

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 598

INTRODUCER: Senator Brandes

SUBJECT: Public Works Projects

DATE: January 15, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Peacock	McVaney	GO	Unfavorable
2.			CA	
3.			AP	

I. Summary:

SB 598 creates section 255.0992, F.S., relating to public works projects and prohibited governmental actions. The bill defines the terms “political subdivision” and “public works” or “public works project.” The bill prohibits the state and its political subdivisions that contract for construction, maintenance, repair, or improvement of public works from imposing certain conditions on contractors, subcontractors, or material suppliers or carriers, except as otherwise required by federal or state law.

CS/SB 598 also prohibits the state or a political subdivision from restricting a qualified contractor, subcontractor, or material supplier or carrier from submitting a bid on any public works project.

II. Present Situation:

The Consultants’ Competitive Negotiation Act

In 1972, Congress passed the Brooks Act (Public Law 92-582), which codified Qualifications-Based Selection (QBS) as the federal procurement method for design professional services. The QBS process entails first soliciting statements of qualifications from licensed architectural and engineering providers, selecting the most qualified respondent, and then negotiating a fair and reasonable price. The vast majority of states currently require a QBS process when selecting the services of design professionals.

Florida's Consultants' Competitive Negotiation Act (CCNA), was enacted by the Legislature in 1973¹ to specify the procedures to be followed when procuring professional services by an agency.²

Currently, the CCNA, codified in s. 287.055, F.S., specifies the process to be followed when state and local government agencies procure the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper. The CCNA requires that state agencies publicly announce, in a consistent and uniform manner, each occasion when professional services must be purchased for one of the following:³

- A project, when the basic construction cost is estimated by the agency to exceed \$325,000.
- A planning or study activity, when the fee for professional services exceeds \$35,000.

The public notice must provide a general description of the project and describe how the interested consultants may apply for consideration.

The CCNA provides a two-phase selection process.⁴ In the first phase, the "competitive selection," the agency evaluates the qualifications and past performance of no fewer than three bidders. The agency selects the bidders, ranked in order of preference, and considers the most highly qualified to perform the required services. The CCNA requires consideration of several factors in determining the most highly qualified bidders.⁵

The CCNA prohibits the agency from requesting, accepting, and considering, during the selection process, proposals for the compensation to be paid.⁶ Section 287.055(2)(d), F.S., defines the term "compensation" to mean "the amount paid by the agency for professional services regardless of whether stated as compensation" or as other types of rates.

In the second phase, the "competitive negotiation," the agency negotiates compensation with the most qualified of the three selected firms for professional services at compensation which the agency determines is "fair, competitive, and reasonable."⁷ If a satisfactory contract cannot be negotiated, the agency must formally terminate negotiations with that firm and must then negotiate with the second most qualified firm. The agency must negotiate with the third most qualified firm if the negotiation with the second most qualified firm fails to produce a satisfactory contract.⁸ If a satisfactory contract cannot be negotiated with any of the three selected, the agency must select additional firms in order of their competence and qualifications

¹ Chapter 73-19, L.O.F.

² Section 287.055(2)(b), F.S., defines "Agency" as "the state, a state agency, a municipality, a political subdivision, a school district, or a school board. The term "agency" does not extend to a nongovernmental developer that contributes public facilities to a political subdivision under s. 380.06, F.S., or ss. 163.3220-163.3243, F.S."

³ Section 287.055(3)(a)1., F.S.

⁴ Sections 287.055(4) and (5), F.S.

⁵ The following is a full listing of the factors that s. 287.055(4)(b), F.S., requires agencies to consider: the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the firms; and, the volume of work previously awarded to each firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms.

⁶ Section 287.055(4)(b), F.S.

⁷ Section 287.055(5)(a), F.S.

⁸ Section 287.055(5)(b), F.S.

and continue negotiations until a contract is reached.⁹ Once negotiations with a firm are terminated, the agency cannot resume negotiations with that firm for the project.

