

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/CS/SB 534

INTRODUCER: Governmental Oversight and Accountability Committee; Community Affairs Committee; and Senator Perry

SUBJECT: Public Works Projects

DATE: April 19, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Present</u>	<u>Yeatman</u>	<u>CA</u>	<u>Fav/CS</u>
2.	<u>Peacock</u>	<u>Ferrin</u>	<u>GO</u>	<u>Fav/CS</u>
3.	<u>Wells</u>	<u>Hansen</u>	<u>AP</u>	<u>Pre-meeting</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 534 prohibits the state and its political subdivisions that contract for public works projects from imposing restrictive conditions on certain contractors, subcontractors, or material suppliers or carriers, except as otherwise required by federal or state law. Specifically, the state or political subdivision that contracts for a public works project may not require that a contractor, subcontractor, or material supplier or carrier engaged in the project:

- 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 projects include only those projects for which 50 percent or more of the cost will be paid from state-appropriated funds.

The bill also prohibits the state or a political subdivision from restricting a qualified contractor, subcontractor, or material supplier or carrier from submitting a bid on any public works project or being awarded any contract, subcontract, material order, or carrying order. However, the prohibition does not apply to discriminatory vendors or those that have committed a public entity crime.

The bill has no impact on state revenues or expenditures.

The bill has an effective date of July 1, 2017.

II. Present Situation:

The Consultants' Competitive Negotiation Act

In 1972, Congress passed the Brooks Act (Public Law 92-582), which codified Qualifications-Based Selection (QBS) as the federal procurement method for architect and engineering services. The QBS process entails first soliciting statements of qualifications from licensed architectural and engineering providers, selecting the most qualified respondent, and then negotiating a fair and reasonable price. The vast majority of states currently require a QBS process when selecting the services of architectural and engineering professionals.¹

The Florida Legislature enacted the Consultants' Competitive Negotiation Act (CCNA) in 1973,² which specifies the necessary procedures when procuring professional services by an agency.³

Currently, the CCNA, codified in s. 287.055, F.S., specifies the process that state and local government agencies must follow when procuring the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper. The CCNA requires that state agencies publicly announce, in a consistent and uniform manner, each occasion when professional services must be purchased for one of the following:⁴

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

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

The CCNA provides a two-phase selection process.⁵ In the first phase, the “competitive selection,” the agency evaluates the qualifications and past performance of no fewer than three bidders. The agency selects the bidders, ranked in order of preference, and considers the most highly qualified to perform the required services. The CCNA requires consideration of several factors in determining the most highly qualified bidders.⁶

¹ Forty-six states use this process. American Council of Engineering Companies, Qualifications-Based Selection Resource Center, available at <http://www.acec.org/advocacy/qbs/> (last visited Feb. 24, 2017).

² Chapter 73-19, Laws of Fla.

³ Section 287.055(2)(b), F.S., defines “agency” as the state, a state agency, a municipality, a political subdivision, a school district, or a school board. The term agency does not extend to a nongovernmental developer that contributes public facilities to a political subdivision under s. 380.06, F.S., or ss. 163.3220-163.3243, F.S.

⁴ Section 287.055(3)(a)1., F.S.

⁵ Sections 287.055(4) and (5), F.S.

⁶ Section 287.055(4)(b), F.S., requires agencies to consider the following factors: the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the firms; and, the volume of work previously awarded to each firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms.

The CCNA prohibits the agency from requesting, accepting, and considering, during the selection process, proposals for the compensation to be paid.⁷ Section 287.055(2)(d), F.S., defines the term “compensation” to mean the amount paid by the agency for professional services regardless of whether stated as compensation or as other types of rates.

In the second phase, the “competitive negotiation,” the agency negotiates compensation with the most qualified of the minimum three selected firms for professional services at compensation, which the agency determines, is “fair, competitive, and reasonable.”⁸ If the agency cannot negotiate a satisfactory contract, the agency must formally terminate negotiations with that firm and must then negotiate with the second most qualified firm.⁹ The agency must negotiate with the third most qualified firm if the negotiation with the second most qualified firm fails to produce a satisfactory contract.¹⁰ If the agency cannot negotiate a satisfactory contract with any of the three selected, the agency must select additional firms in order of their competence and qualifications and continue negotiations until it reaches a contract.¹¹ Once negotiations with a firm are terminated, the agency cannot resume negotiations with that firm for the project.

