

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 1076

INTRODUCER: Senator Brodeur

SUBJECT: Public Works Projects

DATE: March 9, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Ponder</u>	<u>McVaney</u>	<u>GO</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>CA</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 1076 prohibits a state college, county, municipality, school district, or other political subdivision of the state from using certain preferences in competitive solicitations for construction services when any state-appropriated funds, locally-appropriated funds, or any combination thereof are to be used to fund the project. Current law provides that for a competitive solicitation for construction services in which 50 percent or more of the cost will be paid from state-appropriated funds, a state college, county, municipality, school district, or other political subdivision of the state may not use a local ordinance or regulation that provides a preference based upon: (1) the contractor’s maintaining an office or place of business within a particular local jurisdiction; (2) the contractor’s hiring employees or subcontractors from within a particular local jurisdiction; or (3) the contractor’s prior payment of local taxes, assessments, or duties within a particular local jurisdiction.

The bill removes the 50 percent or more threshold and applies the prohibition on local preference to all solicitations that will be paid for with funding that is state-appropriated, locally-appropriated, or any combination thereof.

The bill amends the definition of the term “public works project” to remove the 50 percent or more cost threshold and provide that the term applies to activities paid for with locally-appropriated funds, or any combination of local or state funds. Additionally, this definition is amended to remove the limitation to appropriations at the time of the competitive solicitation.

The bill prohibits the state or any political subdivision that contracts for a public works project, except as required by federal or state law, from taking the following action:

- Granting a preference or imposing a penalty during the bidding process based on the geographic location of the company headquarters or offices of the contractor, subcontractor, or material supplier or carrier submitting a bid on a public works project or the residence of the employees of such contractor, subcontractor, or material supplier or carrier; or

- Requiring a contractor, subcontractor, or material supplier or carrier engaged in a public works project to train employees in designated programs with a restricted curriculum or from a single source.

The bill also prohibits a contractor, subcontractor, or material supplier or carrier who is qualified, licensed, or certified by state or local law - from receiving information about public works opportunities.

The bill may have an indeterminate fiscal impact on local governments.

The bill takes effect on July 1, 2021.

II. Present Situation:

Procurement of Construction Services

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., authorizes the Department of Management Services to adopt rules for bidding on building construction contracts. These rules must establish:

- Procedures for determining the qualifications and responsibility of potential bidders prior to advertising for and receiving bids for building construction contracts;
- Procedures for awarding each state agency construction project to the lowest qualified bidder;
- Procedures to govern negotiations for construction contracts and contract modifications when such negotiations are determined to be in the best interest of the state; and
- Procedures for entering into performance-based contracts for the development of public facilities when those contracts are determined to be in the best interest of the state.¹

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.² A county, municipality, special district as defined in chapter 189, or other political subdivision seeking to construct or improve a public building must competitively award to an appropriately licensed contractor each project that is estimated to cost more than \$300,000.³

Section 255.0525(1), F.S., requires the solicitation of competitive bids or proposals for any state construction project that is projected to cost more than \$200,000 to be publicly advertised in the Florida Administrative Register (FAR) at least 21 days prior to the established bid opening. If the cost of 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 at least 30 days prior to the bid opening.⁴ Similar publishing requirements apply to counties, municipalities, and political subdivisions under s. 255.0525(2), F.S.

¹ Section 255.29, F.S.; *See* Rule 60D-5.001 et seq., Florida Administrative Code.

² Section 255.0525, F.S.,

³ Section 255.20, F.S.

⁴ Section 255.0525(1), F.S.

Florida Preference to State Residents

Florida law provides a preference for the employment of state residents in construction contracts funded by state funds.⁵ 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 qualifications”⁶ to those of non-residents.⁷ A contract for construction funded by local funds may contain such a provision but is not required to be included.⁸ 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.⁹

Prohibited Local Government Preferences

Section 255.0991, F.S., prohibits a local ordinance or regulation from giving preference to a local contractor in certain circumstances. For a competitive solicitation¹⁰ for construction services in which 50 percent or more of the cost will be paid from state-appropriated funds, a state college, county, municipality, school district, or other political subdivision of the state may not use a local ordinance or regulation that provides a preference based upon:

- The contractor’s maintaining an office or place of business within a particular local jurisdiction;
- The contractor’s hiring employees or subcontractors from within a particular local jurisdiction; or
- The contractor’s prior payment of local taxes, assessments, or duties within a particular local jurisdiction.¹¹

When 50 percent or more of the costs will be paid from state-appropriated funds, a state college, county, municipality, school district, or other political subdivision must disclose in the solicitation document the amount of such funds or the percentage of such funds as compared to the anticipated total cost of the construction services.¹² If less than 50 percent of the costs for the construction services will be funded from state-appropriated funds, a state college, county, municipality, school district, or other political subdivision is not prevented from awarding a contract to a contractor in accordance with applicable state laws or local ordinances or regulations.¹³

⁵ Section 255.099(1), F.S.

