

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1017 Preference in Award of Governmental Contracts

SPONSOR(S): Appropriations Committee; Government Operations Subcommittee; Fresen

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N, As CS	Harrington	Williamson
2) Appropriations Committee	26 Y, 0 N, As CS	White	Leznoff
3) State Affairs Committee			

SUMMARY ANALYSIS

Current law requires each state agency, university, college, school district, or other political subdivision of this state to award a preference to Florida-based businesses for the purchase of personal property and services, including printing services, through competitive solicitation, when the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is another state, or political subdivision of that state. However, uniform in-state preferences are not provided for all state purchasing.

The bill creates a uniform local business preference for state procurement for goods or contractual services, including construction services. The bill defines "local business" for purposes of evaluating state procurements and awarding in-state preferences to local businesses. The bill creates a preference procedure that permits both the out-of-state and in-state vendors to submit their best and final bid.

The bill provides that the preference does not apply if such preference is prohibited by law, the procurement is designated for small business, it is an emergency, or it is a sole source procurement.

The bill may have an indeterminate positive fiscal impact on state government. See Fiscal Comments section for further discussion.

The bill provides an effective date of July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency¹ procurement of personal property and services. The Department of Management Services (DMS) is responsible for overseeing state purchasing activity, including professional and construction services, as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology.² DMS establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.³

Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods, which include:⁴

- Single source contracts, which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid, which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposal, 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, which are used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services.

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.⁵ Section 287.012(6), F.S., provides that 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."

Local governmental units are not subject to the provisions of chapter 287, F.S.

Florida In-state Preference

State agencies, universities, colleges, school districts, and other political subdivisions are required to grant a preference in the award for contracts for the purchase of personal property, when competitive solicitation is required and when the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is in another state, or political subdivision of that state.⁶ The preference is mandatory and is utilized by the procuring entity to award a preference to the lowest responsible and responsive vendor having a principal place of business in this state. The preference awarded is the same preference provided by the out-of-state bidder's home state.

¹ Section 287.012(1), F.S., defines agency as "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 See ss. 287.032 and 287.042, F.S.

³ *Id.*

⁴ See ss. 287.012(6) and 287.057, F.S.

⁵ 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.

⁶ Section 287.084(1)(a), F.S.

If the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is another state, or political subdivision of that state, and that state does not award a preference for in-state vendors, state agencies, universities, colleges, school districts, and other political subdivisions must award a 5 percent preference to Florida-based vendors.⁷

A vendor whose principal place of business is outside of this state must submit with the bid, proposal, or reply documents a written opinion of an attorney at law licensed to practice law in that foreign state as to the preferences, if any, granted by the law of that state to a business entity whose principal place of business is in that foreign state.⁸

Florida's preference law does not apply to transportation projects for which federal aid funds are available,⁹ or to counties or cities.¹⁰ It also does not apply in the award of contracts for the purchase of construction services.

Procurement of Construction Services

Chapter 255, F.S., specifies the procedures to be followed in the procurement of construction services for public property and publicly-owned buildings. DMS is responsible for establishing by rule the following:¹¹

- Procedures for determining the qualifications and responsibility of potential bidders prior to advertisement for and receipt of bids for building construction contracts;
- Procedures for awarding each state agency construction project to the lowest qualified bidder;
- Procedures to govern negotiations for construction contracts and contract modifications when such negotiations are determined to be in the best interest of the state; and
- Procedures for entering into performance-based contracts for the development of public facilities those contracts are determined to be in the best interest of the state.

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.¹² Counties, municipalities, special districts, or other political subdivisions seeking to construct or improve a public building must competitively bid the project if the projected cost is in excess of \$300,000.¹³

Section 255.0525, F.S., requires the solicitation of competitive bids or proposals for any state construction project that is projected to cost more than \$200,000 to be publicly advertised in the Florida Administrative Weekly¹⁴ at least 21 days prior to the established bid opening. If the construction project is projected to exceed \$500,000, the advertisement must be published at least 30 days prior to the bid opening in the Florida Administrative Weekly, and at least once 30 days prior to the bid opening in a newspaper of general circulation in the county where the project is located.¹⁵

Florida In-state Preference

Current law requires every official board in the state, whether of the state, a county, or a municipality, to give a preference in the purchase of material or in the procurement of construction contracts for buildings, to materialmen, contractors, builders, architects, and laborers who reside within the state, whenever such material can be purchased or the services can be employed at no greater expense than would be obtained if the materials or services were provided by a person residing in another state.

