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 Appropriations

BILL:	CS/SB 1194
INTRODUCER:	Transportation Committee and Senator Hooper
SUBJECT:	Transportation
DATE:	April 14, 2021
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Price	Vickers	TR	**Fav/CS**
2.	McAuliffe	Sadberry	AP	**Pre-meeting**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1194 contains various transportation-related provisions, including:

- Precluding a governmental entity from prohibiting a bid relating to the entity's procurement of certain contractual services from a vendor possessing a valid certificate of qualification from the Florida Department of Transportation (FDOT) relating to certain road and bridge construction contracts or a license relating to construction, electrical and alarm, or septic tank contracting corresponding to the services being procured.
- Authorizing construction equipment in a work zone on roadways with a posted speed limit of 55 miles per hour or higher to display a combination of flashing green, amber, and red lights during periods when workers are present.
- Authorizing flashing lights on vehicles during periods of extremely low visibility on roadways posted with a speed limit of 55 miles per hour or more.
- Revising provisions relating to an annual cap on the FDOT's authorization to enter into contracts for innovative transportation projects.
- Amending financial statement requirements relating to applications for certificates of qualification to bid on contracts for the performance of work for the FDOT under certain construction contracts.
- Excluding certain airports from the prohibition against the same entity performing design and performing construction engineering and inspection services on a project funded by the FDOT and administered by a local governmental entity

- Substantially revising provisions relating to the State Arbitration Board, which hears claims for additional compensation arising out of construction and maintenance contracts between the FDOT and its contractors.
- Defining the term "borrow pit" and requiring a borrow pit operator to provide a notice of intent to extract to the DEP.
- Prohibiting the FDOT, and its contractors and subcontractors, from purchasing or using specified substances extracted from a borrow pit unless certification is provided by the operator showing the borrow pit is in compliance with certain existing requirements and proof is provided of currently valid permits required by the Florida Department of Environmental Protection (DEP) and the appropriate water management district.
- Requiring the FDOT, if it determines substances are being obtained and used from a noncompliant borrow pit, to cease accepting any substances within 48 hours. The FDOT may resume acceptance of substances from the borrow pit once the pit is in compliance.

The bill does not appear to impact state and local revenues but may present other fiscal impacts. See the "Fiscal Impact Statement" for further information.

The bill takes effect July 1, 2021.

II. Present Situation:

For ease or organization and readability, the present situation is discussed below in conjunction with the effect of the proposed changes.

III. Effect of Proposed Changes:

Procurement of Public Construction Services (Section 1)

Present Situation

Procurement Methods

Chapter 287, F.S., sets out provisions governing agency[1] procurement of personal property and services. Agencies may use different methods, depending on the cost and characteristics of the goods or services being procured, which include:

- Invitations to bid, used when an agency is capable of specifically defining the scope of work for which a contractual service is required or of establishing precise specifications defining the actual commodity or group of commodities required.[2]
- Requests for proposals, used when the purposes and uses for which the commodity, group of commodities, or contractual service being sought can be specifically defined and the agency is capable of identifying necessary deliverables. Responsive vendors may propose various combinations or versions of commodities or contractual services to meet the agency's specifications.[3]

[1] "Agency" is defined 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," but does not include university and college boards of trustees or the state universities and colleges. Section 287.012(1), F.S.
[2] Section 287.057(1)(a), F.S.
[3] Section 287.057(1)(b), F.S.

- Invitations to negotiate, used to determine the best method for achieving a specific goal or solving a particular problem. This procurement method identifies one or more responsive vendors with which the agency may negotiate to receive the best value.[4]
- Single source contracts, used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase and which may be excepted from competitive-solicitation requirements.[5]

FDOT Certificate of Qualification

Current law requires any contractor desiring to bid on any FDOT construction contract in excess of $250,000 to first be certified by the FDOT as qualified pursuant to s. 337.14, F.S., and the FDOT's rules.[6] Those rules include requirements 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. The rules also apply to applicants seeking to bid on road, bridge, or public transportation construction contracts in excess of $250,000.[7]

Licensure: Construction, Electrical and Alarm System, and Septic Tank Contracting

Chapter 489, F.S., is administered by the Department of Business and Professional Regulation and, in general, requires licensure of various types of contractors before contracting to perform work of the type for which they are licensed. Part I of ch. 489, F.S., relating to construction contracting, expressly does not apply to contractors in work on bridges, roads, streets, highways, or railroads, and services incidental thereto.[8] "Services incidental thereto" specifically includes storm drainage and excavation work necessary for the construction of bridges, roads, streets, highways, and railroads, and those subcontractor categories, defined in s 489.105(3)(d)-(q), F.S., and includes directly contracting with a governmental entity for such work.[9] Section 489.105(3)(d)-(q), F.S., includes a wide variety of contractors including roofing, air-conditioning, plumbing, underground utility and excavation, and solar.

