# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 1022

SPONSOR: Senators Cowin, Sebesta, and others

SUBJECT: Public Procuring and Contracting

DATE: March 22, 2001 REVISED: 04/05/01

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | White | Wilson | GO | Fav/1 amendment |
| 2. | | | CA | |
| 3. | | | AGG | |
| 4. | | | AP | |
| 5. | | | | |
| 6. | | | | |

## I. Summary:


The bill creates the "Open Contracting Act" which applies to the state and any political subdivision, agency, or instrumentality thereof when it is procuring products or services or letting contracts for the manufacture or construction of public works, or overseeing such procurement, manufacture, or construction.

When engaged in these activities, the governmental entities must ensure that specifications and agreements subject to the entities' approval, do not contain any provisions which: (a) require parties to enter into agreements with labor organizations; (b) discriminate against parties for refusing to adhere to agreements with labor organizations; or (c) require the employees of the parties to become union members.

This bill creates an unnumbered section of the Florida Statutes.


## II. Present Situation:

**Construction Contracts--**The Department of Management Services (DMS) is responsible for adopting rules that set forth the procedures for state construction contracts.[1] These rules provide that competitive sealed bidding procedures must be used, unless waived by the DMS in certain circumstances, for construction contracts in excess of $200,000.[2] The competitive bidding process requires that the contract be awarded to the responsive bidder who has submitted the

[1] Sections 255.29 and 255.30, F.S.
[2] Rules 60D-5.007, 5.0073, and 5.008, F.A.C.

lowest bid.[3] For construction projects costing $200,000 or less, agencies may procure the contract by competitive negotiation.[4]

Construction contracts procured by counties, municipalities, special districts, or other political subdivisions of the state must also be competitively awarded based on the submission of sealed bids or proposals, if the projects are in excess of $200,000.[5] These local entities are statutorily permitted to enact ordinances or resolutions that provide procedures for conducting the bidding process.[6]

**Project Labor Agreements--**One form of construction industry contract that could be affected by the bill is known as a project labor agreement (PLA). A PLA establishes an arrangement in which all successful bidders to a contract are required to become signatories to a collective bargaining agreement for the duration of a construction project. The agreement usually covers wages, working conditions, work rules, and dispute-resolution procedures for the duration of the project. PLAs also usually contain clauses that guarantee the project will be built without strikes, lock-outs, or other disruptions, which might delay completion and increase costs.

A PLA that requires union-only workers, union hall workers, and/or that successful bidders must sign collective bargaining agreements with labor union representatives as a condition of being allowed to perform work on the project are referred to as union-only PLAs. When used in Florida, due to the state constitution's "Right to work" provision, union-only PLAs typically provide that successful bidders must become signatories to a collective bargaining agreement with a union representative and that workers will be hired from union halls.[7]

Project Labor Agreements are expressly made lawful by the National Labor Relations Act (NLRA)[8], and in *Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. v. Massachusetts Water Resources Authority (MWRA)*, the Supreme Court held that a state project manager is free under federal law to require or prohibit the use of a PLA on an individual state construction project.[9] In this case, the MWRA was ordered by the court to clean up the Boston Harbor. The order required construction to proceed without interruption, making no allowance for delays from causes such as labor disputes.

The cleanup project was expected to cost $6.1 billion over 10 years. The MWRA chose Kaiser Engineers as its project manager, and on behalf the MWRA, Kaiser negotiated a PLA with the Building and Construction Trades Council (BCTC). The PLA recognized BCTC as the exclusive bargaining agent for all craft employees, and required: (a) certain labor dispute

[3] Rules 60D-5.002 and 5.007, F.A.C.
[4] Rule 60D-5.0073, F.A.C.
[5] Section 255.20, F.S.
[6] *Id*.
[7] Article 1, s. 6 of the Florida Constitution, provides that the right of person to work shall not be denied or abridged on account of membership or non-membership in any labor union or organization, and that the right of employees to bargain collectively through a labor union shall be denied or abridged. Accordingly, employees in this state cannot be compelled to join a union, and thus, PLAs in Florida cannot require union-only workers. When PLAs are used in Florida, the agreements typically provide that employees will be hired through union hall, as all employees, whether union or non-union, may legally be hired through union halls.
[8] 29 U.S.C. s. 158(e)-(f).
[9] 507 U.S. 218 (1983).

resolution methods; (b) that all employees become union members within seven days of employment; (c) a ten year no-strike commitment; and (d) a requirement that all contractors and subcontractors be bound by the PLA.

The MWRA approved this agreement, and provided in its bid solicitation for work on the project that every successful bidder and all levels of subcontractors must agree to the terms of the PLA. Subsequently, Associated Builders and Contractors (ABC) sued to enjoin enforcement of the PLA on numerous grounds. Initially, the U.S. District Court denied the injunction. On appeal, the Court of Appeals held that federal law preempted the PLA bid specification because the MWRA was regulating activities that Congress intended to be unrestricted.