⁶ Section 255.099(1)(a), F.S., defines the term “substantially equal qualifications” to mean 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.

⁷ Section 255.099(1), F.S.

⁸ *Id.*

⁹ Section 255.099(1)(b), F.S.

¹⁰ Section 255.248(2), F.S., defines “competitive solicitation” to mean an invitation to bid, a request for proposals, or an invitation to negotiate.

¹¹ Section 255.0991(2), F.S.

¹² Section 255.0991(3), F.S.

¹³ Section 255.0991(4), F.S.

Public Works Projects

In 2017, the Legislature created s. 255.0992, F.S., addressing limitations with respect to public works contracts - except for contracts issued by the Department of Transportation (DOT) under ch. 337, F.S.¹⁴ This section defines “public works project” to mean:

[A]n activity of which 50 percent or more of the cost will be paid from state-appropriated funds that were appropriated at the time of the competitive solicitation and which consists of the construction, maintenance, repair, renovation, remodeling, or improvement of 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 that is owned in whole or in part by any political subdivision.

Except as required by federal or state law, the state or any political subdivision that contracts for a public works project may not require a contractor, subcontractor, or material supplier or carrier engaged in the project 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.¹⁵

The state or any political subdivision that contracts for a public works project may not prohibit any contractor, subcontractor, or material supplier or carrier able to perform such work who is qualified, licensed, or certified as required by state law to perform such work from submitting a bid on the public works project.¹⁶ This provision does not apply to vendors listed on the convicted and discriminatory vendor list.

Federal Labor and Wage Laws

The National Labor Relations Act of 1935¹⁷ and the Labor Management Relations Act of 1947¹⁸ 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.

¹⁴ Chapter 2017-113, L.O.F.

¹⁵ Section 255.0992(2)(a), F.S.

¹⁶ Section 255.099(2)(b), F.S.

¹⁷ 29 U.S.C. ss. 151-169 (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).

¹⁸ 29 U.S.C. ss. 141-197 (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).

The Fair Labor Standards Act (FLSA or act) establishes a federal minimum wage, which is the lowest hourly wage that can be paid in the United States.¹⁹ A state may set the rate higher than the federal minimum, but not lower.²⁰ The act also requires employers to pay time and a half to their employees for overtime hours worked,²¹ and establishes standards for recordkeeping²² and child labor.²³ Over 135 million workers are covered under the act;²⁴ most, but not all, jobs are covered by the FLSA. In addition, some jobs covered by the act are considered “exempt” from the FLSA overtime requirements.²⁵

On February 12, 2014, President Obama signed Executive Order 13658, which establishes a minimum wage for certain federal contractors.²⁶ 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 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.”²⁷ The Executive Order hourly minimum wage in effect from January 1, 2021, through December 31, 2021, is \$10.95.²⁸

The Davis-Bacon Act²⁹ applies to contractors and subcontractors performing on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works.³⁰ Contractors and subcontractors subject to the Davis-Bacon Act are required to pay their laborers and mechanics employed under the contract no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects in the area, as determined by the Department of Labor.³¹ The Davis-Bacon Act applies to contractors and subcontractors performing work on federal or District of Columbia contracts.³² Many federal laws that authorize federal assistance for construction through grants, loans, loan guarantees, and insurance are referred to as Davis-Bacon “related Acts.”³³ The

¹⁹ 29 U.S.C. s. 206 .

²⁰ 29 U.S.C. s. 218(a).

²¹ 29 U.S.C. s. 207(a)(1).

²² 29 U.S.C. s. 211.

²³ 29 U.S.C. s. 212.

²⁴ United States Department of Labor, *Wage and Hour Division: Resources for Workers*, available at <http://www.dol.gov/whd/workers.htm> (last visited February 22, 2021).

²⁵ 29 U.S.C. s. 213; United States Department of Labor, *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, www.dol.gov/whd/regs/compliance/whdfs14.pdf (last visited February 22, 2021).

²⁶ 30 Exec. Order 13658, 79 Fed. Reg. 9851 (Feb. 12, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors> (last visited February 22, 2021).

²⁷ *Id.*

²⁸ 85 Fed. Reg. 53850 (August 31, 2020), available at <https://www.federalregister.gov/documents/2020/08/31/2020-19037/establishing-a-minimum-wage-for-contractors-notice-of-rate-change-in-effect-as-of-january-1-2021> (last visited February 22, 2021).

