

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 Criminal Justice

BILL: CS/SB 582

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Gaetz

SUBJECT: Public Corruption

DATE: January 29, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Peacock</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
2.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

PLEASE MAKE SELECTION

I. Summary:

CS/SB 582 amends the laws relating to public corruption. Specifically, the bill:

- Defines “governmental entity” as an agency or entity of the state, a county, municipality, or special district or any other public entity created or authorized by law.
- Defines “public contractor” as any person who has entered into a contract with a governmental entity or any officer or employee of a person who has entered into a contract with a governmental entity.
- Changes the mens rea element for certain public corruption crimes from “corruptly” to “knowingly and intentionally.”
- Expands the application of the official misconduct law in s. 838.022, F.S., to public contractors.
- Expands the application of the bid tampering law in s. 838.22, F.S., to public contractors who contract to assist a governmental entity in a competitive procurement.

The bill has an effective date of October 1, 2016.

II. Present Situation:

Nineteenth Statewide Grand Jury

A statewide grand jury¹ was impaneled in February 2010 upon the petition of Governor Charlie Crist to the Supreme Court of Florida. In the Petition for Order to Impanel a Statewide Grand Jury, Governor Crist requested that the following should be addressed:²

- Examine criminal activity of public officials who have abused their powers via their public office;
- Consider whether Florida's prosecutors have sufficient resources to effectively combat corruption;
- Address the effectiveness of Florida's current statutes in fighting public corruption;
- Identify any deficiencies in current laws, punishments or enforcement efforts and make detailed recommendations to improve our anti-corruption initiatives;
- Investigate crimes, return indictments, and make presentations; and
- Examine public policy issues regarding public corruption and develop specific recommendations regarding improving current laws.

The Nineteenth Statewide Grand Jury issued its First Interim Report: A Study of Public Corruption in Florida and Recommended Solutions on December 17, 2010. In its report, the Nineteenth Statewide Grand Jury made several recommendations to the Legislature, including revisions to ch. 838, F.S., regarding the definitions of the terms "public servant" and "corruptly" and "corrupt intent," and the offenses of bribery, unlawful compensation or reward for official behavior, official misconduct, and bid tampering.

Color of Law

Florida law does not enhance criminal classifications or felony sentencing penalties for criminal acts committed "under color of law" where the enhancements for wrongful conduct are based on public authority or position or the assertion of such that does not form an element of the underlying crime. The Nineteenth Statewide Grand Jury also recommended that the Legislature consider reclassification of such offenses.³

Doctrine of Mens Rea and Scienter

The term "mens rea" is defined as "a guilty mind; a guilty or wrongful purpose; a criminal intent."⁴ Black's Law Dictionary notes that the term scienter is defined as "knowingly" and frequently used to signify the defendant's guilty knowledge.⁵ The general rule is that scienter or mens rea is a necessary element in the indictment for every crime.⁶

¹ See ss. 905.31-905.40, F.S., known as the Statewide Grand Jury Act.

² Nineteenth Statewide Grand Jury First Interim Report: A Study of Public Corruption in Florida and Recommended Solutions, December 17, 2010, Case No. SC 09-1910. Available online at: [http://myfloridalegal.com/webfiles.nsf/WF/JFAO-8CLT9A/\\$file/19thSWGJInterimReport.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JFAO-8CLT9A/$file/19thSWGJInterimReport.pdf) (last visited on November 20, 2015).

³ *Id.*

⁴ BLACK'S LAW DICTIONARY 1137 (4th Rev. 1968).

⁵ *Id.* 1512.

⁶ *Chicone v. State*, 684 So.2d 736, 741 (Fla. 1996). Also, see *U.S. v. Balint*, 258 U.S. 250 (1922).

The Nineteenth Statewide Grand Jury found that the use of the word “corruptly” or “with corrupt intent” made prosecutions of offenses under ch. 838, F.S., more difficult and might require additional evidence, such as testimony from persons involved.⁷ The Nineteenth Statewide Grand Jury recommended that the additional element of “corruptly” or “with corrupt intent” be removed from the ch. 838, F.S., offenses of bribery, unlawful compensation, official misconduct, and bid tampering.⁸

Bribery; Misuse of Public Office: Chapter 838, F.S.

Chapter 838, F.S., pertains to bribery and other offenses concerning the misuse of public office.

Section 838.014(4), F.S., defines the term “corruptly” or “with corrupt intent” as acting knowingly and dishonestly for a wrongful purpose.

Section 838.014(6), F.S., defines the term “public servant” as:

- (a) Any officer or employee of a state, county, municipal, or special district agency or entity;
- (b) Any legislative or judicial officer or employee;
- (c) Any person, except a witness, who acts as a general or special magistrate, receiver, auditor, arbitrator, umpire, referee, consultant, or hearing officer while performing a governmental function; or
- (d) A candidate for election or appointment to any of the positions listed in this subsection, or an individual who has been elected to, but has yet to officially assume the responsibilities of, public office.

