

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 545 Prohibition Against Contracting with Scrutinized Companies  
**SPONSOR(S):** Fine, Moskowitz, and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 780

| REFERENCE   | ACTION    | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|---|-----------|---------|--|
| 1) Oversight, Transparency & Administration<br>Subcommittee | 11 Y, 0 N | Moore   | Harrington                               |
| 2) Government Accountability Committee                      | 20 Y, 2 N | Moore   | Williamson                               |

### SUMMARY ANALYSIS

Current law prohibits a company that is on the Scrutinized Companies that Boycott Israel List (Israel List) or that is engaged in a boycott of Israel from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local governmental entity for goods or services of \$1 million or more. A company that submits a bid or proposal for or enters into or renews such a contract must certify that the company is not participating in a boycott of Israel.

The bill amends the provision prohibiting agencies and local governmental entities from contracting with companies on the Israel List or that boycott Israel to apply the prohibition to contracts for goods or services of any amount, rather than only contracts of \$1 million or more. The bill requires a contract with an agency or local governmental entity for goods or services of any amount entered into or renewed on or after July 1, 2018, to contain a provision that allows for the termination of the contract at the option of the awarding body if the company has been placed on the Israel List or is engaged in a boycott of Israel.

The bill may have an indeterminate negative fiscal impact on the state and local governments. See Fiscal Comments section.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

##### Procurement of Commodities and Services

Chapter 287, F.S., regulates state agency<sup>1</sup> procurement of personal property and services. Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods that include:

- Single source contracts, which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- Invitations to bid, which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposals, which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- Invitations to negotiate, which are used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services.<sup>2</sup>

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.<sup>3</sup> However, specified contractual services and commodities are not subject to competitive solicitation requirements.<sup>4</sup>

The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include overseeing agency implementation of the procurement process,<sup>5</sup> creating uniform agency procurement rules,<sup>6</sup> implementing the online procurement program,<sup>7</sup> and establishing state term contracts.<sup>8</sup> The agency procurement process is partly decentralized in that agencies, except in the case of state term contracts, may procure goods and services themselves in accordance with requirements set forth in statute and rule, rather than placing orders through DMS.

##### Prohibition against Contracting with Companies that Boycott Israel

Current law prohibits a company that is on the Scrutinized Companies that Boycott Israel List (Israel List)<sup>9</sup> or that is engaged in a boycott of Israel<sup>10</sup> from bidding on, submitting a proposal for, or entering

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<sup>1</sup> Section 287.012(1), F.S., defines the term "agency" 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. "Agency" does not include the university and college boards of trustees or the state universities and colleges.

<sup>2</sup> See ss. 287.012(6) and 287.057(1), F.S.

<sup>3</sup> Section 287.057(1), F.S., requires all projects that exceed the Category Two threshold amount (\$35,000) contained in s. 287.017, F.S., to be competitively procured.

<sup>4</sup> See s. 287.057(3)(e), F.S.

<sup>5</sup> See ss. 287.032 and 287.042, F.S.

<sup>6</sup> See ss. 287.032(2) and 287.042(3), (4), and (12), F.S.

<sup>7</sup> See s. 287.057(23), F.S.

<sup>8</sup> See ss. 287.042(2), 287.056, and 287.1345, F.S.

<sup>9</sup> The Israel List is a list of companies that boycott Israel that is compiled by the State Board of Administration. Section 215.4725(2), F.S.

<sup>10</sup> The term "boycott of Israel" means refusing to deal, terminating business activities, or taking other actions to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, in a discriminatory manner.

Sections 287.135(1)(b) and 215.4725(1)(a), F.S.

into or renewing a contract with an agency or local governmental entity<sup>11</sup> for goods or services of \$1 million or more.<sup>12</sup> A company that submits a bid or proposal for or enters into or renews such a contract must certify that the company is not participating in a boycott of Israel.<sup>13</sup> The certification must be submitted at the time a bid or proposal is submitted or before a contract is executed or renewed.<sup>14</sup> In addition, a contract for goods or services of \$1 million or more entered into or renewed on or after October 1, 2016, must contain a provision that allows for the termination of the contract, at the option of the awarding body, if the company is found to have submitted a false certification, has been placed on the Israel List, or is engaged in a boycott of Israel.<sup>15</sup>

If an agency or local governmental entity determines that a company has submitted a false certification, it must provide the company with written notice, and the company has 90 days to respond in writing to such determination.<sup>16</sup> If the company fails to demonstrate that the determination of false certification was made in error, the awarding body must bring a civil action against the company.<sup>17</sup> If a civil action is brought and the court determines that the company submitted a false certification, the company must pay all reasonable attorney fees and costs (including costs for investigations that led to the finding of false certification).<sup>18</sup> In addition, a civil penalty equal to the greater of \$2 million or twice the amount of the contract for which the false certification was submitted must be imposed.<sup>19</sup> The company is ineligible to bid on any contract with an agency or local governmental entity for three years after the date the agency or local governmental entity determined that the company submitted a false certification.<sup>20</sup> A civil action to collect the penalties must commence within three years after the date the false certification is submitted.<sup>21</sup>

An agency or local governmental entity is authorized to make a case-by-case exception to the contracting prohibition for a company on the Israel List if all of the following occur:

- The boycott of Israel was initiated before October 1, 2016.
- The company certifies in writing that it has ceased its boycott of Israel.
- The agency or local governmental entity determines that it is in the best interest of the state or local community to contract with the company.
- The company has adopted, has publicized, and is implementing a formal plan to cease scrutinized business operations<sup>22</sup> and to refrain from engaging in any new scrutinized business operations.<sup>23</sup>

An agency or local governmental entity is also authorized to make an exception to the contracting prohibition for a company on the Israel List if one of the following occurs:

- The local governmental entity makes a public finding that, absent such an exemption, the local governmental entity would be unable to obtain the goods or services for which the contract is offered.
- For a contract with an executive agency, the Governor makes a public finding that, absent such an exemption, the agency would be unable to obtain the goods or services for which the contract is offered.