²⁹ Davis-Bacon Act, 40 U.S.C. s. 3141-3148.

³⁰ United States Department of Labor, *Wage and Hour Division: Davis-Bacon and Related Acts*, available at <http://www.dol.gov/whd/govcontracts/dbra.htm> (last visited February 24, 2021).

³¹ *Id.*

³² *Id.*

³³ United States Department of Labor, *Fact Sheet #66: The Davis-Bacon and Related Acts (DBRA)*, <http://www.dol.gov/whd/regs/compliance/whdfs66.pdf> (last visited February 24, 2021). Examples of “related Acts” are the

“related Acts” include provisions that require the prevailing wage provisions of the Davis-Bacon Act to apply to most federally assisted construction.³⁴

State Labor and Wage Regulations

The State Constitution protects the right for workers to collectively bargain, including public sector employees.³⁵ It provides, in pertinent part, that “[t]he right of persons to work 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.³⁶ 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.”³⁷ Employers must pay employees no less than the minimum wage for all hours worked in Florida.³⁸ The current state minimum wage is \$8.65 per hour,³⁹ which is higher than the federal rate.⁴⁰

Department of Transportation Construction Projects

Chapter 337, F.S., governs contracting by DOT. Any person who wants to bid for a construction contract in excess of \$250,000 must be certified by DOT as qualified.⁴¹ Certification is also required to bid on road, bridge, or public transportation construction projects of more than \$250,000.⁴² The purpose of certification is to ensure professional and financial competence relating to the performance of construction contracts by evaluating bidders “with respect to the equipment, past record, experience, financial resources, and organizational personnel of the applying contractor which are necessary to perform the specific class of work for which the contractor seeks certification.”⁴³

Federal Aid Highway Acts, the Housing and Community Development Act of 1974, and the Federal Water Pollution Control Act.

³⁴ *Id.*

³⁵ Art. I, s. 6, FLA. CONST.

³⁶ See *Hillsborough Cty. Gov’tl Emps. Ass’n, Inc. v. Hillsborough Cty. Aviation Auth.*, 522 So. 2d 358 (Fla. 1988); *City of Tallahassee v. Public Employees Relations Comm’n*, 410 So. 2d 487 (Fla. 1981); *Dade Cty. Classroom Teachers Ass’n v. Legislature of Fla.*, 269 So. 2d 684 (Fla. 1972).

³⁷ Art. X, s. 24(a), FLA. CONST.

³⁸ Art. X, s. 24(c), FLA. CONST.

³⁹ Department of Economic Opportunity, *Display Posters and Required Notices*, https://floridajobs.org/docs/default-source/business-growth-and-partnerships/for-employers/posters-and-required-notices/2021-minimum-wage/poster-fl-minimum-wage-2021-english.pdf?sfvrsn=74a4bb0_2 (last visited February 2, 2021).

⁴⁰ 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 February 24, 2021).

⁴¹ Section 337.14(1), F.S.

⁴² Section 337.14(2), F.S.

⁴³ Section 337.14(1), F.S.

Home Rule

Counties

A county without a charter has such power of self-government as provided by general⁴⁴ or special law, and may enact county ordinances not inconsistent with general law.⁴⁵ Counties operating under county charters have all the powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors.⁴⁶ General law authorizes counties “the power to carry on county government”⁴⁷ and to “perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.”⁴⁸

Municipalities

Chapter 166, F.S., also known as the Municipal Home Rule Powers Act,⁴⁹ acknowledges the constitutional grant to municipalities of governmental, corporate, and proprietary power necessary to conduct municipal government, functions, and services.⁵⁰ Chapter 166, F.S., provides municipalities with broad home rule powers, respecting expressed limits on municipal powers established by the Florida Constitution, applicable laws, and county charters.⁵¹

Section 166.221, F.S., authorizes municipalities to levy reasonable business, professional, and occupational regulatory fees, commensurate with the cost of the regulatory activity, including consumer protection, on such classes of businesses, professions, and occupations, the regulation of which has not been preempted by the state or a county pursuant to a county charter.

Preemption

Local governments have broad authority to legislate on any matter that is not inconsistent with federal or state law. Where state preemption applies, it precludes a local government from exercising authority in that particular area.⁵² Florida law recognizes two types of preemption: express and implied. Express preemption requires a specific legislative statement; it cannot be implied or inferred.⁵³ Express preemption of a field by the Legislature must be accomplished by

⁴⁴ Chapter 125, Part I, F.S.

