STORAGE NAME: h2115a.gg
DATE: April 12, 2000

HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GENERAL GOVERNMENT APPROPRIATIONS
ANALYSIS

BILL #: HB 2115 (PCB BRCA 00-01)

RELATING TO: Florida Engineers Management Corporation

SPONSOR(S): Committee on Business Regulation & Consumer Affairs and Representative Ogles and others

TIED BILL(S): None.

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) BUSINESS REGULATION & CONSUMER AFFAIRS YEAS 8 NAYS 0
(2) GENERAL GOVERNMENT APPROPRIATIONS YEAS 10 NAYS 0
(3)
(4)
(5)

I. SUMMARY:

The bill reenacts and saves from automatic repeal the Florida Engineers Management Corporation (FEMC). FEMC is a private corporation statutorily established to provide administrative support to the Florida Board of Professional Engineers. Prior to the creation of FEMC, such administrative support had been provided by the Department of Business and Professional Regulation (DBPR).

The bill makes various other changes to ensure that FEMC operates in an effective manner, spends public funds prudently, and is fully accountable for its actions.

This bill does not have a significant fiscal impact on state or local government.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government	Yes [x]	No []	N/A []
2. Lower Taxes	Yes []	No []	N/A [x]
3. Individual Freedom	Yes []	No []	N/A [x]
4. Personal Responsibility	Yes []	No []	N/A [x]
5. Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

The Florida Engineers Management Corporation (FEMC) is a private corporation statutorily established to provide administrative support to the Florida Board of Professional Engineers (BPE). Prior to the creation of FEMC in 1997, such administrative support had been provided by the Department of Business and Professional Regulation (DBPR).

As provided in its enacting legislation, the section establishing FEMC (s. 471.038, F.S.) will automatically repeal on October 1, 2000, unless reenacted. If the section is repealed, FEMC will cease to exist and its administrative responsibilities, along with any remaining funds, will revert to DBPR.

FEMC is, to date, the only instance of a private corporation being created to provide staff support for the regulation of any profession under DBPR. However, other professions have expressed an interest in following the lead of FEMC, and additional privatization efforts are expected.

The enacting legislation for s. 471.038, F.S., stated that the Legislature had determined "that the privatization of certain functions that are performed by the department for the board will encourage greater operational and economic efficiency and, therefore, will benefit regulated persons and the public."

A performance review of FEMC conducted by the Office of Program Policy Analysis and Government Accountability, and issued in March of this year, concluded that performance had improved under FEMC, with FEMC handling more cases, and disposing of a higher percentage of them in a more timely fashion than had DBPR. On the other hand, the review found that the administrative costs for regulating the engineers' profession had increased 16% (or $247,467) above the regulatory costs from the previous renewal year under DBPR.

Public meetings law. Presently, s. 471.038, F.S., explicitly makes FEMC subject to Florida's public records law. However, there is no similar statutory provision making them subject to Florida's public meetings law. Despite the ambiguity, FEMC considers that it is subject to the meetings law, and adheres to those requirements, providing notice as required by that law.

Annual report due date. Under current law, FEMC must provide an annual report to the DBPR secretary, the board, and the legislature, by January 1 of each year. FEMC's first annual report was issued on January 1, 1999, and covered an 11 month period ending November 30, 1999. A report due date of January 1 of each year, producing a report that covers a November-to-November time span is not standard. Usually, the time span encompassed by an annual report is a fiscal year (July 1 to June 30 of the next year). Alternately, some annual reports cover a calender year (January 1 to December 31).

Procedures to resolve any noncompliance by FEMC. Presently, s. 471.038, F.S., requires DBPR and the Board of Professional Engineers to certify that FEMC is acting in compliance with its statutory and DBPR contract responsibilities. However, no statutory provision exists explaining or setting forth procedures to resolve the situation, should these bodies determine that noncompliance exists.

Examination security. Presently, FEMC's methods and procedures for handling and transporting examinations are less expensive, and less secure, than the methods and procedures used by DBPR.

FEMC maintains that their methods and procedures may be less secure, but are nevertheless sufficient. They assert that their methods and procedures are the same as used in almost all other states, that they save a significant amount of money, and that in some aspects, they actually produce a greater reliability. The transporting of examinations by DBPR, as compared to FEMC, illustrates that last point. DBPR chooses to utilize contract security companies (i.e., armored car companies such as Brinks or Loomis Fargo) to transport the examinations to the examination site. FEMC, on the other hand, chooses to transport the examinations in the personal cars of selected FEMC staff persons. FEMC points out at least one instance in the past when DBPR's contract security company mistakenly delivered Florida's accountancy examinations to New York City and maintains that by using their own staff, such a mistake could never happen.