Ultimately, the U.S. Supreme Court reversed the Court of Appeals. The U.S. Supreme Court upheld the MWRA's use of the PLA bid specification, stating that the NLRA provides that PLAs are lawful, and moreover, that Massachusetts was merely acting as a proprietor. According to the Court, the state cannot offend preemption principles when it is merely acting as a proprietor; rather, only when the state acts as a regulator can preemption occur.

**President Bush's Executive Order**—On February 17, 2001, President Bush issued Executive Order #13202, which provides that federal executive agencies, to the extent permitted by law, shall not in bid specifications, project agreements, or other controlling documents, nor when issuing grants, providing financial assistance, or entering other cooperative agreements for construction projects:

- Require or prohibit bidders, offerors, contractors or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same or other related construction projects; or
- Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction projects.

The order further states that nothing contained therein prohibits contractors or subcontractors from voluntarily entering into agreements with labor organizations.

## III. Effect of Proposed Changes:

**Section 1.** The bill creates the, "Open Contracting Act," the stated purpose of which is to prohibit governmental entities from imposing certain labor requirements as a condition of performing public works. This prohibition is limited to governmental entities. The bill states that nothing in the act prohibits bidders, offerors, contractors, or subcontractors from entering into agreements with labor organizations on public works projects, provided that the agreements are made voluntarily and without coercion.

The specific governmental entities covered by the bill are the state and any political subdivision,[10] agency, or instrumentality thereof (hereinafter collectively referred to as "the state") when they are procuring products or services or letting contracts for the manufacture or construction of public works, or overseeing such procurement, manufacture, or construction. When engaged in these activities, the state must ensure that bid specifications, project agreements, and other controlling documents entered into, required, or subject to the state's approval, do not contain any provisions which:

- Require bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same or related projects;
- Discriminate against bidders, offerors, contractors, or subcontractors for refusing to be signatories or otherwise adhere to agreements with one or more labor organizations on the same or related projects; or
- Require any bidder, offeror, contractor, or subcontractor to enter into, adhere to, or enforce any agreement that requires its employees, as a condition of employment, to:
  - Become members of or become affiliated with a labor organization; or
  - Pay dues or fees to a labor organization, over an employee's objection, in excess of the employee's share of the labor organization's costs relating to collective bargaining, contract administration, or grievance adjustment.

The bill also provides that any bidder, offeror, contractor, or subcontractor that may suffer injury has standing to challenge the bid specification, project agreement, or other controlling document which violates the act, and if the challenge is successful, the party is entitled to costs and attorneys' fees.

**Section 2.** The act takes effect on October 1, 2001.

## IV. Constitutional Issues:

### A. Municipality/County Mandates Restrictions:

The bill does not require counties or municipalities to spend funds, or to take an action requiring the expenditure of funds. The bill only prohibits municipalities and counties from imposing the labor organization requirements proscribed by the bill.

### B. Public Records/Open Meetings Issues:

None.

### C. Trust Funds Restrictions:

None.

[10] The term "political subdivision" is broadly defined for purposes of all statutory construction, to include "counties, cities, towns, villages, special tax districts, special road and bridge districts, bridge districts, and all other districts in the state." Section s. 1.01(8), F.S.

D. Other Constitutional Issues:

If this bill is enacted, it may be challenged on the ground that it is preempted by the NLRA. According to the U.S. Supreme Court, a state law may be preempted by the NLRA if it regulates in a zone protected and reserved for market freedom (known as the Machinist's preemption principle), or protected and reserved for NLRB jurisdiction (known as the Garmon preemption principle).[11] The U.S. Supreme Court has further explained:

> A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to preemption by NLRA, because preemption doctrines apply only to state regulation.[12]

Under these principles, the determination of whether the bill is preempted by the NLRA will turn on whether this state in enacting the statute is acting as a regulator or as a market participant.

Proponents of the bill would argue that the state is acting as a market participant. According to proponents, the statute created by the bill does not regulate because it does not direct private entities to engage in any conduct with regard to their own labor relations; instead, the statute only concerns the activity of the state, and simply provides that the state may not include a union-only requirement as part of the its own bidding and construction contract documents. Thus, under the bill, the state is acting merely as a market participant by setting its own terms for its own construction projects, while leaving private contractors free to contract with unions or to not do so.

On the other hand, opponents would argue that the state is regulating. According to opponents, the state is not merely making a proprietary decision as a project manager; instead, it is regulating how every type of government entity statewide decides to complete its construction projects. In other words, the statute sets forth a flat prohibition on union-only PLAs, an action which is not permitted because the NLRA explicitly protects the use of PLAs that require the use of a labor organization or hiring hall labor. Consequently, the statute would be preempted by the NLRA.