Effect of Proposed Changes

Section 1 of the bill creates s. 287.05705, F.S., to provide that if a competitive solicitation is limited to the classes of work for which the FDOT issues certificates of qualification and does not involve the construction, remodeling, repair, or improvement of any building, or if a vendor holds an FDOT certificate of qualification or license under ch. 489, F.S., corresponding to the contractual service being procured, the procuring governmental entity may not prohibit a vendor from responding (*e.g.*, submitting a bid or proposal) to that entity's competitive solicitation. The bill applies these provisions to all competitive solicitations issued by a governmental entity on or after October 1, 2021.

[4] Section 287.057(1)(c), F.S.
[5] Section 287.057(3)(c), F.S.
[6] Chapter 14-22, F.A.C.
[7] Section 337.14(1), F.S., and Rule 14-22.0011(1), F.A.C.
[8] Section 489.103(1)
[9] Rule 61G4-12.011(9), F.A.C.

Lights on Vehicles (Section 2)

Present Situation

Current law generally prohibits a person from driving or otherwise moving on a road any vehicle or equipment that has a lamp or device that displays red, red and white, or blue lights visible from directly in front of such vehicle or equipment, with certain exceptions.[10] The display of blue lights on any vehicle or equipment is prohibited, except police vehicles and vehicles owned, operated, or leased by the Department of Corrections (DOC) or any county correctional agency when responding to emergencies.[11]

The display of flashing lights on vehicles is also prohibited, except:[12]

- As a means of indicating a right or left turn, to change lanes, or to indicate that the vehicles is lawfully stopped or disabled upon the highway.
- When a motorist intermittently flashes his or her vehicles' headlamps at an oncoming vehicle notwithstanding the motorist's intent for doing so.
- Flashing blue lights on police, DOC, or county correctional agency vehicles.
- Flashing amber lights on road or street maintenance equipment, road or street maintenance vehicles, road service vehicles, refuse collection vehicles, petroleum tankers, and mail carrier vehicles when in operation or when a hazard exists; and on commercial motor vehicles or trailers designed to transport unprocessed logs or pulpwood.
- Flashing red or red and white lights on vehicles such as those of a fire department or medical staff or facilities and ambulances.
- Flashing red lights on emergency response vehicles used by the Fish and Wildlife Conservation Commission, the DEP, and the Department of Health when responding to an emergency in the line of duty.
- Flashing white lights or flashing white strobe lights on road maintenance and construction equipment and vehicles when in operation and where a hazard exists; and on school buses and vehicles used to transport farm workers.
- Flashing white and red lights on bicycles and bicycle riders.
- Additional flashing lights authorized under s. 316.235, F.S., relating to additionally authorized lighting equipment on vehicles such as running board or fender lights.

Effect of Proposed Changes

Section 2 amends s. 316.2397, F.S., to authorize on roadways with a posted speed limit of 55 miles per hour or more:

- Flashing green, amber, and red lights on construction equipment within a work zone[13] during periods when workers are present.
- Flashing lights on vehicles during periods of extremely low visibility.[14]

[10] Section 316.2397(1), F.S.
[11] Section 316.2397(2), F.S.
[12] Section 316.2397(7), F.S.
[13] Section 316.003(105) defines "work zone *area*" to mean "the area and its approaches on any state-maintained highway, county-maintained highway, or municipal street where construction, repair, maintenance, or other street-related or highway-related work is being performed or where one or more lanes are closed to traffic."
[14] With the exception of vehicles in funeral processions as provided in 316.1974(4)(c), F.S., Florida law does not expressly authorize the use of hazard lights on moving vehicles. The Florida Driver Handbook indicates that a driver should not use

Innovative Transportation Projects (Section 3)