Florida Preference to State Residents

⁷ *Id.*

⁸ Section 287.084(2), F.S.

⁹ Section 287.084(1)(b), F.S.

¹⁰ Section 287.084(1)(c), F.S.

¹¹ Section 255.29, F.S.

¹² See chapters 60D-5.002 and 60D-5.0073, F.A.C.; see also s. 255.0525, F.S.

¹³ See s. 255.20(1), F.S. For electrical work, local governments must competitively bid projects estimated to cost more than \$75,000.

¹⁴ The Florida Administrative Weekly was renamed the Florida Administrative Register during the 2012 Session. Chapter 2012-63, L.O.F.

¹⁵ For counties, municipalities, and political subdivisions, similar publishing provisions apply. Section 255.0525(2), F.S.

Florida law provides a preference for the employment of state residents in construction contracts funded by money appropriated with state funds. Such contracts must contain a provision requiring the contractor to give preference to the employment of state residents in the performance of the work if state residents have substantially equal qualifications¹⁶ to those of non-residents.¹⁷ If a construction contract is funded by local funds, the contract may contain such a provision.¹⁸ In addition, the contractor required to employ state residents must contact the Department of Economic Opportunity to post the contractor's employment needs in the state's job bank system.¹⁹

Florida Department of Transportation

The Florida Department of Transportation (FDOT) Central Procurement Office is responsible for acquiring professional consulting services, contractual services, and commodities related to the state highway systems. FDOT procures road and bridge construction materials and services, and other products or services related to the maintenance of roads, bridges or other transportation facilities, as well as supplies and services that support FDOT. FDOT purchasing is governed by chapters 283 and 287, F.S., and the rules adopted by DMS. However, the FDOT may purchase parts and repairs valued at up to the threshold amount provided for Category Two (\$35,000) for the repair of mobile road maintenance equipment, marine vessels, permanent vehicle scales, and mechanical and electrical equipment for movable bridges, toll facilities including the Florida Turnpike, and up to the threshold amount for Category Three (\$65,000) for treatment plans and lift stations for water and sewage and major heating and cooling systems without receiving competitive solicitations.

If FDOT determines that an emergency exists in regard to the purchase of materials, machinery, tools, equipment, or supplies, so that the delay incident to giving opportunity for competitive bidding would be detrimental to the interests of the state, the provisions for competitive bidding do not apply and FDOT may authorize or purchase such materials, machinery, tools, equipment, or supplies without giving opportunity for competitive bidding thereon. Within 10 days after such determination and purchase, FDOT must notify DMS as to the conditions and circumstances constituting such emergency.²⁰ When FDOT advertises for bids for supplies, materials, equipment, or other items needed by FDOT, specifications must be drafted in such manner as will afford adequate protection to the state as to quality and performance, but specifications must not be drafted in any manner that will preclude competition in bidding.²¹

Chapter 337, F.S., contains other requirements and provisions specifically related to FDOT contracting, which includes efforts to encourage awarding contracts to disadvantaged business enterprises²² and requirements for prequalification and certification in specified circumstances.²³

Public Printing

Chapter 283, F.S., governs public printing and applies to all agencies. Section 283.33, F.S., provides that publications may be printed in-house or may be purchased on bid, whichever is more economical or practicable. All printing of publications purchased by agencies that cost in excess of the threshold for Category Two (\$35,000) must be competitively procured and the agency must award the contract to the vendor that submits the lowest responsive bid and that will furnish all materials used in printing.

Florida In-state Preference

Current law provides that when agencies award a contract to have materials printed, the agency, university, college, school district, or other political subdivision of this state must grant a preference to the lowest responsible and responsive vendor having a principal place of business within this state.

¹⁶ Section 255.099(1)(a), F.S., defines substantially equal qualifications as the "qualifications of two or more persons among whom the employer cannot make a reasonable determination that the qualifications held by one person are better suited for the position than the qualifications held by the other person or persons."

¹⁷ Section 255.099(1), F.S.

¹⁸ *Id.*

¹⁹ Section 255.099(1)(b), F.S.

²⁰ Section 337.02(2), F.S.

²¹ Section 337.02(3), F.S.

²² Section 337.139, F.S.

²³ Section 337.14, F.S.

