

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/CS/CS/SB 612

INTRODUCER: Judiciary Committee; Community Affairs Committee; Governmental Oversight and Accountability Committee; and Senator Hays

SUBJECT: Government Contracting

DATE: April 9, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>McKay</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
2.	<u>Stearns</u>	<u>Yeatman</u>	<u>CA</u>	<u>Fav/CS</u>
3.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
4.	_____	_____	<u>AP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/CS/SB 612 provides that state law preempts and supersedes local ordinances and regulations that give preference to local contractors if a competitive solicitation for personal property uses state funds to pay for 51 percent or more of the total cost. Current law requires agencies and political subdivisions of the state except for counties and municipalities in purchasing personal property through competitive solicitation to give a preference to a vendor whose principal place of business is in Florida. The bill removes counties and municipalities from the exemption on preference requirements, so that counties and municipalities must now comply with legislative preference requirements.

The bill requires a political subdivision of the state to disclose in the solicitation document of a competitive solicitation whether payment will come from funds appropriated by the state and the amount or percentage relative to the total cost of the personal property or construction services, if known.

The bill requires the Department of Management Services to maintain a vendor complaint list, a suspended vendor list, and a terminated vendor list, which are comprised of vendors identified by

state agencies and participating local governments. Agencies must consider the fact of a vendor's status on any of the lists in evaluating competitive solicitations.

Within 30 days after an agency contracts with a vendor, the bill requires an agency to update the Florida Accountability Contract Tracking System website indicating whether the contract was issued to a vendor on one of the lists.

II. Present Situation:

Procurement of Commodities and Services

Chapter 287, F.S., regulates the procurement of personal property¹ and services by state agencies.² 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. The DMS establishes statewide purchasing rules and negotiates contracts and purchasing agreements intended to leverage state buying power.³

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

- Single source contracts, used if an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid, used if 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 if 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, used if 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 follow a competitive solicitation, or bid 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,

¹ "Personal property" is not independently defined for purposes of ch. 287, F.S., but the title of the chapter is "Procurement of Personal Property and Services." Additionally, the definition of "commodity" in s. 287.012(5), F.S., is "any of the various supplies, materials, goods, merchandise, food, equipment, information technology, *and other personal property*, including a mobile home, trailer, or other portable structure that has less than 5,000 square feet of floor space, purchased, leased, or otherwise contracted for by the state and its agencies." This definition is used in Part I of ch. 287, F.S., "Commodities, Insurance, and Contractual Services."

² 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."

³ Section 287.042(1) and (2), F.S.

⁴ Sections 287.012(6) and 287.057(1) and (3)(c), 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.

or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement.”

Vendor Reporting

The DMS has some limited general authority in policing vendors who fail to adequately perform their contractual duties. The DMS currently maintains a convicted vendor list, suspended vendor list, and a vendor complaint list.⁶ The DMS must maintain the convicted vendor list pursuant to s. 287.133, F.S., which prohibits persons convicted of public entity crimes from being awarded contracts and requires the DMS to place people on the list using an administrative process.⁷ The DMS maintains the suspended vendor list pursuant to its general authority to “remove from its vendor list any source of supply which fails to fulfill any of its duties specified in a contract with the state.”⁸ The suspended vendor list consists of vendors whose contracts have been found in default by state agencies.⁹ The vendor complaint list consists of all formal vendor complaints issued to vendors by state agencies and received by the DMS.¹⁰ Florida law does not require agencies to formally report to the DMS if agencies experience problems with vendors or terminate vendors due to contract nonperformance.

Though s. 287.133(1)(g), F.S., allows the DMS to place persons convicted of public entity crimes against political subdivisions on the convicted vendor list, if political subdivisions terminate vendors for cause due to contract nonperformance issues, Florida law does not mandate the reporting of termination of vendors to the DMS.

Contract Tracking

Pursuant to s. 215.985(14), F.S., the Chief Financial Officer (CFO) is required to establish and maintain a publically-available contract tracking system. Within 30 days of contract execution, each state entity must submit specified information to the CFO’s website.¹¹ The information includes:

- Names of the contracting entities.
- Procurement method.
- Beginning and ending dates of the contract.
- Nature or type of the commodities or services purchased.

⁶ See The Florida Department of Management Services, Convicted/Suspended/Discriminatory/Complaints Vendor Lists website.

http://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/convicted_suspended_discriminatory_complaints_vendor_lists (last visited April 2, 2014).

⁷ As of April 2, 2014, no one is listed on the convicted vendor list.

http://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/convicted_suspended_discriminatory_complaints_vendor_lists/convicted_vendor_list.

⁸ Section 287.042(1)(b), F.S. The administrative rule implementing this authority is Rule 60A-1.006(2), F.A.C.

