead of audited, certified statements. An applying contractor who desires to bid exclusively on construction contracts with proposed budget estimates of \$2 million or less may submit reviewed annual or reviewed interim financial statements prepared by a CPA.

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

### **Public Records Exemption/Confidentiality of Identities of Bidders (Section 6)**

#### *Present Situation*

Section 336.168(1) and (3), F.S., establish confidential and exempt status from public records requirements of s. 119.07(1), F.S., for:

- A document or electronic file revealing the FDOT's official cost estimate of a project until the contract for the project has been executed or until the project is no longer under active consideration; and
- The FDOT's bid analysis and monitoring system, including all system documentation, input, computer processes and programs, electronic data files, and output. This does not apply to the actual source documents, unless otherwise exempted under other provisions of law.

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<sup>34</sup> Section 337.14(4), F.S. See s. 10, ch. 2021-188, Laws of Fla., which added the ability factor and MCR as things not being affected by the submission of an application.

<sup>35</sup> See FTBA email to Transportation Committee staff, November 30, 2021 (on file in the Senate Transportation Committee).

Section 337.168(2), F.S., currently provides that a document<sup>36</sup> revealing the identity of persons who have requested or obtained bid packages, plans, or specifications pertaining to any project to be let by the department is confidential and exempt from the provisions of s. 119.07(1), F.S., 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 before the two working days before the deadline for obtaining bid packages, plans, or specifications remains a public record.

The FDOT maintains a website that lists the identity of those who have requested or obtained bid packages for a given project.<sup>37</sup> The lists contain for each person a vendor identification number, an indication of the name of the entity that ordered the documents, and a shipping address and phone number for each. The lists do not appear to contain any information which would be exempt other any other provisions of law. The FDOT advises the lists are published daily, except for during the two-day confidential period defined in current law, and a comprehensive list is then published after the letting occurs.<sup>38</sup>

The issue appears to relate to small contractors, who use the identities of potential bidders for the purpose of submitting sub-contract bids to general contractors for their use in preparing bids for FDOT projects.<sup>39</sup>

### *Effect of Proposed Changes*

**Section 6** of the bill amends s. 337.168(2), F.S., to repeal the temporary public records exemption for 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 the FDOT. According to the FTBA, this revision provides full transparency as to the identity of potential bidders during the entire procurement process.<sup>40</sup>

### **Effective Date (Section 7)**

The bill is effective July 1, 2022.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

<sup>36</sup> The FDOT advises that many documents submitted by contractors contain both exempt and non-exempt information. Telephone conversation between FDOT staff and Senate Transportation Committee staff, November 24, 2021. In accordance with s. 119.07(1)(d), F.S., the FDOT would be required to redact any information contained in a document that reveals the identity of persons who have requested or obtained bid packages if the information is exempt under any other provision of law.

<sup>37</sup> See e.g., FDOT, *Contractors ordering Plans and Specs by Letting Report*, available at <https://fdotwp2.dot.state.fl.us/ContractProposalProcessing/CPA> and *Contractors ordering Proposals by Letting Report*, available at <https://fdotwp2.dot.state.fl.us/ContractProposalProcessing/CPA> (last visited November 24, 2021). Enter “guest” for the user name and select “Sign in.”

<sup>38</sup> See FDOT email to Transportation Committee staff, November 24, 2021 (on file in the Senate Transportation Committee).

<sup>39</sup> Telephone conversation between FDOT staff and Senate Transportation Committee staff, November 24, 2021.

<sup>40</sup> See FTBA email to Transportation Committee staff, November 30, 2021 (on file in the Senate Transportation Committee).

B. Public Records/Open Meetings Issues:

None. The bill does not expand public records exemptions.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

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

Increasing the budget estimate amount for construction contracts from \$1 million to \$2 million for certain contractors exclusively bidding, allowing these additional contractors to submit reviewed financial statements should reduce the costs on these contractors to submit bids. A reviewed annual or reviewed interim financial statement is less expensive than an audited, certified annual or interim financial statement.

C. Government Sector Impact:

The impact on current funding levels, if any, of imposing a maximum commitment of no more than 25 percent of state revenues in the STTF for the identified public transportation projects, excluding those used for matching federal grants, as well as any effect on other projects in the work program, is dependent on funding levels selected by the FDOT within the authorized range. To the extent that funding for public transportation projects is increased above currently programmed levels within the cap, other projects in the work program may be impacted.

