

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 53 Public Works Projects
SPONSOR(S): Government Operations Subcommittee, DiCeglie
TIED BILLS: **IDEN./SIM. BILLS:** SB 1076

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	10 Y, 6 N, As CS	Roth	Smith
2) Public Integrity & Elections Committee			
3) State Affairs Committee			

SUMMARY ANALYSIS

Currently, 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:

- 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.

Additionally, current law provides that, 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.

"Public works project" means an 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.

For competitive solicitations for construction services, the bill removes the 50 percent or more, state-appropriated funding threshold and applies the preference based prohibitions to solicitations that will be paid for with funding that is state-appropriated, locally-appropriated, or any combination thereof. The bill also removes the 50 percent or more, state-appropriated funding threshold for public works projects and applies the pre-bid prohibitions to activities paid for with state-appropriated, locally-appropriated, or any combination thereof.

The bill adds a preference based prohibition for public works projects. Specifically, that the state or any political subdivision that contracts for a public works project may not grant a preference or impose 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.

Additionally, the bill prohibits a state or political subdivision that contracts for a public works project from requiring a contractor, subcontractor, or material supplier or carrier engaged in such project to train employees in designated programs with restricted curriculum or from a single source.

The bill does not appear to have a fiscal impact on the state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

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. The Department of Management Services is responsible for establishing by rule the following:

- 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, or other political subdivision seeking to construct or improve a public building must competitively bid the project if the estimated cost is in excess of \$300,000.³

Section 255.0525, 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

For a competitive solicitation⁵ 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.⁶

Several counties and municipalities have adopted ordinances requiring companies bidding on contracts to pay their employees a "living wage,"⁷ while others have adopted ordinances requiring apprenticeship programs.⁸

Preference to State Residents

¹ Section 255.29, F.S.

² See s. 255.0525, F.S.; see also chapters 60D-5.002 and 60D-5.0073, F.A.C.

³ Section 255.20(1), F.S. For electrical work, local governments must competitively bid projects estimated to cost more than \$75,000.

⁴ For counties, municipalities, and political subdivisions, similar publishing provisions apply. See Section 255.0525(2), F.S.

⁵ "Competitive solicitation" means an invitation to bid, a request for proposals, or an invitation to negotiate. Section 255.248, F.S.

⁶ Section 255.0991(2), F.S.

⁷ See, e.g., Broward County Code of Ordinances s. 26-102, Palm Beach County Code of Ordinances s. 2-147 to 2-250.1, Miami-Dade County Code of Ordinances s. 2-8.9.

⁸ See Charlie Frago, *Tampa Seeks to Require Apprenticeships on Large City Projects*, Tampa Bay Times (December 4, 2020), available at <https://www.tampabay.com/news/tampa/2020/12/04/tampa-seeks-to-require-apprenticeships-on-large-city-projects/> (last visited February 5, 2021).

Florida law provides a preference for the employment of state residents in construction contracts funded with state funds. Such contracts must contain a provision requiring the contractor to give preference to employing state residents to perform the work if such residents have substantially equal qualifications⁹ to those of nonresidents.¹⁰ If a construction contract is funded by local funds, the contract may, but is not required to, contain such a provision.¹¹ 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.¹²

A contract will not be let to any person who refuses to execute an agreement that gives preference to state residents.¹³ However, contracts involving the expenditure of federal aid funds do not have to give preference to employing state residents if that conflicts with federal law.¹⁴

Public Works Projects

In 2017,¹⁵ the Florida Legislature created s. 255.0992, F.S., relating to public works projects, and defined the following terms:

- "Political subdivision" means a separate agency or unit of local government created or established by law or ordinance and the officers thereof. The term includes, but is not limited to, a county; a city, town, or other municipality; or a department, commission, authority, school district, taxing district, water management district, board, public corporation, institution of higher education, or other public agency or body thereof authorized to expend public funds for construction, maintenance, repair, or improvement of public works.
- "Public works project" means an 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.

The law provides that 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:¹⁶

- 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.

In addition, the law provides¹⁷ that the state or any political subdivision that contracts for a public works project may not prohibit any contractor, subcontractor, or material supplier or carrier from submitting a bid on the project if such individual is able to perform the work described and is qualified, licensed, or

⁹ 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."

¹⁰ Section 255.099(1), F.S.

¹¹ *Id.*

¹² Section 255.099(1)(b), F.S.

¹³ Section 255.099(2), F.S.

¹⁴ *Id.*

¹⁵ Chapter 2017-113, L.O.F.

¹⁶ Section 255.0992(2)(a), F.S.

¹⁷ Section 255.0992(2)(b), F.S.

certified as required by state law. However, this provision does not apply to vendors listed in ss. 287.133¹⁸ and 287.134, F.S.¹⁹

The law does not apply to contracts executed by the Department of Transportation (DOT) under ch. 337, F.S.²⁰

During the bid process, it is common for local governments to place certain limitations, such as the requirement of a general contractor's license, on the bid documents.

Federal Labor and Wage Laws

The National Labor Relations Act of 1935²¹ and the Labor Management Relations Act of 1947²² 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 or act) establishes a federal minimum wage, which is the lowest hourly wage that can be paid in the United States.²³ A state may set the rate higher than the federal minimum, but not lower.²⁴ The act also requires employers to pay time and a half to their employees for overtime hours worked,²⁵ and establishes standards for recordkeeping²⁶ and child labor.²⁷ Over 135 million workers are covered under the act;²⁸ 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.²⁹

On February 12, 2014, President Obama signed Executive Order 13658, which establishes a minimum wage for certain federal contractors.³⁰ 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

¹⁸ Section 287.133, F.S., prohibits a vendor that has been convicted of a public entity crime from being awarded or performing work as a contractor, supplier, subcontractor, or consultant under a contract with the state, any of its departments or agencies, or any political subdivision.