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<sup>11</sup> The term “local governmental entity” means a county, municipality, special district, or other political subdivision of the state.

Section 287.135(1)(d), F.S.

<sup>12</sup> Section 287.135(2), F.S.

<sup>13</sup> Section 287.135(5), F.S.

<sup>14</sup> *Id.*

<sup>15</sup> Section 287.135(3)(c), F.S.

<sup>16</sup> Section 287.135(5)(a), F.S.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Section 287.135(5)(a)1., F.S.

<sup>20</sup> Section 287.135(5)(a)2., F.S.

<sup>21</sup> Section 287.135(5)(b), F.S.

<sup>22</sup> Section 215.473(1)(u), F.S., defines “scrutinized business operations” to mean business operations that result in a company becoming a scrutinized company.

<sup>23</sup> Section 287.135(4), F.S.

- For a contract with an office of a state constitutional officer other than the Governor, the state constitutional officer makes a public finding that, absent such an exemption, the office would be unable to obtain the goods or services for which the contract is offered.<sup>24</sup>

### **Effect of the Bill**

The bill amends the provision prohibiting agencies and local governmental entities from contracting with companies on the Israel List or that boycott Israel to apply the prohibition to contracts for goods or services of any amount, rather than only contracts of \$1 million or more.

The bill requires a contract with an agency or local governmental entity for goods or services of any amount entered into or renewed on or after July 1, 2018, to contain a provision that allows for the termination of the contract at the option of the awarding body if the company has been placed on the Israel List or is engaged in a boycott of Israel.

An agency or local governmental entity is authorized to make a case-by-case exception to the contracting prohibition for a company on the Israel List based on the same conditions currently applicable to contracts of \$1 million or more.

#### **B. SECTION DIRECTORY:**

Section 1. amends s. 287.135, F.S., relating to prohibition against contracting with scrutinized companies.

Section 2. provides an effective date of July 1, 2018.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

The bill does not appear to impact state government revenues.

##### **2. Expenditures:**

See Fiscal Comments.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

##### **1. Revenues:**

The bill does not appear to impact local government revenues.

##### **2. Expenditures:**

See Fiscal Comments.

#### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill may have an indeterminate negative fiscal impact on the private sector. A company that engages in a boycott of Israel may not be eligible to contract with the state and local governmental entities, which may have a negative fiscal impact on the company.

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<sup>24</sup> *Id.*

#### D. FISCAL COMMENTS:

The bill may have an indeterminate negative fiscal impact on the state and local governments. State agencies and local governments will not be authorized to contract with certain companies that boycott Israel in certain instances. This prohibition may eliminate companies that otherwise would have been the least expensive source for certain goods or services.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

##### 2. Other:

###### Dormant Foreign Affairs Doctrine

The United States Constitution grants the federal government various powers related to foreign affairs, such as the power to declare war,<sup>25</sup> maintain a military,<sup>26</sup> enter into treaties and other international agreements,<sup>27</sup> regulate foreign commerce,<sup>28</sup> and hear cases involving foreign states and citizens.<sup>29</sup> These grants of power have been interpreted to grant the federal government the exclusive power to act in the area of foreign affairs.<sup>30</sup> The federal government's exclusive authority to act in the area of foreign affairs is known as the dormant foreign affairs doctrine.

When a state law operates in the field of foreign affairs without federal authorization, a reviewing court might find the state law to be invalid as a violation of the dormant foreign affairs doctrine.<sup>31</sup> If the purpose of the bill is to impact foreign affairs,<sup>32</sup> or if the effects of the bill have a sufficiently serious impact on foreign policy,<sup>33</sup> the bill may be found in violation of the dormant foreign affairs doctrine.<sup>34</sup>

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

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<sup>25</sup> Section 8, Art. I, U.S. Constitution.

<sup>26</sup> *Id.*

<sup>27</sup> Section 2, Art. II, U.S. Constitution.

<sup>28</sup> Section 8, Art. I, U.S. Constitution.

<sup>29</sup> Section 2, Art. III, U.S. Constitution.

<sup>30</sup> *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (stating that the "Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.").

<sup>31</sup> *Zschernig v. Miller*, 389 U.S. 429 (1968); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

<sup>32</sup> *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000) (pointing out that a congressional invocation of exclusively national powers with respect to addressing human rights violations in Burma precluded Massachusetts from restricting its agencies from purchasing goods or services from companies that did business with Burma; the case, however, was decided on the basis that a federal law preempted the state law.).

<sup>33</sup> *Clark v. Allen*, 331 U.S. 503, 517-518 (1947) (finding a state law that addressed the disposition of personal property of alien decedents valid, in spite of noting that the law would "have some incidental or indirect effect in foreign countries."); *Zschernig v. Miller*, 389 U.S. 429 (1968).

<sup>34</sup> Matthew Shafer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining, and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 237-239 (2011).

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.