

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 Governmental Oversight and Accountability

BILL: SB 590

INTRODUCER: Senator Altman

SUBJECT: Flags

DATE: March 3, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stearns</u>	<u>Yeatman</u>	<u>CA</u>	Favorable
2.	<u>Peacock</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
3.	_____	_____	<u>FP</u>	_____

I. Summary:

SB 590 requires all United States and state flags purchased on or after January 1, 2016, by the state, a county, or a municipality for public use to be made in the United States entirely from domestically grown, produced, and manufactured materials.

II. Present Situation:

Display of United States and State Flags

The United States and state flags must be displayed in certain venues under current law. The United States flag must be displayed at the state capitol¹ and at every county courthouse,² public auditorium,³ polling station on election days,⁴ and on the grounds and in the classrooms of public K-20 educational institutions.⁵ Display of the state flag is otherwise governed by protocols adopted by the Governor.⁶

Procurement of Flags

Purchases by the executive branch are regulated by the provisions of ch. 287, F.S. The Department of Management Services (DMS) is responsible for the procurement of goods and services for all state agencies.⁷ DMS employs state-wide purchasing rules to coordinate purchases across the various agencies of the state, utilizing the buying power of the state to

¹ Section 256.01, F.S.

² *Id.*

³ Section 256.11, F.S.

⁴ Section 256.011(1), F.S.

⁵ Section 1000.06, F.S.; also, see Section 256.032, F.S. (requiring state flag to be displayed on grounds of every elementary and secondary public school).

⁶ Section 256.015(1), F.S.

⁷ Section 287.042(1)(a), F.S.

promote efficiency and savings in the procurement process.⁸ Agencies are defined in ch. 287, F.S., 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."⁹ State universities and colleges, including their boards of trustees, are specifically excluded from this definition of agency.¹⁰

Accounting requirements for purchases vary depending on the value of the services. Formal competitive bidding is required for all contracts in excess of \$35,000.¹¹ For contracts between \$2,500 and \$35,000, agencies should receive informal bids when practical, but may conform to "good purchasing practices," such as written quotations or written records of telephone quotations.¹² For contracts less than \$2,500, agencies are only required to conform to good purchasing practices.¹³

While there is currently no specific state law on flag procurement, most flags purchased by DMS are manufactured in the United States from domestically-sourced materials. Of the 772 flags purchased by agencies via MyFloridaMarketplace¹⁴ in fiscal year 2012-13, 682 were produced by RESPECT of Florida.¹⁵ RESPECT of Florida is a 501(c)(3)¹⁶ non-profit organization under contract with DMS¹⁷ to administer the State Use Program, designed to provide employment opportunities for handicapped individuals.¹⁸ All United States and state flags sold by RESPECT are assembled in the organization's Miami employment center from materials produced in the United States.¹⁹

The legislative and judicial branches have separate procurement processes. The purchase of flags for the House of Representatives and Senate are handled by each chamber's administrative offices. Procurement for the judicial branch falls under the control of the Office of the State Courts Administrator.²⁰

The procurement of goods and services by counties, municipalities, and school districts are not governed by the provisions of ch. 287, F.S.²¹ Generally, flags purchased by counties, municipalities, or school districts are subject only to local ordinance. However, current law authorizes the Department of State to provide state flags to schools, governmental agencies, and

⁸ Section 287.032(1), F.S.

⁹ Section 287.012(1), F.S.

¹⁰ *Id.* The Administrative Procedure Act defines the term "agency" differently. See Section 120.52(1), F.S.

¹¹ Section 287.057(1), F.S.

¹² Rule 60A-1.002(3), F.A.C.

¹³ Rule 60A-1.002(2), F.A.C.

¹⁴ The online procurement system operated by DMS through which agencies may make certain types of purchases, at http://www.dms.myflorida.com/business_operations/state_purchasing/myfloridamarketplace (last visited February 6, 2015).

¹⁵ HB 201 Bill Analysis, Department of Management Services, March 6, 2014.

¹⁶ 26 U.S.C. s. 501(c)(3).

¹⁷ See Rule 60E-1.003, F.A.C. (authorizing DMS to designate a "Central, Non-Profit Agency" to provide services specified in ss. 413.032-413.037, F.S.).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Fla. R. Jud. Admin. 2.205(e)(2).