In October 2011, the Attorney General opined that local governments could not create a hybrid procurement process for awarding projects and are limited to utilizing statutorily defined procedures.¹²

Procurement of Construction Services for Public Property and Publicly Owned Buildings

Chapter 255, F.S., specifies the procedures to be followed in the procurement of construction services for public property and publicly owned buildings. Section 255.29, F.S., requires the Department of Management Services (DMS) to establish, by rule,¹³ the following construction contract procedures for:

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

⁷ Section 287.055(4)(b), F.S.

⁸ Section 287.055(5)(a), F.S.

⁹ Section 287.055(5)(b), F.S.

¹⁰ *Id.*

¹¹ Section 287.055(5)(c), F.S.

¹² Op. Att’y Gen. Fla. 2011-21 (2011).

¹³ Chapter 60D-5, F.A.C., establishes the procedures for s. 255.29, F. S., which requires procedures be followed in advertising for bids for construction contracts; in determining the eligibility of potential bidders to submit proposals for construction contracts; in awarding construction contracts; for waiver of non-material bid deviations; for rejection of bids; for disqualification of contractors; and in requesting authority to negotiate contracts and in negotiating contracts.

- Entering into performance-based contracts for the development of public facilities when DMS determines the use of such contracts to be in the best interest of the state.

These procedures must include, but are not limited to:¹⁴

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

The state must competitively bid contracts for construction projects that it projects to cost in excess of \$200,000.¹⁵ County, municipal, or other political subdivision contracts for construction projects that are projected to cost in excess of \$200,000 also must be bid competitively.¹⁶ Counties, municipalities, special districts,¹⁷ or other political subdivisions seeking to construct or improve a public building must bid the project competitively if the projected cost is in excess of \$300,000.¹⁸

The solicitation of competitive bids or proposals for any state construction project with anticipated costs of more than \$200,000 must be advertised publicly in the Florida Administrative Register (FAR) at least 21 days prior to the established bid opening.¹⁹ If the construction project is projected to exceed \$500,000, the advertisement must be published in the FAR at least 30 days prior to the bid opening, and at least once in a newspaper of general circulation in the county where the project is located 30 days prior to the bid opening.²⁰

Department of Management Services Convicted Vendors and Discriminatory Vendor Lists

The DMS is required to keep a convicted vendor list²¹ that identifies vendors who have committed a public entity crime.²² If a vendor is included on the convicted vendor list, the

¹⁴ Section 255.29(4)(a)-(d), F.S.

¹⁵ Section 255.0525(1), F.S. Also, see Rules 60D-5.002(2) and 60D-5.0073, F.A.C.

¹⁶ Section 255.0525(2), F.S.

¹⁷ Section 255.20(1), F.S. (Special district as defined in ch. 189, F.S.).

¹⁸ *Id.* For electrical work, local governments must bid projects competitively estimated to cost more than \$75,000.

¹⁹ Section 255.0525(1), F.S.

²⁰ *Id.* Similar publishing provisions apply to construction projects projected to cost more than \$200,000 for counties, municipalities, and political subdivisions. See Section 255.0525(2), F.S.

²¹ Section 287.133, F.S., and Rule 60A-1.006(5), F.A.C.

²² Section 287.133(1)(g), F.S., defines “public entity crime” as a violation of any state or federal law by a person with respect to and directly related to the transaction of business with any public entity or with an agency or political subdivision of any other state or with the United States, including, but not limited to, any bid, proposal, reply, or contract for goods or services, any lease for real property, or any contract for the construction or repair of a public building or public work, involving antitrust, fraud, theft, bribery, collusion, racketeering, conspiracy, or material misrepresentation.

vendor may not do business with the state²³ in excess of \$35,000 as provided in s. 287.017(2), F.S., for a period of 36 months following placement on the list.

The DMS also maintains a discriminatory vendor list that identifies vendors where a determination of liability by a state circuit court or a federal district court for a violation of any state or federal law prohibiting discrimination on the basis of race, gender, national origin, disability, or religion.²⁴ If DMS places a vendor on the discriminatory vendor list, the vendor may not do business with the state, and the state may not accept any bids or proposals or transact business with such vendor for a period of 36 months following placement on the list.²⁵

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

Florida law provides a preference for the employment of state residents in construction contracts funded by state funds.²⁶ 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 qualifications²⁷ to those of non-residents.²⁸ If a construction contract is funded by local funds, the contract may contain such a provision.²⁹ 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.³⁰

Department of Transportation Construction Projects

Chapter 337, F.S., governs contracting by the Department of Transportation (DOT). In order for a person to bid for a construction contract in excess of \$250,000, DOT must certify such person as qualified.³¹ Certification is also required to bid on road, bridge, or public transportation construction projects of more than \$250,000.³² The purpose of certification is to ensure professional and financial competence relating to the performance of construction contracts by evaluating bidders "with respect to equipment, past record, experience, financial resources, and organizational personnel of the applicant necessary to perform the specific class of work for which the person seeks certification."³³

²³ Section 287.134(2)(a), F.S. A vendor placed on the list may not submit bids or proposals to a public entity on a contract to provide goods and services; a contract for construction or repair of a public building or public work; or leases of real property. The vendor may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant with a public entity, and may not transact business with any public entity.