Present Situation

The FDOT is currently authorized to establish a program for transportation projects that demonstrate innovative techniques of highway and bridge design, construction, maintenance, and finance. The innovations must intend to measure resiliency and structural integrity and control time and cost increases on construction projects. These techniques may include state-of-the-art technology for pavement, safety, and other aspects of highway and bridge design, construction, and maintenance; innovative bidding and financing techniques; accelerated construction procedures; and techniques that have the potential to reduce project life cycle costs. To the maximum extent practical, the FDOT must use existing processes to award and administer construction and maintenance contracts. [15]

The FDOT is limited to $120 million in contracts annually for the purposes of innovative transportation projects. This annual cap on contracts for innovative transportation projects does not apply to:

- Turnpike Enterprise projects.
- Transportation projects funded by the American Recovery and Reinvestment Act of 2009.

Currently, minor design-build contracts are included in the annual cap for innovative transportation projects. These projects are bridges under $10 million and other transportation projects (resurfacing) that are not considered to be major design-build.[16]

Effect of Proposed Changes

Section 3 amends s. 337.025, F.S., to repeal redundant language relative to exclusion of Turnpike Enterprise projects and obsolete language relative to exclusion of transportation projects funded by the American Recovery and Reinvestment Act of 2009 from the annual $120 million cap.

The bill also excludes low-bid design-build milling and resurfacing contracts from the annual cap. Such contracts would not be counted toward the annual cap for innovative transportation projects, possibly resulting in increased opportunities for the FDOT to engage in innovative transportation projects.

Whether all low-bid milling and resurfacing contracts are "innovative," even with the design-build element, is unclear. The FDOT's work program instructions state that resurfacing deals with improvements to the structural condition of existing pavement, intended to preserve the

emergency flashers in instances of low visibility or rain and may only use emergency flashers when a vehicle is disabled or stopped on the side of the road. Department of Highway Safety and Motor Vehicles, *Florida Driver Handbook*, at p. 48, available at https://www3.flhsmv.gov/handbooks/englishdriverhandbook.pdf (last visited April 7, 2021).

[15] Section 337.025(1), F.S.

[16] FDOT Construction, *Design-Build Minor*, available at https://www.fdot.gov/construction/AltContract/General/DBMinor.shtm (last visited April 7, 2021).

pavement's structural integrity. The program provides for pavement milling and pavement resurfacing, among other activities.[17]

FDOT Certificates of Qualification (Section 5)

Present Situation

FDOT Certificate of Qualification

Current law requires any contractor desiring to bid on any FDOT construction contract in excess of $250,000 to first be certified by the FDOT as qualified to perform the specific class of work for which the contractor seeks certification. A contractor who is not already qualified and in good standing with the FDOT as of January 1, 2019, and who desires to bid on FDOT contracts in excess of $50 million must have satisfactorily completed two projects, each in excess of $15 million, for the FDOT or for any other state's department of transportation.[18]

When applying to the FDOT, each application for certification must be accompanied by the contractor's latest annual financial statement, which must have been completed within the last 12 months. If the application or the annual financial statement shows the contractor's financial condition more than four months prior to the date on which the FDOT receives the application, the contractor must also submit an interim financial statement and an updated application.[19] Each required annual or interim financial statement must be audited and accompanied by the opinion of a certified public accountant.

Contractor Maximum Capacity Rating

The FDOT's rules include requirements 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. In so doing, the FDOT verifies and evaluates whether an applicant is competent and responsible and possesses the necessary financial resources to perform the requested work.[20]

Part of the latter inquiry involves whether an applicant has the financial resources sufficient to establish a maximum capacity rating (MCR), which is defined as the total aggregate dollar amount of *uncompleted* work an applicant may have under contract at any one time as a prime contractor and/or subcontractor, regardless of the work location and with whom the applicant contracted.[21]

[17] FDOT, *Work Program Instructions Tentative Work Program – FY 21/22-25/26*, Part III – Chapter 27: Resurfacing, (rev. April 1, 2021) available at https://fdotewp1.dot.state.fl.us/fmsupportapps/Documents/development/WorkProgramInstructions.pdf (last visited April 7, 2021).
[18] Section 337.14(1), F.S.
[19] The interim statement must cover the period from the end date of the annual statement and must show the financial condition of the applying contractor no more than four months prior to the date the FDOT receives the interim statement but, upon request of the applicant, an application and accompanying annual or interim financial statement received by the FDOT within 15 days after either four-month period is considered timely.
[20] Rule 14.22-003(1), F.A.C.
[21] Rule 14.22-003(1)(d) and (2), F.A.C.