DBPR, on the other hand, maintains that by having such informal procedures and security methods, the department and the board could have difficulty defending themselves against a challenge asserting that the examinations have been compromised. Losing such a challenge would have severely adverse financial consequences, particularly with regard to the substantial cost involved in having to create a new test question bank.

Controls on travel and other expenditures. Currently, FEMC is not required to abide by the same travel expenditure standards and controls imposed on state employees, by chapter 112, F.S. FEMC asserts that it nevertheless has internal policies and procedures that serve to prevent extravagant expenditures on travel, meals, or other items. That policy is the same as the National Council of Examiners for Engineering and Surveying policy on reimbursement of travel expenses.

The DBPR is concerned that, whether such extravagant expenditures have actually taken place or not, the *potential* for such expenditure exists so long as statutory controls are not established.

Financial and compliance audits. The law requires FEMC to provide for annual financial and compliance audits of its financial accounts and records by a private CPA in conjunction with the Auditor General of the state. Though FEMC did contract with a CPA, who performed financial audits, the Auditor General was not involved. Concerns were raised regarding the level of detail of those audits.

Staggered terms for FEMC members. Once appointed, the terms for the members of the FEMC board of directors do not have an expiration date. However, members can be removed for the same reasons that any other board member under DBPR can be removed (as set forth in s. 455.209, F.S.).

The accepted practice with all other regulatory boards under DBPR is for its members' terms to expire after four years, with the expiration dates arranged in such a fashion ("staggered") as to have only a small number of member's terms expire in any single year. The purpose of having terms that expire in a staggered fashion is to continuously bring in "new blood" while insuring continuity.

Record and data compatibility. Due to DBPR concerns regarding data security, FEMC was required to establish a licensee data system separate from DBPR's centralized licensee database. The corporation incurred costs in excess of $100,000 to develop this system and the two systems cannot exchange data (talk to each other) easily. In fact, there is no on-line connection between the two.

There is concern that, should the department be called upon to resume control of the administrative duties now performed by FEMC, the form and format of FEMC's data could make it difficult, if not impossible, to reintegrate that data into DBPR's system.

Performance-based program budgeting. The DBPR, along with other state agencies, is developing a "performance-based program budget" to replace the traditional budget approach. Performance-based budgeting necessitates developing baseline performance data, then establishing quantifiable performance measures and performance standards (goals). The agency will then measure the success of its programs against whether it has met, exceeded, or failed to meet the standards adopted by the legislature.

FEMC is not subject to the performance measures and standards approach or analysis. Currently, FEMC simply submits a requested budget to the Board of Professional Engineers.

Contract administrator/executive director/FEMC president

Section 471.038(4)(g)4., F.S., requires the DBPR to hire a contract administrator to "actively supervise" the administrative, investigative, and prosecutorial activities of FEMC. FEMC's by-laws, adopted in the contract between the DBPR and FEMC, provide that FEMC's president, as selected by FEMC's board of directors shall serve as FEMC's chief executive officer, and shall also serve as the executive director of the Board of Professional Engineers (BPE). Under this model, one person is FEMC president and BPE executive director, while a second person is the DBPR's contract administrator, working for DBPR and supervising (though not directing) the activities of the FEMC staff.

However, s. 455.203(2), F.S., provides that the department shall, "appoint the executive director of each board, subject to the approval of the board." The department believes it should appoint the BPE executive director, who would also serve as DBPR's contract administrator. In addition to the provision in s. 455.203(2), F.S., the department cites a constitutional problem of an impermissible delegation of police powers by allowing the BPE executive director to be employed by FEMC.

See the comments section of this document for a discussion of the constitutional issue and the positions of the department, the BPE, the Florida Society of Engineers, and FEMC relating to the executive director.

Subsequent sunsets. FEMC is scheduled to automatically repeal ("sunset") on October 1, 2000. Until 1992, s. 11.61, F.S., required that regulatory statutes be set for sunset repeal every 10 years, with a legislative review immediately prior to the sunset date. During 1991-92, the policy of 10-year sunsets for regulation was repealed. Sunsets were replaced by sunrises (a "sunrise" is a study to be done only once, prior to enacting regulatory legislation). Despite the repeal of automatic sunsets, it has not been uncommon for specific, newly created programs to be set for a sunset sometime within its first few years of operation.