²⁴ Section 287.134, F.S.

²⁵ Section 287.134(2), F.S.

²⁶ Section 255.099(1), F.S.

²⁷ 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.

²⁸ Section 255.099(1), F.S.

²⁹ *Id.*

³⁰ Section 255.099(1)(b), F.S.

³¹ Section 337.14(1), F.S. and ch. 14-22, F.A.C.

³² Section 337.14(2), F.S.

³³ Section 337.14(1), F.S.

An applicant seeking certification of qualification must include its latest annual financial statement completed within the last 12 months.³⁴ If the applicant submits an annual financial statement that was completed more than 4 months prior to the date on which DOT receives the application, then the applicant must submit an interim financial statement and an updated application.³⁵ A certified public accountant must audit each annual or interim financial statement.³⁶ If the applicant meets the qualifications, DOT issues a certificate of qualification that is valid for 18 months after the date of the applicant's financial statement, or a shorter period as DOT prescribes.³⁷ DOT may revoke such certificate of qualification for a contractor who was delinquent on a previously awarded contract.³⁸

DOT does not prohibit a qualified, licensed or certified contractor from bidding. However, a contract may not be awarded if the bid is determined to be irregular or non-responsive. DOT does require training for certain work categories, such as bridgework and other technical road and bridge areas.

Federal Labor and Wage Laws

The National Labor Relations Act of 1935³⁹ and the Labor Management Relations Act of 1947⁴⁰ constitute a comprehensive scheme of regulations guaranteeing employees the right to organize, to bargain collectively through chosen representatives, and to engage in concerted activities to secure their rights in industries involved in or affected by interstate commerce.

The Fair Labor Standards Act (FLSA) establishes a federal minimum wage, which is the lowest hourly wage that can be paid in the United States.⁴¹ A state may set the rate higher than the federal minimum, but not lower.⁴² It also requires employers to pay time and a half to its employees for overtime hours worked,⁴³ and establishes standards for recordkeeping⁴⁴ and child labor.⁴⁵ Over 135 million workers are covered under the act,⁴⁶ most jobs are covered by the FLSA, but not all jobs are covered. In addition, some jobs are covered, but are considered "exempt" from the FLSA overtime requirements.⁴⁷

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Section 337.14(4), F.S.

³⁸ Section 337.16, F.S.

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

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

⁴¹ 29 U.S.C. s. 206.

⁴² 29 U.S.C. s. 218(a).

⁴³ 29 U.S.C. s. 207.

⁴⁴ 29 U.S.C. s. 211.

⁴⁵ 29 U.S.C. s. 212.

⁴⁶ United States Department of Labor, Wage and Hour Division, <http://www.dol.gov/whd/workers.htm> (last visited Feb 24, 2017).

⁴⁷ 29 U.S.C. s. 213; http://www.dol.gov/whd/overtime_pay.htm (last visited Feb. 24, 2017).

On February 12, 2014, President Obama signed Executive Order 13658, which establishes a minimum wage for certain federal contractors.⁴⁸ The Executive Order requires parties who contract with the federal government to pay workers performing work on or in connection with covered federal contracts at least \$10.10 per hour beginning on January 1, 2015. Beginning January 1, 2016, and annually thereafter, employer must pay such workers 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.”⁴⁹

On September 20, 2016, the Department of Labor published a Notice in the Federal Register to announce that, beginning January 1, 2017, the Executive Order increases the minimum wage rate to \$10.20 per hour and tipped employees performing work on or in connection with covered contracts generally must be paid a minimum cash wage at \$6.80 per hour.⁵⁰

State Labor and Wage Regulations

Article I, Section 6 of the State Constitution creates a constitutional right to collectively bargain for public sector employees. It provides, in pertinent part, that “[t]he right of persons to work 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.⁵¹

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.”⁵² The State Constitution requires that employers pay employees no less than the minimum wage for all hours worked in Florida.⁵³ The current state minimum wage is \$8.10 per hour,⁵⁴ which is higher than the federal rate.⁵⁵

⁴⁸ A copy of the Executive Order can be found online at <http://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors> (last visited Feb. 24, 2017).