According to the FDOT's rules, the MCR is established by a formula, one element of which is the "ability factor." For example, for new applicants and applicants not qualified under the rule for more than two years, the "ability score" determines the ability factor, which is determined from the total ability score resulting from evaluations of the applicant's organization, management, work experience, and letters of recommendation.[22]

Currently, if an applicant for a certificate of qualification is found to possess the prescribed qualifications, the FDOT must issue the applicant a certificate, which, unless revoked by the FDOT for good cause, is valid for a period of 18 months after the date of the applicant's financial statement, or such shorter period as the FDOT prescribes. Submission of an application does not affect expiration of the certificate.[23]

Effect of Proposed Changes

Section 5 amends s. 337.14(1) and (4), F.S., to clarify that any contractor desiring to bid on contracts in excess of $50 million must first be certified by the FDOT as qualified, in addition to the existing requirement relating to satisfactory completion of two projects, each in excess of $15 million.

The bill requires each application for certification to be accompanied by *audited, certified* financial statements prepared in accordance with generally accepted accounting principles and auditing standards by a certified public accountant licensed in this state or another state. The applying contractor's audited, certified financial statements must specifically address the applying contractor and must have been prepared within the immediately preceding 12 months. The FDOT may not consider any financial information relating to the parent entity of the applying contractor, if any, and may not certify as qualified any applying contractor that fails to submit the required audited, certified financial statements.

If the application or the annual financial statement shows the applying contractor's financial condition more than four months before the date on which the FDOT receives the application, the applying contractor must also submit interim *audited, certified* financial statements prepared in accordance with generally accepted accounting and auditing principles and standards by a certified public accountant licensed in this state or another state.

The bill provides that submission of an application *and subsequent approval* do not affect expiration of a contractor's certificate of qualification and, additionally, do not affect a contractor's ability factor or maximum capacity rating.

Construction, Engineering, and Inspection Services (Section 5)

Construction, engineering, and inspection (CEI) services include the activities required to review and inspect highway and bridge construction performed by a construction contractor for compliance with contract requirements. These services are critical to ensuring the safety of the traveling public.

[22] *Id*.
[23] Section 337.14(4), F.S.

Currently, a contractor[24] or affiliate[25] holding an FDOT certification of qualification may not also qualify to provide testing services or CEI services to the FDOT in connection with a construction contract under which the contractor is performing any work.[26] Simply stated, the contractor is prohibited from performing both the construction work *and* the CEI services on the same project, to avoid any conflict of interest that may arise in inspecting one's own work.[27]

Legislation enacted in 2019 restated the prohibition with respect to projects funded by the FDOT and administered by a local governmental entity; *i.e.*, that the entity performing design services and CEI services may not be the same entity.[28] Specified seaports were made exempt from the prohibition in that legislation, but airports were not.[29]

According to the Florida Airports Council, the current prohibition increases airport project construction costs, lengthens project schedules due to additional coordination with consultants, and reduces project efficiency. Further:

- Florida airports leverage many different delivery methods for conducting CEI activities, depending on the project.
- Airports deliver more than road projects, such as building, hangars, ramps, and runways, and the CEI methods and processes the FDOT uses do not accommodate airport construction projects.
- "Airports need to remain agile with the many types of projects that they deliver, particularly as it pertains to the unique and specialized nature of airport projects, to ensure that each project is completed safely, timely and cost effectively."[30]

Effect of Proposed Changes

Section 5 amends s. 337.14(7), F.S., to provide that with respect to projects funded by the FDOT and administered by a local governmental entity, airports as defined in s. 332.004, F.S.,[31] are likewise exempt from the prohibition against the same entity performing design services and CEI services.

[24] Section 337.165(1)(d), F.S.
[25] Section 337.165(1)(a), F.S.
[26] Section 337.14(7), F.S.
[27] This limitation does not apply to any design-build prequalification pursuant to s. 337.11(7), F.S., and does not apply when the FDOT otherwise determines by written order entered at least 30 days before advertisement that the limitation is not in the public's best interests with respect to a particular contract for testing services or CEI services.
[28] Chapter 2019-153, L.O.F.
[29] Those listed in s. 311.09, which include the ports of Jacksonville, Port Canaveral, Port Citrus, Fort Pierce, Palm Beach, Port Everglades, Miami, Port Manatee, St. Petersburg, Tampa, Port St. Joe, Panama City, Pensacola, Key West, and Fernandina.
[30] *See* email to House committee staff relating to HB 1441 (2020) (on file in the Senate Transportation Committee).
[31] That section defines the term "airport" to mean "any area of land or water, or any manmade object or facility located therein, which is used, or intended for public use, for the landing and takeoff of aircraft, and any appurtenant areas which are used, or intended for public use, for airport buildings or other airport facilities or rights-of-way."

