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 Commerce and Tourism Committee

BILL:	SB 90
INTRODUCER:	Senators Smith and Margolis
SUBJECT:	State Contracts
DATE:	January 15, 2013
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Juliachs	Hrdlicka	CM	**Favorable**
2.			GO	
3.			BGA	
4.			BC	
5.				
6.				

I. Summary:

SB 90 requires that all state contracts exceeding $35,000 include a provision requiring any call-center services to be staffed by persons located within the United States.

This bill substantially amends s. 287.058, F.S.

II. Present Situation:

Procurement laws govern the manner in which a government receives goods and services. In Florida, ch. 287, F.S., broadly, governs the public procurement of personal property and services. Section 287.058, F.S., outlines the minimum requirements that must be present in public procurement contracts that exceed the amount of $35,000.[1]

The federal government also has its own body of law regulating procurement activities. One of the most well known pieces of legislation regulating federal procurement is The Buy American Act, which restricts the federal government from purchasing nondomestic end products,[2] unless an enumerated exception provided in the statute is applicable.[3, 4]

[1] Section, 287.017, F.S., sets forth purchasing categories by the threshold amount. Procurement contracts that exceed $35,000 are designated as a category two.

[2] "According to the Federal Acquisition Regulation (FAR), a domestic end product means an unmanufactured end product mined or produced in the United States, or an end product manufactured in the U.S. if the cost of its components that are mined, produced, or manufactured in the U.S. exceeds 50 percent of the cost of all its components." United States Government Accountability Office, *Federal Procurement: International Agreements Result in Waivers of Some U.S. Restrictions* (January 2005), GAO-05-188, fn. 6, p. 3, available at http://www.gao.gov/assets/250/245118.pdf (last visited December 13, 2012).

The expansion of international trade between the United States and foreign governments has resulted in many agreements that contain mutually beneficial government procurement obligations. In the spirit of promoting trade relations, governments have agreed to require that each party's goods and service be given the same treatment as domestic goods and services. As such, a government is prohibited from arbitrarily giving preferential treatment to domestic goods at the expense of foreign goods originating from a country where there is an enforceable and standing trade agreement espousing mutually beneficial government procurement obligations.

Historically, international trade agreements have been treated as congressional-executive agreements (CEA), which require the majority of both houses in Congress to be implemented,[5] as opposed to only a two-thirds vote of the Senate.[6] One explanation for the use of CEAs in the context of international trade agreements stems from the view that participation by the House of Representatives is appropriate in light of its constitutional role in revenue raising.[7] Moreover, congressional authorization has been deemed necessary as trade agreements have become much more elaborate through the regulation of a broader spectrum of subjects ranging from subsidies, government procurement, and product standards.[8] To avoid constitutional challenges for an unlawful delegation of power, Congress enacted the Trade Act of 1974 and Trade Act of 2002, which provide the President with guidelines and authorization to engage in such trade negotiations.[9]

The most well-known examples of CEAs are the World Trade Organization Government Procurement Agreement (GPA), the North American Free Trade Agreement (NAFTA), and numerous other bilateral free trade agreements (FTA).[10]

World Trade Organization Government Procurement Agreement (GPA)

The agreement that established the World Trade Organization (WTO)[11] came as a result of the Uruguay Rounds of Multilateral Trade Negotiations, which also produced a series of other

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[3] 41 U.S.C. s. 8302 (2012).
[4] *See supra*, note 2 (Exceptions include the following: "where the cost of the domestic end product would be unreasonable; where domestic end products are not reasonably available in sufficient commercial quantities of a satisfactory quality; where the agency head determines that a domestic preference would be inconsistent with the public interest; where the purchases are for use outside of the United States; where the purchases are less than the micro purchase threshold; and where the purchases are for commissary resale.").
[5] The Congressional Research Service, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather than Treaties* (July 28, 2004), available at http://assets.opencrs.com/rpts/97-896_20040728.pdf (last visited December 13, 2012).
[6] *See* U.S. Const. art. 2, s. 2.
[7] Restatement Third of Foreign Relations Law s. 303, note 9 (1987).
[8] *See Supra* note 5.
[9] *Id.*
[10] A list of the federal government's current procurement obligations under international agreements is available at http://www.ustr.gov/trade-topics/government-procurement.
[11] In a letter dated November 7, 1991, Governor Lawton Chiles authorized coverage of Florida under the GATT/WTO Government Procurement Agreement.