⁴⁹ *Id.*

⁵⁰ United States Department of Labor, Wage and Hour Division, Final Rule: Executive Order 13658, Establishing a Minimum Wage for Contractors, <https://www.dol.gov/whd/flsa/eo13658/index.htm> (last visited Feb. 24, 2017).

⁵¹ See *Hillsborough Cnty. Gov'tl Emps. Ass'n, Inc. v. Hillsborough Cnty. Aviation Auth.*, 522 So.2d 358 (Fla. 1988); *City of Tallahassee v. Public Employees Relations Comm'n*, 410 So.2d 487 (Fla. 1981); *Dade Cnty. Classroom Teachers Ass'n v. Legislature of Fla.*, 269 So.2d 684 (Fla. 1972).

⁵² Article X, s. 24(a), FLA. CONST. and s. 448.110, F.S.

⁵³ Article X, s. 24(c), FLA. CONST.

⁵⁴ <http://www.floridajobs.org/business-growth-and-partnerships/for-employers/display-posters-and-required-notices> (last visited Feb. 24, 2017).

⁵⁵ 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 Feb. 24, 2017).

Federal Project Labor Agreements

In 2009, President Barack Obama signed Executive Order 13502 authorizing the use of project labor agreements for federal construction projects.⁵⁶ The Executive Order defines the term “project labor agreement” as a pre-hire collective bargaining agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project and is an agreement described in 29 U.S.C. 158(f). The Executive Order provides that executive agencies may, on a project-by-project basis, require the use of a project labor agreement by a contractor if the agreement will advance the federal government’s goal of achieving economy and efficiency in procurement; produce labor-management stability; and ensure compliance with laws and regulations concerning safety, health, equal employment opportunity, and labor and employment standards.

Federal Prevailing Wage Requirements

The Davis-Bacon Act applies to contractors and subcontractors performing work on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair of public works projects or public buildings.⁵⁷ The United States Department of Labor, Wage and Hour Division, issues two types of wage determinations: general determinations (also known as area determinations) and project determinations. The wage and fringe benefits⁵⁸ in the applicable Davis-Bacon wage determination must be the minimum paid by contractors and subcontractors to laborers and mechanics.⁵⁹

III. Effect of Proposed Changes:

Section 1 creates s. 255.0992, F.S., relating to public works projects and prohibited governmental actions. The section defines 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, institute 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.

⁵⁶ A copy of the Executive Order can be found online at <https://www.gpo.gov/fdsys/pkg/FR-2009-02-11/pdf/E9-3113.pdf> (last visited Feb. 24, 2017); the Executive Order is codified in subpart 22.5 of the Federal Acquisition Regulation.

⁵⁷ 40 U.S.C. s. 3142(a).

⁵⁸ Examples of fringe benefits include life insurance, health insurance, pension, vacation, holidays, sick leave, and other “bona fide” fringe benefits. <http://www.dol.gov/whd/programs/dbra/faqs/fringes.htm#Fringe> (last visited Feb. 24, 2017).

⁵⁹ 40 U.S.C. s. 3142(b).

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

- 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.

The bill also provides that the state or any political subdivision that contracts for a public works project may not prohibit a 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. However, this provision does not apply to the vendors specified in ss. 287.133(convicted vendor list) and 287.134(discriminatory vendor list), F.S.

Additionally, this section does not apply to contracts executed by the Department of Transportation under ch. 337, F.S.

Section 2 provides that this act shall take effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties or municipalities to spend funds, reduce the counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill has no impact on state revenues or expenditures.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 255.0992 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS/CS by Governmental Oversight and Accountability on March 22, 2017:

- Ensures that vendors and companies who have violated state and federal law and appear on lists governed by s. 287.133 or s. 297.134, F.S., are not awarded a public works contract.

CS by Community Affairs on March 6, 2017:

- Revises the definition of “public works project” so that the term includes only an activity of which 50 percent or more of the cost will be paid from state-appropriated funds; and
- Clarifies that although the state or a political subdivision that contracts for a public works project may not prohibit certain qualified, licensed, or certified persons from submitting a bid or being awarded any contract, subcontract, material order, or carrying order, this provision does not apply to vendors listed under s. 287.133 or s. 287.134, F.S.

B. Amendments:

None.