State Arbitration Board (Section 6)

Present Situation

Current law creates the State Arbitration Board (SAB) within the FDOT to facilitate the prompt settlement of claims[32] for additional compensation arising out of construction and maintenance contracts between the FDOT and its various contractors.[33] Every contractual claim in an amount up to $250,000 per contract or, at the claimant's option, up to $1 million per contract or, upon agreement of the parties, up to $2 million per contract, which cannot be resolved by negotiation between the FDOT and the contractor must be arbitrated by the SAB after the FDOT's acceptance of the project. However, either party may request that the claim be submitted to binding private arbitration. A court of law may not consider the settlement of a claim until the SAB process has been exhausted.[34]

The SAB is composed of three members: one member is appointed by the FDOT Secretary; one member is elected by those construction or maintenance companies who are under contract with the FDOT; and the third member is chosen by agreement of the other two members. Whenever the third member has a conflict of interest regarding an affiliation with one of the parties, the other two members select an alternate member for that hearing. The FDOT secretary may select an alternative or substitute to serve as the FDOT's member for any hearing or term. Each member serves a two-year term. The SAB elects a chair, each term, who is the administrator of the SAB and custodian of its records.[35]

An arbitration hearing may be requested by the FDOT or by a contractor who has a dispute with the FDOT.[36] For all contracts entered into after June 30, 1993, the request must be made to the SAB within 820 days after the final acceptance of the work. The SAB must conduct the hearing within 45 days of the request. The party requesting the SAB's consideration must give notice of the hearing to each SAB member. If the SAB finds that a third party is necessary to resolve the dispute, the SAB may vote to dismiss the claim, which may thereafter be pursued in accordance with Florida law.[37] All members must be present to conduct a meeting. Upon being called into session, the SAB must promptly proceed to a determination of the issue or issues in dispute.[38]

When a valid contract is in effect defining the rights, duties, and liabilities of the parties with respect to any matter in dispute, the SAB may only determine the proper interpretation and application of the appropriate contract provisions. Any investigation made by less than the whole membership of the SAB must be by authority of a written directive by the chair, and the investigation must be summarized in writing and considered by the SAB as part of the record of its proceedings.[39] The SAB must hand down its order within 60 days after it is called into

[32] For the purpose of s. 337.185, F.S., the term "claim" means the aggregate of all outstanding claims by a party arising out of a construction or maintenance contract.
[33] Section 337.185(1), F.S.
[34] Section 337.185(1), F.S.
[35] Section 337.185(2), F.S.
[36] Current State Arbitration Board procedures are available at: https://cdn.ymaws.com/ftba.site-ym.com/resource/resmgr/website_files/arbitration_board/11-19-20_State_Arbitration_B.pdf (last visited April 8, 2020).
[37] Section 337.185(3), F.S.
[38] Section 337.185(4), F.S.
[39] Section 337.185(5), F.S.

session. If all three SAB members do not agree, the order of the majority constitutes the order of the SAB.[40]

The SAB members may receive compensation for the performance of their duties from administrative fees received by the SAB, except that an FDOT employee may not receive compensation. The compensation amount is determined by the SAB, but may not exceed $125 per hour, up to $1,000 per day for each member authorized to receive compensation. This does not prevent the member elected by construction or maintenance companies from being an employee of an association affiliated with the industry, even if the sole responsibility of that member is service on the SAB. Travel expenses for the industry member may be paid by an industry association, if necessary. The SAB may allocate funds annually for clerical and other administrative services.[41]

The party requesting arbitration must pay a fee to the SAB in accordance with a schedule established by it, to cover the cost of administration and compensation of the SAB, not to exceed:

- $500 per claim which is $25,000 or less;
- $1,000 per claim which is in excess of $25,000 but not exceeding $50,000;
- $1,500 per claim which is in excess of $50,000 but not exceeding $100,000;
- $2,000 per claim which is in excess of $100,000 but not exceeding $200,000;
- $3,000 per claim which is in excess of $200,000 but not exceeding $300,000;
- $4,000 per claim which is in excess of $300,000 but not exceeding $400,000; or
- $5,000 per claim which is in excess of $400,000.[42]

The SAB in its order may apportion the above fees, and the cost of recording and preparing a transcript of the hearing, among the parties in accordance with the SAB's finding of liability.[43]

Effect of Proposed Changes

Section 6 substantially revises s. 337.185, F.S., relating to the SAB. The bill creates the following definitions:

- "Claim" means the aggregate of all outstanding written requests for additional monetary compensation, time, or other adjustments to the contract, the entitlement or impact of which is disputed by the FDOT and could not be resolved by negotiations between the FDOT and the contractor.
- "Contractor" means a person or firm having a contract for rendering services to the FDOT relating to the construction or maintenance of a transportation facility.
- "Final acceptance" means that the contractor has completely performed the work provided for under the contract, the FDOT or its agent has determined that the contractor has satisfactorily completed the work provided for under the contract, and the FDOT or its agent has submitted written notice of final acceptance to the contractor.

[40] Section 337.185(6), F.S.
[41] Section 337.185(7), F.S.
[42] Section 337.185(8), F.S.
[43] Section 337.185(9), F.S.

The bill requires every claim of up to $250,000 per contract that cannot be resolved by negotiations between the FDOT and the contractor to be arbitrated by the SAB. Authorization for either party to request that a claim be submitted to binding private arbitration is removed. An award issued by the SAB is final and enforceable by a court of law.

A contractor may submit a claim greater than $250,000 up to $1 million per contract or, upon agreement of the parties, up to $2 million per contract to be arbitrated by the SAB. An award issued by the SAB is final if a request for a trial de novo[44] is not filed within the time provided by Rule 1.830, Florida Rules of Civil Procedure.[45] At the trial de novo, the court may not admit evidence that there has been an arbitration proceeding, the nature or amount of the award, or any other matter concerning the conduct of the arbitration proceeding, except that testimony given at an arbitration hearing may be used for any purpose otherwise permitted by the Florida Evidence Code.[46] If a request for trial de novo is not filed within the time provided, the award issued by the board is final and enforceable by a court of law.

An arbitration request may not be made to the SAB before final acceptance, but must be made within 820 days after final acceptance. The SAB must still schedule a hearing within 45 days after an arbitration request but, if possible, must now conduct the hearing within 90 days after the request instead of the previous 45-day deadline.

The bill authorizes the SAB to administer oaths and conduct the proceedings as provided by court rules. The bill requires the hearing to be conducted informally, with the presentation of testimony and evidence being kept to a minimum. The bill requires matters to be presented to the arbitrators primarily through the statements and arguments of counsel. The SAB must address the scope of discovery, presentation of testimony, and evidence at a preliminary hearing by considering the size, subject matter, and complexity of the dispute. Any party to the arbitration may petition the SAB, for good cause shown, to issue subpoenas for the attendance of witnesses and the production of books, records, documents, and other evidence at the arbitration and may petition the SAB for orders compelling such attendance and production at the arbitration. Subpoenas must be served and are enforceable in the manner provided by law.

The SAB must issue its award within 45 days after the conclusion of the arbitration hearing (rather than within 60 days after being called into session under current law). If all three members of the board do not agree, the award agreed to by the majority of the board constitutes the award of the board.

The board is still composed of three members who are selected in the same manner as in current law. If the first or second member has a conflict of interest regarding affiliation with one of the parties, the appointing entity must appoint an alternate member for that hearing. If the third member has such a conflict, the first and second members must select an alternate. Each member serves a 4-year term, instead of the current 2-year term. As under current law, the SAB still elects a chair for each term, and the chair is the SAB administrator and custodian of its records.

[44] A trial de novo refers to a new trial on the entire case and is conducted as if there had been no trial in the first instance.
[45] Rule 1.830, Florida Rules of Civil Procedure, relates to voluntary binding arbitration. The rule provides that a voluntary binding arbitration decision may be appealed within 30 days after service of the decision on the parties. Appeal is limited to the grounds specified in s. 44.104(10), F.S.
[46] Chapter 90, F.S.

The presence of all SAB members is required to conduct a meeting, whether in person or via videoconferencing.