¹⁹ Section 287.134, F.S., prohibits an entity that has been found by a court to have committed discrimination based on race, gender, national origin, disability, or religion from being awarded or performing work as a contractor, supplier, subcontractor, or consultant under a contract with the state or any department or agency of the state.

²⁰ Section 255.0992(3), F.S.

²¹ 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).

²² 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).

²³ 29 U.S.C. s. 206.

²⁴ 29 U.S.C. s. 218(a).

²⁵ 29 U.S.C. s. 207(a)(1).

²⁶ 29 U.S.C. s. 211.

²⁷ 29 U.S.C. s. 212.

²⁸ United States Department of Labor, *Wage and Hour Division: Resources for Workers*, available at <http://www.dol.gov/whd/workers.htm> (last visited February 2, 2021).

²⁹ 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 2, 2021).

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 2, 2021).

reduces supervisory costs.”³¹ The Executive Order hourly minimum wage in effect from January 1, 2021, through December 31, 2021, is \$10.95.³²

The Davis-Bacon Act³³ 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.³⁴ 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.³⁵ The Davis-Bacon Act applies to contractors and subcontractors performing work on federal or District of Columbia contracts.³⁶ Many federal laws that authorize federal assistance for construction through grants, loans, loan guarantees, and insurance are referred to as Davis-Bacon “related Acts.”³⁷ The “related Acts” include provisions that require the prevailing wage provisions of the Davis-Bacon Act to apply to most federally assisted construction.³⁸

State Labor and Wage Regulations

The State Constitution protects the right for workers to collectively bargain, including public sector employees.³⁹ 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.⁴⁰

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.”⁴¹ Employers must pay employees no less than the minimum wage for all hours worked in Florida.⁴² The current state minimum wage is \$8.65 per hour,⁴³ which is higher than the federal rate.⁴⁴

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.⁴⁵ Certification is also required to bid on road, bridge, or public transportation construction projects of more than \$250,000.⁴⁶ The purpose

³¹ *Id.*

³² 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 2, 2021).

³³ Davis-Bacon Act, 40 U.S.C. s. 3141-3148.

³⁴ 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 2, 2021).

³⁵ *Id.*

³⁶ *Id.*

³⁷ 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 2, 2021). Examples of “related Acts” are the Federal Aid Highway Acts, the Housing and Community Development Act of 1974, and the Federal Water Pollution Control Act.

³⁸ *Id.*

³⁹ Art. I, s. 6, FLA. CONST.

⁴⁰ See *Hillsborough Cnty. Gov’t 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).

⁴¹ Art. X, s. 24(a), FLA. CONST.

⁴² Art. X, s. 24(c), FLA. CONST.

⁴³ 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).

⁴⁴ 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 2, 2021).

⁴⁵ Section 337.14(1), F.S.

⁴⁶ Section 337.14(2), F.S.

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.”⁴⁷

Effect of the Bill

For competitive solicitations for construction services, the bill removes the 50 percent or more, state-appropriated funding threshold and applies the preference based prohibitions to solicitations that will be paid for with funding that is state-appropriated, locally-appropriated, or any combination thereof. These preference based prohibitions apply to a state college, county, municipality, school district, or other political subdivision of the state. The bill provides they 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.

The bill also removes the 50 percent or more, state-appropriated funding threshold for public works projects and applies the pre-bid prohibitions to activities paid for with state-appropriated, locally-appropriated, or any combination thereof. Specifically, 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;
- Recruit or hire employees from a designated, restricted, or single source; or
- Train employees in designated programs with a restricted curriculum or from a single source.

The bill adds a preference based prohibition for public works projects. Specifically, that the state or any political subdivision that contracts for a public works project may not grant a preference or impose 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.

Lastly, the bill provides that a state or political subdivision may not prohibit a contractor, subcontractor, or material supplier or carrier who is able, qualified, licensed, or certified to perform such work, from receiving information about public works opportunities.

The bill does not apply to contracts executed by the Department of Transportation under ch. 337, F.S.

B. SECTION DIRECTORY:

Section 1: Amends s. 255.0991, F.S., relating to contracts for construction services; prohibited local government preferences.

Section 2: Amends s. 255.0992, F.S., relating to public works projects; prohibited governmental actions.

Section 3: Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

⁴⁷ Section 337.14(1), F.S.
STORAGE NAME: h0053a.GOS
DATE: 2/19/2021

1. Revenues:

The bill does not appear to impact state revenues.

2. Expenditures:

The bill does not appear to impact state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to impact local government revenues.

2. Expenditures:

The bill does not appear to impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

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:

None.

B. RULE-MAKING AUTHORITY:

The bill neither provides rulemaking authority nor requires implementation by executive branch rulemaking.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 18, 2021, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment maintained the underlying bill and:

- Prohibited certain preference-based requirements from being applied to any competitive solicitation for construction services paid for with funding that is state-appropriated, locally appropriated, or any combination thereof. The current threshold requirement of 50 percent or more of the cost being from state-appropriated funds, appropriated at the time of the competitive solicitation is removed.
- Prohibited the state or any political subdivision that contracts for a public works project from 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 who is submitting a bid on a public works project, as well as, the residence of the employees of such contractor, subcontractor, or material supplier or carrier.

This analysis is drafted to the committee substitute as approved by the Government Operations Subcommittee.