In October 2011, the Attorney General opined that local governments could not create a hybrid procurement process for awarding projects but instead are limited to utilizing the statutorily defined procedures.¹⁰

Procurement of Construction Services for Public Property and Publicly Owned Buildings

Chapter 255, F.S., specifies the procedures to be followed in the procurement of construction services for public property and publicly owned buildings. Section 255.29, F.S., requires the Department of Management Services (DMS) to establish, by rule,¹¹ the following construction contract procedures for:

- Determining the qualifications and responsibility of potential bidders prior to advertisement for and receipt of bids for building construction contracts, including procedures for the rejection of bidders who are reasonably determined from prior experience to be unqualified or irresponsible to perform the work required by a proposed contract.
- Awarding each state agency construction project to the lowest qualified bidder as well as procedures to be followed in cases in which DMS declares a valid emergency to exist which would necessitate the waiver of the rules governing the award of state construction contracts to the lowest qualified bidder.
- Governing negotiations for construction contracts and modifications to contract documents when such negotiations are determined by the DMS secretary to be in the best interest of the state.
- Entering into performance-based contracts for the development of public facilities when DMS determines the use of such contracts to be in the best interest of the state.

These procedures must include, but are not limited to:¹²

- Prequalification of bidders;
- Criteria to be used in developing requests for proposals which may provide for singular responsibility for design and construction, developer flexibility in material selection, construction techniques, and application of state-of-the-art improvements;
- Accelerated scheduling, including the development of plans, designs, and construction simultaneously; and
- Evaluation of proposals and award of contracts considering such factors as price, quality, and concept of the proposal.

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.¹³ County, municipal, or other political subdivision contracts for construction

⁹ Section 287.055(5)(c), F.S.

¹⁰ Op. Att'y Gen. Fla. 2011-21 (2011).

¹¹ Chapter 60D-5, F.A.C., establishes the procedures for s. 255.29, F.S., which requires procedures be followed in advertising for bids for construction contracts; in determining the eligibility of potential bidders to submit proposals for construction contracts; in awarding construction contracts; for waiver of non-material bid deviations; for rejection of bids; for disqualification of contractors; and in requesting authority to negotiate contracts and in negotiating contracts.

¹² Section 255.29(4)(a)-(d), F.S.

¹³ Section 255.0525(1), F.S. Also, see Rules 60D-5.002(2) and 60D-5.0073, F.A.C.

projects that are projected to cost in excess of \$200,000 must also be competitively bid.¹⁴ Counties, municipalities, special districts,¹⁵ or other political subdivisions seeking to construct or improve a public building must competitively bid the project if the projected cost is in excess of \$300,000.¹⁶

The solicitation of competitive bids or proposals for any state construction project that is projected to cost more than \$200,000 must be publicly advertised in the Florida Administrative Register (FAR) at least 21 days prior to the established bid opening.¹⁷ If the construction project is projected to exceed \$500,000, the advertisement must be published in the FAR at least 30 days prior to the bid opening, and at least once in a newspaper of general circulation in the county where the project is located 30 days prior to the bid opening.¹⁸

Department of Management Services Convicted Vendors and Discriminatory Vendor Lists

DMS is required to keep a convicted vendor list¹⁹ that identifies vendors who have committed a public entity crime.²⁰ If a vendor is included on the convicted vendor list, that vendor is barred from doing business with the state²¹ in excess of \$35,000 as provided in s. 287.017(2), F.S., for a period of 36 months following placement on the list.

DMS also maintains a discriminatory vendor list that identifies vendors where a determination of liability by a state circuit court or a federal district court for a violation of any state or federal law prohibiting discrimination on the basis of race, gender, national origin, disability, or religion.²² Inclusion on the discriminatory vendor list bars a vendor from doing business with the state, and the state is prohibited from accepting any bids or proposals and transacting business with such vendor for a period of 36 months following placement on the list.²³

¹⁴ Section 255.0525(2), F.S.