The DBPR supports another sunset in two years (October 1, 2002), noting that without a sunset, it is possible that necessary reforms may fail to be imposed. DBPR is also in the process of working on legislation that could establish an entirely different approach to privatization of support services. Should that legislation come to fruition, two different models for privatization will exist. The need to resolve those models would then exist, and a sunset on at least one of the models would make that resolution easier (though to the disadvantage of the model under sunset, if concurrent sunsets for both models were not established).

FEMC, the Board of Professional Engineers, and the Florida Society of Engineers oppose any sunset within the next four years. They note the added workload placed upon any organization under sunset. Under sunset, the FEMC staff is called upon to expend work time and resources working on issues and responding to the voluminous information requests that accompany any sunset review. These are hours that would otherwise be spent discharging their core responsibilities, and all three organizations believe this is an unnecessary diversion from FEMC's actual responsibilities.

C. EFFECT OF PROPOSED CHANGES:

This bill reenacts s. 471.038, F.S., saving the Florida Engineers Management Corporation (FEMC) from automatic repeal. Additionally it:

- Provides explicitly that meetings of FEMC's board of directors are subject to Florida's public meetings law;

- Changes the date, from January 1 to October 1, by which FEMC must provide an annual report;

- Requires that the contract (in addition to its present requirement that DBPR and the Board of Professional Engineers must certify that FEMC is acting in compliance with its statutory and DBPR contract responsibilities) must provide for methods and mechanisms to resolve the situation, should the certification process determine FEMC's noncompliance;

- Strikes language requiring an Office of Program Policy Analysis and Governmental Accountability Analysis (OPPAGA) study. The presentation date for the study is January 1, 2000, rendering that language obsolete;

- Provides for staggered terms for FEMC's board of directors;

- Allows FEMC to use interest paid on its account balance to defray some regulatory costs;

- Provides that DBPR's engineer-related costs associated with the board counsel, the Division of Administrative Hearings, and the DBPR contract administrator, shall be paid from FEMC's budget (presently, the DBPR pays these costs);
- Provides that the Board of Professional Engineers shall by rule establish examination security measures and procedures;
- Requires the department and FEMC to develop performance standards and measurable outcomes for the board to adopt by rule. This will place FEMC in a posture analogous to DBPR, with its performance-based program budget;
- Provides that FEMC's board of directors, and FEMC staff, shall be subject to s. 112.061, F.S., establishing standards and controls for per diem and traveling expenses, and also that FEMC is to expend public funds in a prudent manner, consistent with its contract provisions;
- Requires the Auditor General to conduct an annual audit;
- Does not establish a future repeal date; and
- Provides various technical or clarifying changes.

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D. SECTION-BY-SECTION ANALYSIS:

Section 1. Reenacts s. 471.038, F.S., saving the Florida Engineers Management Corporation (FEMC) from automatic repeal on October 1, 2000. It also makes various other changes to ensure that FEMC operates in an effective manner, spends public funds prudently, and is fully accountable for its actions.

Section 2. Repeals the section of the FEMC enacting legislation (section 5 of ch. 97-312, L.O.F.) which had set FEMC for automatic repeal on October 1, 2000.

Section 3. Amends s. 471.005, F.S., making technical changes and adding a definition for "board of directors," management corporation," and "Secretary."

Sections 4-10. Amend ss. 471.0035, 471.011, 471.015, 471.017, 471.021, 471.023, 471.033, F.S., making technical changes.

Section 11. Provides that the act shall take effect July 1, 2000.

III. <u>FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT</u>:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. <u>Revenues</u>:

   None

2. <u>Expenditures</u>:

   None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The 1997 bill establishing FEMC appropriated $586,000 in start-up costs. The start-up money was provided to FEMC to obtain leases and fund purchases and operations in the time period between October 1, 1997, and June 30, 1998, prior to FEMC actually assuming its administrative responsibilities. FEMC took over the administrative duties for the Board of Professional Engineers on July 1, 1998. In its first full fiscal year (FY 1998-99), FEMC's budget allocation was $2.17 million.

In FEMC's first year of operation, engineer operating expenses were approximately 20% greater than the operating expenses for engineers under DBPR the previous year (($1,625,107 under FEMC vs. $1,344,381 under DBPR). However, that was to be expected. Licensure fees come in on a biennial basis. Fiscal Year 1997-98 (under DBPR) was, for engineers, what is known as a non-renewal year. Fiscal Year 1998-99 (under FEMC) was a renewal year. In a renewal year, both administrative activity and the costs to pay for that activity significantly increase.