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

The fiscal impact of the revisions relating to FDOT contractor certificates of qualification, if any, is indeterminate. The FDOT may incur expenses associated with

revising Rule Chapter 14-22 of the Florida Administrative Code relating to contractor qualification. These expenses, if rule revision is necessary, are expected to be absorbed within existing resources.

The FDOT may experience an indeterminate, but likely insignificant negative fiscal impact associated with responding to requests for documents that reveal the identity of a potential bidder on a transportation project, including, if necessary, redacting any information contained in a document which is made exempt under any other provisions of law, for a two-day period during which such a record would have been exempt under current law.

## **VI. Technical Deficiencies:**

None.

## **VII. Related Issues:**

The FDOT has raised concerns regarding the 25-percent public transportation funding cap imposed by the bill, relating to decreased long-term flexibility in preparing the work program.<sup>41</sup>

Current law requires the FDOT to adopt by rule procedures for administering design-build contracts and specifies what must be minimally included in the procedures.<sup>42</sup> As drafted, the bill is unclear as to whether the procedures adopted to administer design-build contracts also apply to progressive-design build contracts. Failure to adopt by rule any procedures applicable to progressive design-build contracts could result in a challenge under the Administrative Procedures Act.<sup>43</sup> An amendment to existing s. 377.11(7)(b), F.S., to expressly include progressive design-build contracts in the rulemaking requirement may be in order.

The FDOT has also expressed concerns regarding the repeal of the temporary public records exemption for the identity of persons who have requested bid packages, relating to a potential negative impact on the procurement process.<sup>44</sup>

## **VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 206.46, 337.025, 337.11, 337.1101, 337.14, and 337.168.

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<sup>41</sup> FDOT, *2022 Agency Legislative Bill Analysis: SB 398*, pp. 8-9.

<sup>42</sup> Section 337.11(7)(b), F.S.

<sup>43</sup> See s. 120.56(4), F.S.

<sup>44</sup> FDOT, *2022 Agency Legislative Bill Analysis: SB 398*, p. 6.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Appropriations on February 28, 2022:**

The committee substitute:

- Increases the minimum contract value of certain progressive design-build contracts that are exempt from the annual cap on innovative transportation projects, from \$250 million contract value to a \$400 contract value.
- Moves the amendatory provisions allowing the FDOT to enter into progressive design-build contracts from s. 377.11, F.S., to being amended into s. 337.025, F.S.
- Clarifies that stipends paid by the FDOT to non-selected design-build firms that have submitted responsive proposals for construction contracts contained in the FDOT's legislatively-approved work program are not subject to existing documentation and notification requirements for stipend payments made by the FDOT to resolve a bid protest through a settlement.
- Increases from \$1 million to \$2 million the proposed budget estimate amount for triggering authorization of an applying contractor to submit reviewed annual or reviewed interim financial statements prepared by a CPA, instead of audited, certified statements.

**CS by Transportation on December 1, 2021:**

The committee substitute:

- Modifies the minimum 15-percent and maximum 25-percent commitment of state revenues in the STTF for the specified public transportation projects if otherwise provided in the General Appropriations Act.
- Includes progressive design-build contracting as an authorized innovative technique of highway and bridge design and construction projects, excludes certain progressive design-build contracts from an annual \$120 million cap on innovative transportation projects, and removes inapplicability of the cap to low-bid design-build milling and resurfacing contracts.
- Removes a limitation on the FDOT's authority to combine the design and construction phases (a "design-build" project) to a building, a major bridge, a limited access facility, or a rail corridor project, authorizing the FDOT to combine the design and construction phases of any type of project into a single design-build contract.
- Authorizes the FDOT, if it determines that doing so is in the best interests of the public, to use progressive design-build contracting, using a specified two-phase process, the first involving the design-build firm's qualifications and, the second involving negotiations on price.
- Removes the maximum capacity rating of an applicant for a contractor certificate of qualification as factors that do not affect the expiration of a certificate, authorizes an applicant to submit a request to keep an existing certificate of qualification in place until the expiration date and, if approved by the FDOT, keep the current maximum capacity rating of the applicant in place until expiration of the current certificate of qualification.

- Removes the entire subsection of current law containing the temporary public records exemption for 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 the FDOT, instead of leaving unnecessary language deeming such a document to be a public record.
- Removes from the bill authorization of the FDOT to use moneys in the STTF to pay for work zone speed enforcement by entering into an agreement with the FHP.

B. Amendments:

None.