¹⁵ Section 255.20(1), F.S. (Special district as defined in ch. 189, F.S.).

¹⁶ *Id.* For electrical work, local governments must competitively bid projects estimated to cost more than \$75,000.

¹⁷ Section 255.0525(1), F.S.

¹⁸ *Id.* Similar publishing provisions apply to construction projects projected to cost more than \$200,000 for counties, municipalities, and political subdivisions. *See* Section 255.0525(2), F.S.

¹⁹ Section 287.133, F.S., and Rule 60A-1.006(5), F.A.C.

²⁰ Section 287.133(1)(g), F.S., defines “public entity crime” as a violation of any state or federal law by a person with respect to and directly related to the transaction of business with any public entity or with an agency or political subdivision of any other state or with the United States, including, but not limited to, any bid, proposal, reply, or contract for goods or services, any lease for real property, or any contract for the construction or repair of a public building or public work, involving antitrust, fraud, theft, bribery, collusion, racketeering, conspiracy, or material misrepresentation.

²¹ Section 287.135(2)(a), F.S. A vendor placed on the list may not submit bids or proposals to a public entity on a contract to provide goods and services, a contract for construction or repair of a public building or work, leases of real property. The vendor may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant with a public entity, and may not transact business with any public entity.

²² Section 287.134, F.S.

²³ Section 287.134(2), F.S.

Preference for Employment of State Residents in Construction Contracts Funded By State Funds

Florida law provides a preference for the employment of state residents in construction contracts funded by state funds.²⁴ Such contracts must contain a provision requiring the contractor to give preference to the employment of state residents in the performance of the work if state residents have substantially equal qualifications²⁵ to those of non-residents.²⁶ If a construction contract is funded by local funds, the contract may contain such a provision.²⁷ In addition, a contractor required to employ state residents must contact the Department of Economic Opportunity to post the contractor's employment needs in the state's job bank system.²⁸

Department of Transportation Construction Projects

Chapter 337, F.S., governs contracting by the Department of Transportation (DOT). Any person who wants to bid for a construction contract in excess of \$250,000 must be certified by DOT as qualified.²⁹ Certification is also required to bid on road, bridge, or public transportation construction projects of more than \$250,000.³⁰ The purpose of certification is to ensure professional and financial competence relating to the performance of construction contracts by evaluating bidders "with respect to equipment, past record, experience, financial resources, and organizational personnel of the applicant necessary to perform the specific class of work for which the person seeks certification."³¹

Each application for certification of qualification must be accompanied by the latest annual financial statement of the applicant completed within the last 12 months.³² If the application or the annual financial statement shows the financial condition of the applicant more than 4 months prior to the date on which the application is received by DOT, then an audited interim financial statement must be submitted and accompanied by an updated application.³³ If the applicant meets the qualifications, DOT issues a certificate of qualification that is valid for 18 months after the date of the applicant's financial statement, or shorter time period as DOT prescribes.³⁴ Such certificate of qualification may be revoked by DOT for a contractor who is deemed delinquent on a previously awarded contract.³⁵

DOT does not prohibit a qualified, licensed or certified contractor from bidding; however, a contract may not be awarded if the bid is determined to be irregular or non-responsive. DOT

²⁴ Section 255.099(1), F.S.

²⁵ Section 255.099(1)(a), F.S., defines "substantially equal qualifications" as the "qualifications of two or more persons among whom the employer cannot make a reasonable determination that the qualifications held by one person are better suited for the position than the qualifications held by the other person or persons."

²⁶ Section 255.099(1), F.S.

²⁷ *Id.*

²⁸ Section 255.099(1)(b), F.S.

²⁹ Section 337.14(1), F.S. and ch. 14-22, F.A.C.

³⁰ Section 337.14(2), F.S.

³¹ Section 337.14(1), F.S.

³² *Id.*

³³ *Id.*

³⁴ Section 337.14(4), F.S.