international agreements, including the GPA.[12] As enumerated in the preamble, the GPA's objective is the expansion of world trade through three primary measures:

- Prohibition on discrimination based on national origin;
- Establishment of clear, transparent laws, regulations, procedures, and practices regarding governmental procurement; and
- Application of competitive procedural requirements related to notification, tendering (bidding), contract award, tender (bid) protest, etc.[13]

With respect to discrimination on the basis of national origin, Article III of the agreement expressly forbids the application of less favorable treatment to the products, services, and suppliers of other foreign parties than that which would be accorded to domestic products, services, and suppliers.[14] The agreement further provides that all parties will ensure that the laws, regulations, procedures, and practice regulating government procurement in their home state will be executed in a nondiscriminatory manner.[15]

Accordingly, procurement provisions stipulated in the Buy American Act will yield to nondiscriminatory provisions espoused in international trade agreements. The interplay between the act and international trade agreements is described below:

> [T]he Trade Agreements Act of 1979 authorizes the President to waive any otherwise applicable "law, regulation or procedure regarding Government procurement" that would accord foreign products less favorable treatment than that given to domestic products. Article 1004 of The North American Free Trade Agreement (between the United States, Mexico, and Canada) disallows domestic protection legislation, such as the Buy-American Act, in government procurement. Other treaties and agreements also place limitations on the application of the act and must be considered when looking at any Buy American question.[16, 17]

Presently, Florida's executive branch is covered under the GPA[18] for purchases that exceed $552,000 for commodities and services and $7,777,000 for construction services.[19] Florida was 1 of 37 states to agree to procure in accordance with the GPA.[20]

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[12] Signatory countries: Armenia, Canada, Austria Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, Slovenia, Bulgaria, Romania, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, and Chinese Taipei.

[13] 1994 Uruguay Round Agreement on Government Procurement, April 15, 1994, WTO Agreement, Annex 4(b) (hereinafter "GPA"), *and see* GPA Appendix I (United States), Annex 2 (discusses sub-central government entities, such as Florida), both available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited December 13, 2012).

[14] *Id.*

[15] *Id.*

[16] Congressional Research Service, *The Buy American Act: Requiring Government Procurements to Come from Domestic Sources*, (March 13, 2009), available at http://assets.opencrs.com/rpts/97-765_20080829.pdf (last visited December 13, 2012).

[17] *See* 19 U.S.C. ss. 2511(a), 2532, and 2533 (2011); *see also* 48 C.F.R. 25.402 ; *see also* Exec. Order No. 12260, available at http://www.presidency.ucsb.edu/ws/index.php?pid=44462#axzz1jXJhYUyX (last visited December 13, 2012).

[18] *See* Annex 2 (Sub-Central Government Entities), *supra*, note 13.

[19] 76 F.R. 76808-01, December 8, 2011.

[20] *See supra* note 11.

Free Trade Agreements

In addition to the GPA, the United States has also entered into several bilateral free trade agreements[21] and two multilateral free trade agreement,[22] with the most highly recognized being NAFTA. Similar to the GPA, all these agreements contain provisions that call for fair and non-discriminatory treatment of products, goods, and services by all state parties. When necessary, the United States has issued waivers to protect parties from discriminatory purchasing requirements found under existing law that would be contrary to the covenants embodied in such international agreements.[23]

III. Effect of Proposed Changes:

Section 1 amends s. 287.058, F.S., to require that state agency contracts in excess of $35,000 must include a provision specifying that all call center services provided by the contractor and all subcontractors must be staffed by persons located within the United States.

Section 2 provides that the bill takes effect July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

[21] The United States has entered bilateral free trade agreements with the following countries: Australia, Bahrain, Canada, Chile, Israel, Morocco, Oman, Peru, and Singapore. This information is available at http://www.ustr.gov/trade-topics/government-procurement/ftas-government-procurement-obligations (last visited December 13, 2012).
[22] NAFTA (member countries: United States, Mexico, and Canada) and DR-CAFTA (El Salvador, Dominican Republic, Guatemala, Honduras, Nicaragua, and Costa Rica). This information is available at http://www.ustr.gov/trade-topics/government-procurement/ftas-government-procurement-obligations (last visited December 13, 2012).
[23] *See supra,* note 17.