Bribery

Section 838.015, F.S., relates to the offense of bribery.⁹ Any individual who violates this section is guilty of a felony of the second degree, which is punishable as provided for in s. 775.082, s. 775.083, or s. 775.084, F.S.¹⁰

Chapter 838, F.S., also contains three other bribery offenses, including bribery in athletic contests,¹¹ commercial bribery receiving,¹² and commercial bribery.¹³ In *Roque v. State*, the Florida Supreme Court held that s. 838.15, F.S., the commercial bribe receiving law, was

⁷ See *supra* note 2, at 24.

⁸ *Id.*

⁹ Section 838.015(1), F.S., defines “bribery” as corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept for himself or herself or another, any pecuniary or other benefit not authorized by law with an intent or purpose to influence the performance of any act or omission which the person believes to be, or the public servant represents as being, within the official discretion of a public servant, in violation of a public duty, or in performance of a public duty.

¹⁰ Section 838.015(3), F.S. Under sections 775.082 and 775.083, F.S., a second degree felony is punishable by a term of imprisonment not to exceed 15 years, and a maximum fine of \$10,000. Section 775.084, F.S., relates to habitual felony offenders. If a habitual felony offender is convicted of a second degree felony, such offender may be sentenced for a term not exceeding 30 years.

¹¹ Section 838.12, F.S.

¹² Section 838.15, F.S.

¹³ Section 838.16, F.S.

invalid.¹⁴ The Nineteenth Statewide Grand Jury Report opined that s. 838.16, F.S., commercial bribery, was probably unconstitutionally vague since s. 838.16, F.S., referred to s. 838.15, F.S.¹⁵

Unlawful Compensation or Reward for Official Behavior

Section 838.016, F.S., pertains to unlawful compensation or reward for official behavior. It is a second degree felony¹⁶ for any person corruptly to give, offer, or promise to any public servant any benefit not authorized by law; or for any public servant corruptly to request, solicit, accept or agree to accept any benefit not authorized by law:

- For the past, present, or future performance, nonperformance or violation of
- Any act or omission; or
- For the past, present, or future exertion of any influence upon or with any other public servant regarding any act or omission

which the person believes to have been or the public servant represents to have been either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty.¹⁷

Official Misconduct

The offense of official misconduct contained in s. 838.022(1), F.S., provides that it “is unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause harm to another to:

- (a) Falsify, or cause another person to falsify, any official record or official document;
- (b) Conceal, cover up, destroy, mutilate, or alter any official record or official document or cause another person to perform such an act; or
- (c) Obstruct, delay, or prevent the communication of information relating to the commission of a felony that directly involves or affects the public agency or public entity served by the public servant.

Any person who violates this section commits a felony of the third degree, which is punishable as provided for in s. 775.082, s. 775.083, or s. 775.084, F.S.¹⁸

Bid Tampering

Section 838.22, F.S., provides that:

¹⁴ *Roque v. State*, 664 So.2d 928 (Fla. 1995). The Court further noted that s. 838.015, F.S., was impermissibly vague and subject to arbitrary application. *Id.* at 929.

¹⁵ *See supra* note 2, at 34.

¹⁶ Section 838.016(4), F.S. Any person who violates this section commits a second degree felony which is punishable as provided in ss. 775.082, 775.083, or s. 775.084, F.S. *See supra* note 10.

¹⁷ Section 838.016(1) and (2), F.S.

¹⁸ Section 838.022(3), F.S. Under sections 775.082 and 775.083, F.S., a third degree felony is punishable by a term of imprisonment not to exceed 5 years, and a maximum fine of \$5,000. Section 775.084, F.S., relates to habitual felony offenders. If a habitual felony offender is convicted of a third degree felony, such offender may be sentenced for a term not exceeding 10 years.

(1) It is unlawful for a public servant, with corrupt intent to influence or attempt to influence the competitive bidding process undertaken by any state, county, municipal, or special district agency, or any other public entity, for the procurement of commodities or services, to:

(a) Disclose material information concerning a bid or other aspects of the competitive bidding process when such information is not publicly disclosed.

(b) Alter or amend a submitted bid, documents or other materials supporting a submitted bid, or bid results for the purpose of intentionally providing a competitive advantage to any person who submits a bid.

(2) It is unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause unlawful harm to another, to circumvent a competitive bidding process required by law or rule by using a sole-source contract for commodities or services.

(3) It is unlawful for any person to knowingly agree, conspire, combine, or confederate, directly or indirectly, with a public servant to violate subsection (1) or subsection (2).

(4) It is unlawful for any person to knowingly enter into a contract for commodities or services which was secured by a public servant acting in violation of subsection (1) or subsection (2).