⁹ As of April 2, 2014, there are 89 vendors on the suspended vendor list,

http://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/convicted_suspended_discriminatory_complaints_vendor_lists/suspended_vendor_list.

¹⁰ As of April 2, 2014, four vendors are on this list.

http://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/convicted_suspended_discriminatory_complaints_vendor_lists/vendor_complaint_list.

¹¹ The system is called the Florida Accountability Contract Tracking System (FACTS).

<https://facts.fldfs.com/Search/ContractSearch.aspx> (last visited April 2, 2014).

- Applicable contract unit prices and deliverables.
- Total compensation to be paid or received under the contract.
- All payments made to the contractor to date.
- Applicable contract performance measures.
- If a competitive solicitation was not used to procure the goods or services, the justification of the action, including a citation to a statutory exemption or exception from competitive solicitation requirements, if any.
- Electronic copies of the contract and procurement documents that have been redacted to exclude confidential or exempt information.

Procurement of Construction Services

Chapter 255, F.S., specifies procedures to be followed in the procurement of construction services for public property and publicly owned buildings. The department is responsible for establishing in rule:¹²

- Procedures for determining the qualifications and responsibility of potential bidders prior to advertising for and receiving bids on 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 if 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 if the contracts are determined to be in the best interest of the state.

State contracts for construction projects projected to cost in excess of \$200,000 must be competitively bid.¹³ Counties, municipalities, special districts, or other political subdivisions seeking to construct or improve a public building must submit the project to competitive bidding if the projected cost exceeds \$300,000.¹⁴

Section 255.0525, F.S., requires the solicitation of competitive bids or proposals for any state construction project projected to cost more than \$200,000 to be publicly advertised in the Florida Administrative Weekly¹⁵ at least 21 days before the established bid opening. If the construction project is projected to exceed \$500,000, the advertisement must be published in the Florida Administrative Weekly at least 30 days before the bid opening and in a newspaper of general circulation in the county where the project is located at least 30 days before the bid opening.¹⁶

¹² Section 255.29, F.S.

¹³ See ch. 60D-5.002(2)(d) and 60D-5.0073(4), F.A.C.; see also s. 255.0525(1), F.S.

¹⁴ See s. 255.20(1), F.S. For electrical work, local governments must competitively bid projects estimated to cost more than \$75,000.

¹⁵ The Florida Administrative Weekly was renamed the Florida Administrative Register during the 2012 Session. Chapter 2012-63, L.O.F.

¹⁶ For counties, municipalities, and political subdivisions, similar publishing provisions apply. Section 255.0525(2), F.S.

III. Effect of Proposed Changes:

Preference to Florida Businesses in Awarding Contracts

Existing s. 287.084, F.S., addresses situations in which an agency or entity must give preference to Florida business in the purchase of personal property through competitive solicitation. The bill provides that Florida law preempts local laws that give preference to a local contractor if a local government entity will use state funds to pay for at least 51 percent of the cost of personal property or construction services.

In any competitive solicitation subject to the bill, the local government entity must disclose in the solicitation document whether payment will come from state-appropriated funds, and the amount or percentage of the funds compared to the total cost of the personal property or construction services.

The bill repeals a provision that makes counties and municipalities exempt from requirements that state entities and subdivisions grant a preference to businesses in this state if the lowest bidder on a solicitation is from another state or subdivision of another state which grants preferences to its businesses.

Transparency on Contractor Performance and Public Access to Information

The bill requires that state entities entering into agreements with a contractor post to the FACTS website within 30 days after the agreement whether the contractor is or was on the vendor complaint list, suspended vendor list, or terminated vendor list at the time the contract was initially entered into.

The DMS is required to compile and maintain the following three lists, and provide public access to the lists through its website:

- A “suspended vendor list” of all vendors whose ability to bid or perform state or local government contracts has been temporarily suspended by an agency or a participating local governmental entity due to a contract default by the vendor or for other good cause.
- A “terminated vendor list” of all reported vendors whose contracts have been terminated by an agency or a participating local governmental entity due to a contract default by the vendor or for other good cause.
- A “vendor complaint list” of complaints that have been issued to vendors by an agency or participating local governmental entity.

The bill defines “vendor” as an entity or person in a contractual relationship with an agency or a local governmental entity.

Agencies must, and local governmental entities may, provide the DMS with copies of complaints issued to vendors and the names of suspended and terminated vendors for the vendor complaint list, the suspended vendor list, and the terminated vendor list. Agencies must, and local governmental entities may, report quarterly to the DMS with updated information necessary to maintain the lists. Agencies must report to the DMS all instances of a material breach of a contract or a notice of default and subsequent termination within 30 days after the occurrence.

The DMS must maintain and update the above lists and provide the public access on the DMS website.