³⁵ Section 337.16, F.S.

does require training for certain work categories, such as bridge work and other technical road and bridge areas.

Federal Labor and Wage Laws

The National Labor Relations Act of 1935³⁶ and the Labor Management Relations Act of 1947³⁷ constitute a comprehensive scheme of regulations guaranteeing employees the right to organize, to bargain collectively through chosen representatives, and to engage in concerted activities to secure their rights in industries involved in or affected by interstate commerce.

The Fair Labor Standards Act (FLSA) establishes a federal minimum wage, which is the lowest hourly wage that can be paid in the United States.³⁸ A state may set the rate higher than the federal minimum, but not lower.³⁹ It also requires employers to pay time and a half to its employees for overtime hours worked,⁴⁰ and establishes standards for recordkeeping⁴¹ and child labor.⁴² Over 135 million workers are covered under the act;⁴³ most jobs are covered by the FLSA, but not all jobs are covered. In addition, some jobs are covered, but are considered “exempt” from the FLSA overtime requirements.⁴⁴

On February 12, 2014, President Obama signed Executive Order 13658, which establishes a minimum wage for certain federal contractors.⁴⁵ The Executive Order requires parties who contract with the federal government to pay workers performing work on or in connection with covered federal contracts at least \$10.10 per hour beginning on January 1, 2015. Beginning January 1, 2016, and annually thereafter, such workers must be paid an amount determined by the Secretary of Labor in accordance with the Executive Order. The order stated that “[r]aising the pay of low-wage workers increases their morale and the productivity and quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs.”⁴⁶

State Labor and Wage Regulations

Article I, Section 6 of the State Constitution creates a constitutional right to collectively bargain for public sector employees. It provides, in pertinent part, that “[t]he right of persons to work

³⁶ 29 U.S.C. ss. 151 to 169 (encouraging the practice and procedure of collective bargaining and protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection).

³⁷ 29 U.S.C. ss. 141 to 187 (prescribing the rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce).

³⁸ 29 U.S.C. s. 206.

³⁹ 29 U.S.C. s. 218(a).

⁴⁰ 29 U.S.C. s. 207.

⁴¹ 29 U.S.C. s. 211.

⁴² 29 U.S.C. s. 212.

⁴³ <http://www.dol.gov/whd/workers.htm> (last visited December 4, 2015).

⁴⁴ 29 U.S.C. s. 213; http://www.dol.gov/whd/overtime_pay.htm (last visited December 4, 2015).

⁴⁵ A copy of the Executive Order can be found online at: <http://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors> (last visited December 4, 2015).

⁴⁶ *Id.*

shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.” The Florida Supreme Court has held that public employees maintain the same rights to collectively bargain as do private employees.⁴⁷

In addition, the State Constitution provides that “[a]ll working Floridians are entitled to be paid a minimum wage that is sufficient to provide a decent and healthy life for them and their families, that protects their employers from unfair low-wage competition, and that does not force them to rely on taxpayer-funded public services in order to avoid economic hardship.”⁴⁸ The State Constitution requires that employers pay employees no less than the minimum wage for all hours worked in Florida.⁴⁹ The current state minimum wage is \$8.05 per hour,⁵⁰ which is higher than the federal rate.⁵¹

Federal Project Labor Agreements

In 2009, President Barack Obama signed Executive Order 13502 authorizing the use of project labor agreements for federal construction projects.⁵² The Executive Order defines the term “project labor agreement” as “a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f).” The Executive Order provides that executive agencies may, on a project-by-project basis, require the use of a project labor agreement by a contractor where such an agreement will advance the federal government’s goal of achieving economy and efficiency in procurement, produce labor-management stability, and ensure compliance with laws and regulations concerning safety, health, equal employment opportunity, and labor and employment standards.