The preference must be 5 percent if the lowest bid is submitted by a vendor whose principal place of business is outside the state and if the printing can be performed in this state at a level of quality comparable to that obtainable from the vendor submitting the lowest bid outside the state. This preference does not apply to counties or municipalities.²⁴

Effect of the Bill

The bill creates a uniform local business preference for state procurement for goods or contractual services, including construction services.

The bill defines the term “local business” to mean a business entity of which:

- At least 60 percent of the individuals who collectively own the business reside in the state.
- The business’s principal place of business has been located in the state for at least one year. Principal place of business means a fully operational office at which the majority of the business’s employees and principals are located.
- At least 60 percent of the business’s employees reside in the state at the time of contract award.

The bill requires the state to evaluate each competitive solicitation before advertisement to determine whether a local preference is appropriate. The entity must evaluate the availability of local businesses to provide the goods or contractual services, including construction services. When the state makes an evaluation and identifies an opportunity to utilize a local preference, the state must give preference as follows:

- When a business that is not a local business is the lowest responsive bidder and the bid of the local business is not more than 10 percent above the lowest bid or, in the alternative the actual dollar bid is not more than the established dollar threshold for that particular procurement above the lowest bid, preference must be given to the local business by offering the local business and the nonlocal business that was the lowest responsive bidder an opportunity to submit a best and final bid equal to or lower than the amount of the lowest bid.
- The contract award must be made to the bidder submitting the lowest best and final bid. In the case of a tie, the contract must be awarded to the local business.
- A business that intentionally misrepresents its qualifications as a local business in a proposal or bid loses the privilege to claim local preference status for a period of two years.

The bill provides that the preference does not apply if such preference is prohibited by law, the procurement is designated for small business, it is an emergency, or it is a sole source procurement. The bill does not apply to transportation projects which are funded in whole or in part by federal aid funds.

The bill adds language to section 255.0991, F.S., related to construction contracts; section 283.35, F.S., related to public printing; and section 287.084, related to state procurement of goods and contractual services. The bill states that for public printing and state procurement of goods and contractual services, since there is currently a preference in law, entities must choose which preference will apply to the competitive solicitation.

B. SECTION DIRECTORY:

Section 1. creates section 255.0991, F.S., to establish a preference to local businesses.

Section 2. amends section 283.35, F.S., to include the preference to local businesses and states that entities must choose which preference will apply to the competitive solicitation.

Section 3. amends section 287.084, F.S., to include the preference to local businesses and states that entities must choose which preference will apply to the competitive solicitation.

²⁴ Section 283.35, F.S.
STORAGE NAME: h1017d.APC
DATE: 4/11/2013

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill could result in more business being awarded to in-state vendors as a result of the state preference.

D. FISCAL COMMENTS:

The bill may have an indeterminate positive fiscal impact on state government. The bill may have a positive effect as the state government may experience decreased expenditures with the possibility of vendors submitting best and final offers that are at or below the low bid.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

Equal Protection Clause

The United States Constitution provides that “[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws.” The expansion of the in-state preference provisions in this bill may constitute an equal protection violation. If such legislation is challenged, the court would use a rational basis test to determine the constitutionality of the alleged discriminatory treatment. Under the rational basis test, a court must uphold a state statute so long as the classification bears a rational relationship to a legitimate state interest.

Commerce Clause

The United States Constitution provides that Congress shall have the power to “regulate commerce...among the states.” The Commerce Clause acts not only as a positive grant of powers to Congress, but also as a negative constraint upon the states. When a state or local government is acting as a “market participant” rather than a “market regulator,” it is not subject to the limitations of the Commerce Clause. A state is considered to be a “market participant” when it is acting as an economic actor such as a purchaser of goods and services.

B. RULE-MAKING AUTHORITY:

The bill does not provide for rulemaking; however, rulemaking may be necessary for purposes of implementing the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 27, 2013, the Government Operations Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment corrects a drafting issue.

On April 10, 2013, the Appropriations Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment adds the bill language to the sections of statute related to construction contracts (section 255.0991, F.S.), public printing (section 283.35, F.S.), and state procurement of goods and contractual services (section 287.084, F.S.); Corrects a reference to information submitted to the “state” regarding intentionally misrepresenting its local business status to instead reference information submitted to “an agency, university, college, school district, or other political subdivision.”; directs entities to make a choice as to which preference will be used for construction contracts and state procurement of goods and contractual services since there is already a preference in current law; and does not apply to transportation projects which are funded in whole or in part by federal aid funds.

This analysis is drafted to the committee substitute as passed by the Government Operations Appropriations Subcommittee.