D. Other Constitutional Issues:

The Federal Commerce Clause and Market Participant Exception

That Commerce Clause found in Article I, Section 8, Clause 3 provides that Congress shall have the power "to regulate commerce with foreign Nations, and among the several States."[24] This clause speaks to Congress' power to regulate both interstate and foreign commerce clause and acts as a negative constraint upon the states. [25]

For this reason, courts review state action affecting the interstate and foreign commerce with heightened scrutiny.[26] The United States Supreme Court has explained the standard for the foreign commerce clause as follows: "It is a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny. It is crucial to the efficient execution of the Nation's foreign policy that the federal government … speak with one voice when regulating commercial relations with foreign governments."[27]

However, when state is acting as a "market participant," the market participant exception to the Commerce Clause may be applicable. This doctrine provides that 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 Interstate Commerce Clause.[28] 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.[29]

With respect to the Foreign Commerce Clause, the law is unsettled regarding the applicability of the market participant exception. In *Trojan Techs., Inc. v. Pennsylvania,* the United States Court of Appeals for the First Circuit upheld the validity of a Pennsylvania procurement statute that required suppliers contracting with a public agency for public works projects to provide products made of American steel. [30] The court there found that the market participant exception did extend to the Foreign Commerce Clause.[31] Conversely, the United States Court of Appeals for the Third Circuit, in *National Foreign Trade Council v. Natsios*, refused to extend the market participant exception to the Foreign Commerce Clause.[32]

To date, neither the United States Court of Appeals for the Eleventh Circuit nor the United States Supreme Court has ruled on the matter.[33]

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[24] U.S. Const. Art. I, s. 8.
[25] *See Gibbons v. Ogden*, 22 U.S. 1 (1824).
[26] *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446 (1970) ("When construing Congress' power to 'regulate commerce with foreign Nations,' a more extensive constitutional inquiry is required.").
[27] *South-Central Timber Develop., Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (citing *Michelin Tire Corp. v. Wages*, 723 U.S. 276, 285 (1979)).
[28] *See White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983) (providing that a state may grant and enforce a preference to local residents when entering into construction projects for public projects).
[29] *Id.*
[30] *Trojan Techs., Inc. v. Pennsylvania*, 916 F. 2d 903, 912 (3d Cir. 1990), *cert denied*, 501 U.S. 1212 (1991).
[31] *Id.* at 910.
[32] *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 (1st Cir. 1999), *cert granted*, 528 U.S. 1018 (1999).
[33] *See Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (declining to address the analysis of the United States Court of Appeals for the First Circuit on the applicability of the market exception to the Foreign Commerce Clause).

Federal Preemption

Several United States Supreme Court cases have declared state laws directed at foreign conduct, unconstitutional because they have been interpreted as conflicting with federal policy and intent. In *Crosby v. National Foreign Trade Council*, the United States Supreme Court concluded that a Massachusetts' law prohibiting its agencies from purchasing goods and services from companies that did business with Burma was unconstitutional.[34] At that time, the federal government was reassessing its foreign relations status with Burma in light of reports of human rights violations by the government. Congress enacted a statute that imposed a set of mandatory and conditional sanctions on Burma. This statute also authorized the President to impose these sanctions subject to the limitation that they would only limit Americans from conducting *new* business in Burma.[35] The existence of both the state and federal law created a direct conflict since the Massachusetts ban restricted *all* contracts between the state and companies doing business in Burma. This made the state law more overreaching than the prohibitions imposed by the President. For this reason, the United States Supreme Court struck down the law on federal preemption grounds.

SB 90 may implicate foreign relations by requiring that state agency contracts in excess of $35,000 include a provision specifying that all call center services be staffed by persons located within the United States. To the extent that the state enters into such a contract for an amount that exceeds the threshold amounts covered by the GPA and other international agreements, it may be subject to a federal preemption challenge.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

SB 90 could limit the number of private companies qualified to enter into procurement contracts with the state. The Department of Management Services in their agency analysis also stated that while SB 90 may create more American jobs, "large corporations providing worldwide call-center services could have substantial costs associated with requiring these corporations to alter their business models and provide these services within the United States." [36]

[34] *Id.* at 388.
[35] *Id.* at 378-382; *See also, Id.* at 375 ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").
[36] Department of Management Services, *Senate Bill 90 Fiscal Analysis* (December 2012) (on file with the Senate Committee on Commerce and Tourism).

C. Government Sector Impact:

SB 90 could have fiscal implications if the cost of domestic labor is higher than the cost of labor in foreign markets.

VI. Technical Deficiencies:

None.

VII. Additional Information:

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

None.

B. Amendments:

None.