Agencies must require that a vendor responding to a competitive solicitation disclose whether the vendor has, within the previous five years, had a contract terminated by a federal, state, or local governmental entity after defaulting on a contract; paid a fine or penalty incurred by nonperformance of a federal, state, or local government contract; or entered into an agreement with a federal, state, or local governmental entity in settlement of any issues related to default or nonperformance of a contract. An agency may consider a vendor's failure to disclose such information in determining whether the vendor is in breach of any resulting contract. Local governmental entities may require such disclosures.

When evaluating bids, proposals, or replies to competitive solicitations, an agency must consider information available on the three lists in determining whether the vendor submitting a response to the competitive solicitation is a responsible and responsive vendor. If an agency enters into a contract with a vendor on any of the three lists, the contract file must contain documentation specifying that the agency's designee with authority to sign the contract was aware that the contracted vendor was named on the list at the time the contract was initially entered into.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, Sec. 18, of the Constitution of the State of Florida excuses local governments from complying with state mandates that impose negative fiscal consequences. Subsection (a) provides, "No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds" unless certain requirements are met. However, several exemptions and exceptions exist. The exceptions to the constitutional provision include a legislative determination that the law fulfills an important state interest and one of the following relevant conditions: (a) the law requiring the expenditure is approved by two-thirds of the membership of each chamber or (b) the expenditure is required to comply with a law that applies to all persons similarly situated.

The bill deletes the provision in s. 287.084, F.S., which exempts counties and municipalities from state preference requirements in contracting. Therefore, local entities will have to give preference to qualifying contractors, regardless of whether the contractors present the lowest bid. The bill does not contain a legislative determination that the bill fulfills an important state interest.

Subsection (d) of Article VII, Sec. 18, of the State Constitution exempts laws that have an insignificant fiscal impact from the requirements of the mandates provision. Whether a particular bill results in a significant impact on cities and counties must be determined on an aggregate, statewide basis. Laws determined to have an "insignificant fiscal impact,"

which means an amount not greater than the average statewide population for the applicable fiscal year times \$0.10 (\$1.9 million for FY 2013-2014¹⁷), are exempt.¹⁸

The Revenue Estimating Conference has not met on this bill, so financial impact is unknown at this time. If the overall aggregate fiscal impact on cities and counties exceeds \$1.9 million per year, the bill, to be binding on all cities and counties, must meet the relevant conditions as an exception to the constitutional requirements.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Contractors who breach contracts through shoddy work performance or otherwise may suffer financially by not being awarded future contracts by government entities.

C. Government Sector Impact:

Whether the bill will have a fiscal impact on local entities is indeterminate. The extent to the fiscal impact on counties and municipalities due to the bill's legislative preemption of local preference ordinances is unknown.

VI. Technical Deficiencies:

The title provides that s. 287.1335, F.S., is amended in the bill. This section is new, however, so the language should say "creating s. 287.1335."

VII. Related Issues:

The bill creates a preemption in ch. 287, F.S., that applies to both procurement of personal property and construction services. Laws related to the procurement of personal property are located in ch. 287, F.S. However, public construction contracting is regulated in ch. 255, F.S. The construction preference preemption may be better placed in ch. 255, F.S.

¹⁷ Based on the Demographic Estimating Conference's final population estimate for April 1, 2014, which was adopted on February 10, 2014. The Executive Summary can be found at:

<http://edr.state.fl.us/Content/conferences/population/demographicsummary.pdf>.

¹⁸ Florida Senate Committee on Community Affairs, *Interim Report 2012-115: Insignificant Fiscal Impact*, (September 2011). <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-115ca.pdf>.

The DMS may need rulemaking authority to implement the vendor reporting requirements.

The requirement that agencies consider in competitive solicitations whether a vendor is listed on any of the three vendor action lists could offer another avenue for aggrieved vendors to attack agency actions in procurement protests.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 215.985 and 287.084.

This bill creates section 287.1335 of the Florida Statutes.

IX. Additional Information:

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

CS/CS/CS by Judiciary on April 8, 2014:

The underlying CS/CS would have precluded a local government from awarding a preference to a local vendor if the state provides at least 20 percent of the funding for a contract for personal property or construction services. The CS/CS/CS raises this threshold to 51 percent.

CS/CS by Community Affairs on March 19, 2014:

Deletes the provision that added “construction services” to the state preference for Florida businesses.

- Provides that the state preemption of local preference laws and regulations will only be triggered by competitive solicitations for personal property or construction services that utilize state funds to pay for 20 percent or more of the total cost.

CS by Governmental Oversight and Accountability on March 6, 2014:

The CS adds a new section requiring state agencies to report contract problems, fines, defaults, and terminations to the DMS, and for DMS to maintain a vendor complaint list, a suspended vendor list, and a terminated vendor list. Agencies must consider the fact of a vendor’s status on any of the lists in evaluating competitive solicitations. Local governments may participate in the vendor reporting provisions.

- B. **Amendments:**

None.