In 1999, House Bill 101, a law substantially the same as that proposed in the bill, was enacted in Ohio. The Ohio law applied to public authorities when engaged in the procurement of products or services, awarding contracts, or overseeing procurement or construction for public improvements. While engaged in these activities, the public authority was required to ensure that bid specifications issued by the public authority for the public improvement and any subsequent contract or other agreement to which the public authority and a contractor or subcontractor are direct parties do not require a contractor or subcontractor to:

[11] *Boston Harbor*, 507 U.S. at 226-227.
[12] *Id.*

- Enter into agreements with any labor organization;
- Enter into any agreement that requires the employees of that contractor or subcontractor to do either of the following as a condition of employment;
  - Become members of or affiliated with a labor organization; or
  - Pay dues or fees to a labor organization.

Furthermore, the Ohio law provided that public authorities are prohibited from discriminating against any bidder, contractor, or subcontractor for refusing to become a party to any agreement with any labor organization on a public improvement currently under bid or its related projects.

The law was subsequently challenged in Ohio county court. The plaintiffs, who were representatives for 17,000 union members, argued that the law's provisions are preempted by the NLRA. The Court agreed, and explained that under the NLRA, the negotiation and administration of collective bargaining agreements, including PLAs, is the responsibility of labor organizations. The Court found this responsibility was irreparably harmed by the law's enactment, and that this was evidenced by the fact that the nearly year-long negotiations between the plaintiffs and a county were terminated when the law was passed.

The Ohio county court is the only court that has addressed the specific issue raised by the bill, i.e., whether federal law preempts a state from enacting a statute that provides that government entities may not require PLAs in its construction contracts. Under the Ohio county court decision, the statute created by the bill would be deemed unconstitutional; however, this Ohio case is currently being appealed to the Ohio Court of Appeals, and given the persuasiveness of both the proponents' and opponents' arguments and the lack of any on point federal or Florida case law, it is difficult, if not impossible, to predict how the appellate courts will ultimately rule.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

Opponents claim this bill will reduce the state's use of unions; thereby, economically harming unions and their members. Proponents claim this bill will benefit non-union contractors and employees, who comprise the majority of the skilled labor population, by enabling them to receive a greater number of state construction contracts.

### C. Government Sector Impact:

The DMS has indicated that the bill will have no affect on the department's facilities management or building construction procurement specifications, which do not include any labor organization requirements. However, although the state procurement process may not be affected, the bill may apply to contracts between state instrumentalities, such a private

service providers, and subcontractors. Moreover, the bill will place limitations on the contracting processes of local governments or other political subdivisions of the state.

## VI. Technical Deficiencies:

As discussed in the "Present Situation" section of this analysis, *supra*, Florida is a "Right to Work" state. Thus, employees in Florida are protected from compulsory union membership. At page two, lines 19 through 22, the bill, however, provides that the state may not require bidders, offerors, contractors, or subcontractors to enter an agreement that requires its employees, as a condition of employment *to pay dues or fees to a labor organization over the employee's objection, in excess of the labor organization's costs related to collective bargaining, contract administration, and grievance adjustment*. Potentially, the highlighted language could be construed as authorizing payment of union costs by all employees subject to the agreement. It appears that such a construction would violate the state constitution's "Right to Work" provision.

## VII. Related Issues:

Public policy arguments that militate against the use of PLAs include the following[13]:

- PLAs require open shop contractors who win a bid to operate within the terms of the PLA and draw their employees from union hiring halls. As a result, few open shop contractors bid because they are forced to operate as unionized contractors, and to forfeit the terms, labor deployment, and methods they have developed to increase efficiency and productivity.

- Competitive bidding laws are defeated and construction costs are increased because the number of potential bidders is reduced due to the lack of open shop contractors willing to bid on a project requiring a PLA.

- Right to work laws are defeated because non-union employees are excluded by PLAs, as although the law permits them to be hired through union hiring halls, the practical reality is that they will not be selected for employment due to their non-membership.

Public policy arguments that support the use of PLAs include the following[14]:

- PLAs ensure the timely completion of complex and lengthy construction projects because the agreement fixes labor costs, specifies a source of skilled, well-trained workers, and eliminates the risk of strikes, lockouts, or other disruptions.

- PLAs result in lower costs because they standardize working terms and conditions, allow project managers to obtain concessions from the unions, and avoid cost increases caused by work stoppages.

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[13] *Government-Mandated Project Labor Agreements in Construction: A Force to Obtain Union Monopoly on Government-Finance Projects*, The Wharton School, January 11, 2000; *The Case Against Union-Only Labor Project Agreements,* Construction Lawyer, January 1999.

[14] *The Case for Project Labor Agreements,* Construction Lawyer, January 1999.

- PLAs are not exclusionary, as every PLA in the public sector allows any contractor, regardless of union status, to bid provided that it agrees to the work under the PLA terms.

Vestiges of the issue addressed by the bill have been discussed in recent years. Chapter 97-177, L.O.F., was enacted to amend s. 553.73, F.S., of the State Building Code to prohibit any state minimum building code from including personnel regulations and professional qualification requirements. These changes were made because local governments had been amending their local building codes to impose labor requirements on contractors.

## VIII. Amendments:

#1 by Governmental Oversight and Productivity:
Deletes language in the bill that could have been construed as authorizing the payment of union costs by non-union employees in violation of the state constitution.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.