Federal Prevailing Wage Requirements

The Davis-Bacon Act applies to contractors and subcontractors performing work on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair of public works projects or public buildings.⁵³ The United States Department of Labor, Wage and Hour Division, issues two types of wage determinations: general determinations (also known as area determinations) and project determinations. The wage and fringe benefits⁵⁴ in the applicable

⁴⁷ See *Hillsborough Cnty. Gov’tl Emps. Ass’n, Inc. v. Hillsborough Cnty. Aviation Auth.*, 522 So.2d 358 (Fla. 1988); *City of Tallahassee v. Public Employees Relations Comm’n*, 410 So.2d 487 (Fla. 1981); *Dade Cnty. Classroom Teachers Ass’n v. Legislature of Fla.*, 269 So.2d 684 (Fla. 1972).

⁴⁸ Article X, s. 24(a), FLA. CONST. and s. 448.110, F.S.

⁴⁹ Article X, s. 24(c), FLA. CONST.

⁵⁰ <http://www.floridajobs.org/business-growth-and-partnerships/for-employers/display-posters-and-required-notice> (last visited December 4, 2015).

⁵¹ The federal minimum wage is \$7.25 per hour. For more information about federal minimum wage provisions, see <http://www.dol.gov/whd/minimumwage.htm> (last visited December 4, 2015).

⁵² A copy of the Executive Order can be found online at:

http://www.whitehouse.gov/the_press_office/ExecutiveOrderUseofProjectLaborAgreementsforFederalConstructionProjects (last visited December 4, 2015); the Executive Order is codified in subpart 22.5 of the Federal Acquisition Regulation.

⁵³ 40 U.S.C. s. 3142(a).

⁵⁴ Examples of fringe benefits include life insurance, health insurance, pension, vacation, holidays, sick leave, and other “bona fide” fringe benefits. <http://www.dol.gov/whd/programs/dbra/faqs/fringes.htm#Fringe> (last visited December 4, 2015).

Davis-Bacon wage determination must be the minimum paid by contractors and subcontractors to laborers and mechanics.⁵⁵

III. Effect of Proposed Changes:

Section 1 creates s. 255.0992, F.S., relating to public works projects and prohibited governmental actions. The following terms are defined:

- “Political subdivision” means a separate agency or unit of local government created or established by law or ordinance and the officers thereof⁵⁶ and is authorized to expend public funds for construction, maintenance, repair, or improvement of public works.
- “Public works” or “public works project” means a building, road, street, sewer, storm drain, water system, site development, irrigation system, reclamation project, gas or electrical distribution system, gas or electrical substation, or other facility, project, or portion thereof, including repair, renovation, or remodeling, owned, in whole or in part, by any political subdivision for which a project for construction, maintenance, repair, or improvement of public works is to be paid for, in whole or in part, with state funds.

Except as required by federal or state law, this section prohibits the state or any political subdivision from requiring a contractor, subcontractor, or material supplier or carrier engaged in the construction, maintenance, repair, or improvement of public works to:

- Pay employees a predetermined amount of wages or prescribe any wage rate;
- Provide employees a specified type, amount, or rate of employee benefits;
- Control, limit, or expand staffing; or
- Recruit, train, or hire employees from a designated, restricted, or single source.

Also, the bill provides that the state or a political subdivision that contracts for a public works project may not prohibit a contractor, subcontractor, or material supplier or carrier who is qualified, licensed, or certified as required by state law from submitting a bid on any public works project.

Section 2 provides that this act shall take effect upon becoming a law.

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 state tax shares with counties and municipalities.

⁵⁵ 40 U.S.C. s. 3142(b).

⁵⁶ The bill notes that the term “political subdivision” includes, but is not limited to, a county; municipality; or an authority, board, commission, department, institution of higher education, public corporation, school district, taxing district, water management district, or other public agency or body.

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.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

The provision in the bill that prevents the state or a political subdivision from prohibiting qualified, licensed and certified vendors from submitting bids on public works projects may conflict with ss. 287.133 and 287.34, F.S., regarding the convicted vendor and discriminatory vendor lists maintained by DMS.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 255.0992 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.)

None.

B. Amendments:

None.