Additionally, FEMC chose to fund activities that DBPR had not done. It had significantly higher publication and postage costs, primarily because it published and mailed (to each of the 25,000 licensed professional engineers, and all licensed building officials and inspectors) four newsletters, a directory of licensed professional engineers, and one special bulletin on an engineering health and safety issue. In the previous year, DBPR had done none of these things.

On the other hand, DBPR had to pay for over $600,000 in engineer related charges not paid for by FEMC. The largest component of this was the $328,333 service charge to General Revenue that the department paid (unless specifically exempt, every state trust fund must pay 7.3% of its annual collections to the General Revenue Fund). DBPR also paid Department of Administrative Hearings (DOAH) charges ($31,060) for formal hearing in disciplinary cases, and Attorney General charges for board counsel ($76,350). DBPR pays these charges rather than FEMC because those government entities may not accept funds from private sector entities. DBPR also paid for the contract administrator ($80,019) required by statute to supervise and review the operation of FEMC. Most of the remainder of the $600,000 is related to disciplinary cases begun while still under DBPR, or to unlicensed activity cases which DBPR handles for all of its professions.

The OPPAGA study chose to compare the regulatory costs under FEMC's first year (FY 98-99), not to the previous year under DBPR (FY 97-98), but rather to two years back (FY 96-

97). They did that in order to be comparing a renewal year under FEMC (FY 98-99) to the next-most-recent renewal year under DBPR (FY 96-97). They also did not include the 7% of licensure revenues paid into general revenue in the total expenditure figure in either year, and this different approach produced the conclusion that FEMC's expenses were 16% higher than DBPR's (rather than the 20% higher, as found by committee staff when comparing FY 98-99 to FY 97-98).

For FY 1998-99, FEMC expended $1,611,688.98 of its $2.17 million appropriation, or 25% less than it was allocated, and return $558,311.02 to DBPR.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This act does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This act does not reduce the authority that counties or municipalities have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This act does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Under the current FEMC contract with the DBPR, the president of FEMC also serves as the Board of Professional Engineers' (BPE's) executive director. That person is not a state employee. The DBPR contends that unless the BPE executive director (ED) is a state employee, hired by DBPR, FEMC has a problem with invalid delegation of police powers. They contend that the ED inevitably exercises police powers by, for instance, determining which disciplinary cases will be dismissed without being sent to the probable cause panel. As with most boards, cases which lack legal sufficiency or evidentiary sufficiency are not sent to probable cause, and are dismissed.

The DBPR contends that only a state employee may be vested with such discretionary police powers. They further contend that s. 455.203(2), F.S., presently gives them authority to appoint all boards' executive directors, regardless of any codicil in any contract.

The BPE, FEMC, and the Florida Society of Engineers contend that the role of the FEMC's contract administrator was statutorily created to specifically address the delegation of police powers issue, and does, in fact, successfully address it to the extent that the BPE executive director need not be appointed by, or an employee of, the DBPR. They contend that the contract administrator, who is a DBPR employee, has the authority to supervise all FEMC activities, including decisions on which cases to prosecute and which to dismiss.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Committee on Business Regulation and Consumer Affairs:

The BPE, FEMC, and the Florida Society of Engineers have indicated that they believe that the BPE is best served by having an ED who is not a DBPR employee. They believe that splitting the functions of the BPE executive director from the responsibilities of the president of FEMC (who directs all the staff serving the BPE) could create an unnecessary bureaucracy, confusion of purpose, and delays. However, representatives of the Florida Society of Engineers stated that their primary concern is the reenactment of FEMC.

The committee discussed the appointment of the executive director of the Florida Board of Professional Engineers and whether or not that person should be employed by FEMC or the Department of Business & Professional Regulation. Two amendments were offered clarifying that the executive director of the board would be an employee of the department, appointed by the secretary, and would also serve as the contract administrator. Therefore, only one department position would be funded by engineer's fees. A FEMC spokesperson testified that the corporation feels very strongly that the president of FEMC should also be the executive director of the BPE. The department testified that, under s. 455.203, F.S., it has authority to appoint the executive director. After discussion, the amendments were withdrawn with the agreement that discussions would continue.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 11, 2000, the Committee on General Government Appropriations adopted one amendment . The amendment clarifies the existing requirement for a CPA audit of FEMC, stating that the audit shall be done according to "generally accepted government auditing standards." In addition, it provides that the Auditor General may also audit FEMC.

VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION AND CONSUMER AFFAIRS:

Prepared by:	Staff Director:
Gip Arthur	Rebecca R. Everhart

AS REVISED BY THE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS:

Prepared by:	Staff Director:
Juliette Noble	Cynthia P. Kelly