⁴⁵ FLA. CONST. art. VIII, s. 1(f).

⁴⁶ FLA. CONST. art. VIII, s. 1(g).

⁴⁷ Section 125.01(1), F.S.

⁴⁸ Section 125.01(1)(w), F.S.

⁴⁹ Section 166.011, F.S.

⁵⁰ Florida House of Representatives, Publications, The Local Government Formation Manual 2018-2020, p. 16, available at <https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3025&Session=2020&DocumentType=General%20Publications&FileName=2018-2020%20Local%20Government%20Formation%20Manual.pdf>.

⁵¹ Section 166.021(4), F.S.

⁵² Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009).

⁵³ See *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309 (Fla. 2008).

clear language stating that intent.⁵⁴ In cases where the Legislature expressly or specifically preempts an area, there is no problem with ascertaining what the Legislature intended.^{55,56}

In cases determining the validity of ordinances enacted in the face of state preemption, the effect has been to find such ordinances null and void.⁵⁷ Implied preemption is actually a decision by a court to create preemption in the absence of an explicit legislative directive.⁵⁸ Preemption of a local government enactment is implied only where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and strong public policy reasons exist for finding preemption.⁵⁹ Implied preemption is found where the local legislation would present the danger of conflict with the state's pervasive regulatory scheme.⁶⁰

III. Effect of Proposed Changes:

Section 1 amends s. 255.0991, F.S., to remove the 50 percent or more state-appropriated funding threshold for competitive solicitations for construction services and thus prohibit certain local preferences to solicitations that will be paid for with funding that is state-appropriated, locally-appropriated, or any combination thereof.

Section 2 amends s. 255.09992, F.S., to modify the definition of the term “public works project” to remove the 50 percent or more cost threshold and provide that the term applies to activities paid for with locally appropriated funds, or any combination of local or state funds. Additionally, this definition is amended to remove the limitation to appropriations at the time of the competitive solicitation.

This section prohibits the state or any political subdivision that contracts for public works project, except as required by federal or state law, from taking the following action:

- Granting a preference or imposing a penalty during the bidding process based on the geographic location of the company headquarters or offices of the contractor, subcontractor, or material supplier or carrier submitting a bid on a public works project or the residence of the employees of such contractor, subcontractor, or material supplier or carrier; or
- Requiring a contractor, subcontractor, or material supplier or carrier engaged in a public works project to train employees in designated programs with a restricted curriculum or from a single source.

Additionally, this section prohibits a contractor, subcontractor, or material supplier or carrier who is qualified, licensed, or certified – by state or local law - from receiving information about public works opportunities.

⁵⁴ *Mulligan*, 934 So.2d at 1243.

⁵⁵ *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So.3d 880, 886 (Fla. 2010).

⁵⁶ Examples of activities “expressly preempted to the state” include: operator use of commercial mobile radio services and electronic communications devices in motor vehicles, s. 316.0075, F.S.; regulation of the use of cameras for enforcing provisions of the Florida Uniform Traffic Control Law, s. 316.0076, F.S.; and, the adoption of standards and fines related to specified subject areas under the purview of the Department of Agriculture and Consumer Services, s. 570.07, F.S.

⁵⁷ *See, e.g., Nat’l Rifle Ass’n of Am., Inc. v. City of S. Miami*, 812 So.2d 504 (Fla. 3d DCA 2002).

⁵⁸ *Phantom of Clearwater, Inc.*, 894 So.2d at 1019.

⁵⁹ *Id.*

⁶⁰ *Sarasota Alliance for Fair Elections, Inc.*, 28 So.3d at 886.

Section 3 provides that the bill takes effect on July 1, 2021.

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 shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may have a positive indeterminate impact to the extent fewer contractors, subcontractors, or material suppliers or carriers will no longer be required to meet certain pre-bid requirements.

C. Government Sector Impact:

The bill will have an indeterminate fiscal impact on local governments.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Several counties and municipalities have adopted local preference ordinances for procurement under the current 50 percent or more state-appropriated funding threshold for public works

projects.⁶¹ The bill does not contain an express Legislative statement to preempt to the state the subject of competitive solicitation for construction services. However, there is a clear and direct conflict between the language of the bill and the local ordinances addressing local preference. Thus, such ordinances would likely be found to be unconstitutional based on implied legislative preemption.

VIII. Statutes Affected:

This bill substantially amends sections 255.0991 and 255.0992 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

⁶¹ See Broward County, Florida, County Code § 1-75 (2020); Hallandale Beach, Florida, Municipal Code § 23-6 (2016), St. Johns County, Florida, County Code § 302.25 (2021).