(5) Any person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084¹⁹

Criminal Use of Personal Identification Information

Section 817.568(11), F.S., provides, in part, that any person who willfully and without authorization fraudulently uses personal identification concerning a public servant as defined in s. 838.014, F.S., without first obtaining the consent of that individual commits a felony of the second degree.

III. Effect of Proposed Changes:

Section 1 amends s. 838.014, F.S., to define the term “governmental entity” as an agency or entity of the state, a county, municipality, or special district or any other public entity created or authorized by law. The bill expands the definition of “governmental entity” to include other public entities, such as Citizens Property Insurance Corporation,²⁰ statutorily-created direct support organizations,²¹ and other statutorily-created public entities. The definition of “corruptly” or “with corrupt intent” is eliminated.

This section defines the term “public contractor,” for purposes of the offenses of official misconduct in s. 838.022, F.S., and bid tampering in s. 838.22, F.S., as any person, as defined by s. 1.01(3), F.S.,²² who has entered into a contract with a governmental entity or any officer or employee of a person, as defined in s. 1.01(3), F.S., who has entered into a contract with a governmental entity.

¹⁹ See *supra* note 3.

²⁰ Section 627.351(6), F.S. Citizens Property Insurance Corporation was created in 2002 as a not-for-profit insurer of last resort for home-owners who could not obtain insurance elsewhere.

²¹ A direct support organization is an organization incorporated under ch. 617, F.S., and approved by the Department of State as a Florida corporation not for profit that is approved by a state agency to operate for the benefit of a specific program, such as the Florida Historic Capitol Museum Council’s direct support organization. See s. 272.131(1)(e), F.S.

²² Section 1.01(3), F.S., provides that the term “person” includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

This section revises the definition of the term “public servant” to mean any officer or employee of a governmental entity, including any executive, legislative, or judicial branch officer or employee and a candidate for election or appointment to any of the officer positions listed in this subsection.

Section 2 amends s. 838.015(1), F.S., relating to bribery, to change the mens rea element of the crime from “corruptly” to “knowingly and intentionally.”

Section 3 amends s. 838.016, F.S., relating to unlawful compensation or reward for official behavior, to redefine the mens rea element of the offense from “corruptly” to “knowingly and intentionally.”

Section 4 amends s. 838.022, F.S., to subject public contractors to the same level of conduct as public servants. The mens rea element of the offense is changed from “with corrupt intent” to “knowingly and intentionally.” The law is clarified so that the harm caused to another must be an “unlawful harm.” Concealing, covering up, destroying, mutilating, or altering an official record is criminalized unless such action is authorized by law or contract.

Section 5 amends s. 838.22, F.S., to expand the application of the bid tampering laws to public contractors who have contracted with a governmental entity to assist in a competitive procurement. These public contractors are treated similar to public servants for this law. The mens rea element of the offense is changed from “with corrupt intent” to “knowingly and intentionally” influence.

Sections 6 through 10 reenact ss. 112.534(2)(a), 117.01(4)(d), 817.568(11), 921.0022(3)(g), and 921.0022(3)(d), F.S., respectively, to incorporate by reference the revisions made in sections 1 through 5 of the bill.

Section 11 provides that the bill takes effect on October 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties’ or municipalities’ ability to raise revenue, or reduce the percentage of a state tax shares with counties and municipalities.

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:

Indeterminate. In response to request for proposals and solicitation of competitive bids for state services and construction projects, a vendor may increase its bid amounts to account for the potential legal expenses that may result from a violation of public corruption laws.

C. Government Sector Impact:

Indeterminate. To the extent the mens rea element of these crimes relating to misuse of public office has become easier to prove, more public servants may be convicted of such crimes.

Also, costs for services provided by public contractors may increase to the extent public contractors factor into their bids the risk of incurring legal expenses associated with being accused of violating public corruption laws.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 838.014, 838.015, 838.016, 838.022, and 838.22.

The bill makes technical changes to the following sections of the Florida Statutes: 112.534(2)(a), 117.01(4)(d), 817.568(11), 921.0022(3)(g), and 921.0022(3)(d).

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

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

CS by Governmental Oversight and Accountability on January 19, 2016:

- Revises the definition of “governmental entity;”
- Creates a definition of “public contractor;”
- Deletes the provisions of the original bill regarding a nongovernmental entity acting on behalf of a governmental entity;

- Provides that public contractors are subject to the offenses of official misconduct and bid tampering in ss. 838.022 and 838.22, F.S.;
- Deletes the term “improper” in the offenses of official misconduct and bid tampering;
- Provides an exception, as authorized by law or contract, for concealing, covering up, destroying, mutilating, or altering any official record or document in the official misconduct offense; and
- Expands the offense of bid tampering to prohibit the disclosure of material information in the competitive solicitation process, including a vendor’s response and evaluation results, and provides an exception for disclosing such information when otherwise authorized by law.

B. Amendments:

None.