The bill requires that SAB members receive compensation from deposits made by the parties based on an estimate of compensation by the SAB, except that, again, an FDOT employee may not receive SAB compensation. All deposits must be held in escrow by the chair in advance of the hearing. Each member eligible for compensation must be compensated at $200 per hour, up to a maximum of $1,500 per day (currently not to exceed $125 per hour up to a maximum of $1,000 per day), and a member must be reimbursed for the actual cost of his or her travel expenses. The SAB is authorized to allocate funds annually for clerical and other administration services.

The bill effectively maintains the same schedule of filing fees as in current law, based on the dollar amount of a claim, and authorizes the SAB to apportion the filing fees and the cost of recording and preparing a transcript of the hearing among the parties in its award.

Borrow Pits (Sections 4, 7, 8 and 9)

Present Situation

Currently, the term "borrow pit" is not defined in Florida law.

Part III of ch. 378, F.S., contains the Resource Extraction Reclamation Act, which prohibits an operator[47] from beginning the process of extracting clay, peat, gravel, sand, or any other solid substance of commercial value found in natural deposits or in the earth, except fuller's earth clay, heavy minerals, limestone, or phosphate, which are regulated elsewhere in ch. 378, F.S., at a new mine[48] without notifying the secretary of the DEP of the intention to mine.[49] The operator's notice of intent to mine must consist of the operator's estimated life of the mine and the operator's signed acknowledgment of the performance standards provided in s. 378.803, F.S.[50]

The act also provides that after January 1, 1989, all operators of existing mines for the extraction of resources as described above must meet the performance standards provided by s. 378.803, F.S., for any new surface area disturbed at such mines.[51]

Section 378.803, F.S., provides the following performance standards for the reclamation of other resources:[52]

- Reclamation must achieve the stormwater, drainage, wetlands, and other surface and groundwater requirements of the DEP and the appropriate water management district.
- The final slopes must be at such an angle as to minimize the possibility of slides and may not exceed the natural angle of repose of the material being mined.

[47] Section 378.403(13), F.S., defines the term "operator" as any person engaged in an operation.
[48] Section 348.403(10), F.S., defines the term "mine" as an area of land upon which mining operations have been conducted, are being conducted, or are planned to be conducted, as the term is commonly used in the trade.
[49] Section 378.801(1), F.S.
[50] Section 378.801(2), F.S.
[51] Section 378.802, F.S.
[52] Section 378.403(17), F.S., defines the term "resource" as soil, clay, peat, stone, gravel, sand, limerock, metallic ore, or any other solid substance of commercial value found in natural deposits on or in the earth, except phosphate.

- Provisions for safety to persons, wildlife, and adjoining property must be provided.
- Any overburden and spoil must be left in a configuration which is in accordance with accepted soil conservation practices and which is suitable for the proposed future use of the land.
- Reclamation must be designed to avoid the collection of water in pools that are, or are likely to become, noxious, odious, or foul.
- All reclamation activities must, to the extent possible, be coordinated with resource extraction and in any event must be initiated at the earliest practicable time.
- Reclamation activities must be consistent with all applicable local government ordinances at least as stringent as the criteria and standards discussed above.

Effect of Proposed Changes

Section 7 amends s. 378.403, F.S., to define the term "borrow pit" as an area of land:
- Upon which excavation of surface resources has been conducted, is being conducted, or is planned to be conducted, as the term is commonly used in the mining trade; and
- Not considered a mine.

Such resources are limited to soil, organic soil, sand, or clay that can be removed with construction excavating equipment and loaded on a haul truck with no additional processing.

Section 4 creates s. 337.0262, F.S., to prohibit the FDOT, and any contractor or subcontractor of the FDOT, from purchasing or using any clay, peat, gravel, sand, or other solid substance extracted from a borrow pit unless:
- The operator certifies to the FDOT, the contractor, or the subcontractor that the borrow pit is in compliance with the notice requirement and the substantive requirements of s. 378.801, F.S., and
- The operator is in compliance with the performance standards described above, including providing proof of currently valid permits required by the DEP and the appropriate water management district.

The bill mandates that all contracts and purchase orders executed by the FDOT, and all subcontracts and purchase orders executed by contractors or subcontractors after July 1, 2021, must include specific requirements for compliance with the bill's provisions.