²¹ *Cf.* Section 287.055(2)(b), F.S. (including "a municipality, a political subdivision, a school district, or a school board" in the definition of "agency" for the purposes of procuring architectural, engineering, and surveying services) in regards to acquisition of professional architectural, engineering, landscape architectural or surveying and mapping services.

other groups and organizations at no cost, up to an annual cost for the Department of \$15,000 per year.²²

While it is possible that some of the flags purchased by state and local governments are foreign-made, the quantity is likely to be small. The Flag Manufacturers Association of America estimates that 95 percent of United States flags are manufactured entirely in the United States.²³ According to the Census Bureau, \$302.7 million of “fabricated flags, banners, and similar emblems” were produced in the United States in 2007,²⁴ while \$4 million worth of flags were imported in 2013.²⁵

Procurement of Flags by the Federal Government and Other States

The federal government is required to purchase domestically manufactured goods if the contract amount exceeds a minimum threshold.²⁶ These requirements can be waived by the President of the United States under the Trade Agreements Act of 1979, if a waiver is necessary for the purpose of entering into trade agreements with other countries.²⁷ According to the Congressional Research Service, waivers under the Trade Agreement Act of 1979 are heavily used, resulting in little remaining scope for the Buy American Act provisions.²⁸

Other provisions of federal law, however, require domestically produced goods. The Berry Amendment²⁹ requires a “super percentage” of certain types of goods (including flags) to be wholly domestic in origin.³⁰ Another statute prohibits the Department of Veterans Affairs from procuring burial flags that were not domestically produced and manufactured.³¹

Several states have existing statutes requiring the use of domestically manufactured flags. Oklahoma requires all flags purchased by the state and all political subdivisions to be manufactured in the United States.³² Massachusetts has a similar law that applies to all public institutions.³³ Arizona requires a domestically-manufactured United States flag to be displayed in all public school classrooms.³⁴ Tennessee requires any United States or state flag purchased

²² Section 256.031(1)(a), F.S.

²³ Flag Manufacturers Association of America, FAQ’s, <http://fmaa-usa.com/info/FAQ.php> (last visited February 6, 2015).

²⁴ U.S. Census Bureau News, Profile America Facts for Features, The Fourth of July 2013, <http://www.census.gov/newsroom/facts-for-features/2013/cb13-ff14.html> (last visited February 6, 2015).

²⁵ U.S. Census Bureau News, Profile America Facts for Features, The Fourth of July 2014, <http://www.census.gov/newsroom/facts-for-features/2014/cb14-ff16.html> (last visited February 6, 2015).

²⁶ 41 U.S.C. s. 8301, et seq. (“Buy American Act of 1933”).

²⁷ 19 U.S.C. s. 2501, et seq.

²⁸ Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law, Congressional Research Service, January 6, 2014, available at <http://www.hsdl.org/?view&did=749327>.

²⁹ 10 U.S.C. s. 2533a.

³⁰ Domestic Content Legislation: The Buy American Act and Complementary Little Buy American Provisions, Congressional Research Service, April 25, 2012, available at <http://fas.org/sgp/crs/misc/R42501.pdf>.

³¹ 38 U.S.C. s. 2301(h)(1).

³² Okla. Stat. tit. 25, s. 158.

³³ Mass. Gen. Laws ch. 2, s. 6.

³⁴ Ariz. Rev. Stat. s. 15-1626(A)(17).

under a state contract to be manufactured in the United States.³⁵ Minnesota prohibits the sale of a United States flag produced outside the United States.³⁶

III. Effect of Proposed Changes:

Section 1 provides that the act may be cited as the “All-American Flag Act.”

Section 2 requires any United States or state flag purchased for public use by the state, a county, or a municipality, on or after January 1, 2016, to be wholly manufactured in the United States from materials grown and/or produced domestically.

Section 3 provides an effective date of July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Impairment of Contract

Both the United States³⁷ and Florida³⁸ constitutions prohibit the state from passing laws impairing existing contractual rights. Contractual rights are impaired to the extent the law changes the substantive rights of the parties in the existing contract.³⁹ For an impairment of contractual rights to be constitutionally valid, the law must balance the state’s objective against the harm to the contract, intruding on the contractual right no more than is necessary to achieve the public purpose of the law.⁴⁰ The ability of the state to modify contractual obligations is most limited when a final agreement has been reached between a party and the state.⁴¹

³⁵ Tenn. Code Ann. s. 4-1-301(d).

³⁶ Minn. Stat. s. 325E.65.

³⁷ U.S. Const. art. 1, § 10, cl. 8. (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”).

³⁸ Fla. Const. art. I, s. 10. (“No . . . law impairing the obligation of contracts shall be passed.”)

³⁹ *Manning v. Travelers Ins. Co.*, 250 So. 2d 872, 874 (Fla. 1971).

⁴⁰ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 779-80 (Fla. 1979).

⁴¹ *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 672 (Fla. 1993).

While the bill only applies to purchases of flags by state or local governments after January 1, 2016, it is possible the state or a local government may have existing contracts that are not compliant with the bill that extend beyond that date.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill could have a positive economic impact on businesses selling United States and state flags that are domestically-produced and sourced. The bill could have a negative impact on businesses selling United States and state flags that are either imported or produced domestically from foreign materials.

C. Government Sector Impact:

This bill may have an indeterminate negative fiscal impact on state and local governments, depending on the extent to which state and local governments are currently purchasing flags produced outside of the United States or made from foreign materials and the cost difference between those flags and domestically-produced and sourced flags.

VI. Technical Deficiencies:

The bill does not contain a method of verification to ensure the flags purchased by state and local governments are manufactured in the United States from domestic materials.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 256.041 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.