If the FDOT determines that substances are being obtained and used from a borrow pit not in compliance with the bill's provisions, the FDOT is required to cease accepting any substances from that pit within 48 hours. The FDOT is authorized to resume acceptance once the pit has reestablished compliance with the bill's provisions.

Section 8 amends s. 378.801, F.S., revising the title to address a notice of intent to extract, rather than to mine. The bill prohibits an operator from beginning the operation of a borrow pit (in addition to the current prohibition again beginning the process of extracting clay, peat, gravel, etc.) at a new *location* (instead of at a new mine) without notifying the DEP secretary of the intent to *extract* (instead of the intent to mine). The operator's notice of intent to *extract* must consist of the operator's estimated life of the *extraction location* (instead of the estimated life of the mine).

Section 9 amends s. 378.802, F.S., revising the title to address existing extraction locations (rather than existing mines). The bill requires that after January 1, 1989, all operators of existing *locations* for the extraction of the resources described in s. 378.801, F.S., must meet the performance standards in s. 378.803, F.S., for any new surface area disturbed at such *locations*.

Section 10 provides that the bill is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The 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.

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 increases hourly compensation for SAB members from $150 to $200, and increases the daily maximum compensation from $1,000 to $1,500 per member. Both current law and the bill require parties bringing arbitrations to the SAB to pay fees, based on the amount of the dispute, to defray the costs of operating the board. Contractors requesting arbitration through the SAB may experience indeterminate increased costs associated with submitting a claim to the SAB.

To the extent the bill results in contractors determining that the new procedural and evidentiary provisions governing SAB proceedings warrant hiring legal counsel, the bill may result in increased costs to contractors in the form of legal representation.

Contractors seeking certificates of qualification may experience indeterminate increased costs associated with the bill's requirements for audited, certified financial statements.

C. Government Sector Impact:

As to the increased SAB compensation, the fees are static. The extent of time for which the fees will adequately cover SAB costs is unknown.

Local governments operating airports may experience a reduction in expenditures due to the exemption from the CEI requirements. Any reduction is dependent on project specifics and is therefore indeterminate.

The bill does not otherwise appear to impact state or local government revenues.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The FDOT currently requires, by contract specification, contractors to take any dispute before what is called a Dispute Review Board (DRB) before invoking the SAB process. The DRB process establishes a per hearing cost of $9,000 to provide compensation to all DRB members for participation in an actual hearing, with the DRB chair receiving $3,500 and the other two members receiving $2,750 each. The FDOT and the contractor equally provide compensation to the DRB for participation in an actual hearing. The FDOT compensates the contractor in the amount of $4,500 as its contribution to the hearing cost. DRB rulings are not binding and can be rejected by either party.[53]

Under the revised SAB provisions, proceedings must be conducted "as provided by court rules." The bill also requires a preliminary hearing not currently required. The FDOT will presumably continue to require the DRB process, by contract, before a contractor may submit a claim to the SAB. The bill requires SAB hearings to be conducted informally, with the presentation of testimony and evidence kept to a minimum, yet matters are to be presented to the SAB primarily through the statements and arguments of counsel.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 316.2397, 337.025, 337.14, 337.185, 378.403, 378.801, and 378.802.

[53] *See* FDOT Dispute Review Board, *Three Party Agreement Form # 700-011-02*, *Section VI Payment*, at p. 5 (July 2019), available at https://www.fdot.gov/construction/constadm/drb/drbmain.shtm (last visited April 13, 2021).

This bill creates the following sections of the Florida Statutes: 287.05705 and 337.0262.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Transportation on March 24, 2021:
The committee substitute:

- Authorizes construction equipment in a work zone on roadways with a posted speed limit of 55 miles per hour or higher to display a combination of flashing green, amber, and red lights during periods when workers are present.
- Prohibits the FDOT, and its contractors and subcontractors, from purchasing or using specified substances extracted from a borrow pit unless certification is provided by the operator showing the borrow pit is in compliance with certain existing requirements, and provides proof of currently valid permits required by the FDEP and the appropriate water management district.
- Mandates that all contracts and purchase orders executed by the FDOT, and all subcontracts and purchase orders executed by contractors or subcontractors after July 1, 2021, must include specific requirements for compliance with the bill's provisions.
- Requires the FDOT, if it determines substances are being obtained and used from a non-compliant borrow pit, to cease accepting any substances within 48 hours. The FDOT may resume acceptance of substances from the borrow pit once the pit is in compliance.

B. Amendments:

None.