

STORAGE NAME: h1425s1.ep
DATE: April 17, 2000

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
ENVIRONMENTAL PROTECTION
ANALYSIS**

BILL #: CS/HB 1425
RELATING TO: Solid Waste Management Services
SPONSOR(S): Committee on Environmental Protection;
Representative Garcia and Others
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMUNITY AFFAIRS (PRC) YEAS 10 NAYS 0
- (2) ENVIRONMENTAL PROTECTION YEAS 13 NAYS 0

I. SUMMARY:

This CS/HB 1425 subjects local governments that provide solid waste management services to the same requirements as private industry and imposes certain requirements on local governments providing services out of jurisdiction.

This legislation clarifies that an injured party may recover in circuit court for injunctive relief, attorney fees, and damages in certain situations.

This bill protects contracts to newly annexed areas, and municipalities that are newly incorporated. This bill also imposes procedures on local governments when a company is displaced, including specified notice or a "pay out" of funds.

This bill extends limitations to contracts, which currently apply to franchises that only provide solid waste services to newly annexed areas.

This bill, as introduced, raised concerns related to the provisions of Article VII, Section 18 (a) and Article I, Section 10 of the Florida Constitution. However, on April 13, 2000, the Committee on Environmental Protection adopted a committee substitute to HB 1425 which alleviates these constitutional concerns.

In addition to the information provided above, this committee substitute also: clarifies that certain hazardous waste closure permits are "post" closure permits or need a "clean closure plan approval" and provides that local governments are authorized to grant a solid waste fee waiver to certain nonprofit organizations that donate goods to charity and have a recycling or reuse rate of 50 percent or better. This CS/HB 1425 also makes additional technical clarifications.

This bill may have an insignificant fiscal impact upon local governments.

The effective date of this act is October 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Currently, local governments provide solid waste management services or provide services through contracts with private waste management companies, or a combination of both. While most landfills in the state are owned by counties, there are several privately owned regional landfills which accept waste from a growing number of counties. Most construction and demolition debris disposal facilities and materials recovery facilities, other than those co-located at landfills, are privately owned. Many large cities use both city collection equipment and crews for some parts of the city and franchise collection in other parts of the city. In many cases, cities or counties permit government solid waste departments to compete with private sector companies for specific contracts. Private companies complain that in these situations, public entities subsidize their costs with funds from other city operations or through a "hidden tax," unfairly competing for contracts.

Private waste management companies express concern that there are instances where local governments annex an unincorporated area of a county, where a private waste management company currently has contracts for waste management services, and then extend the local government's waste management services into the annexed area on an exclusive basis, with little consideration of the existing private contracts.

Currently, in Florida, individuals conducting hazardous and solid waste clean up must obtain a permit prior to closing down the hazardous waste site. Individuals conducting hazardous and solid waste clean up must also comply with federal hazardous and solid waste clean up programs. One federal clean up program in particular, the Risk-Based Corrective Action (RBCA) provides for a post closure permit or a clean closure plan approval to be obtained, instead of a "pre-closure" permit, in order to close down a hazardous solid waste site.

C. EFFECT OF PROPOSED CHANGES:

CS/HB 1425 subjects local governments that provide solid waste management services to the same requirements as private industries who provide competing collection services. The local government that provides the solid waste services in direct competition with the private companies shall not enforce or enact any license, permit or associated fee that does not: apply to the local government or where there is not a similar requirement that applies to the local government. In addition, a local government may not charge a fee that provides them with a material advantage in its ability to compete.

A private company may bring an injunctive action against a local government. Prior to doing so, the complaining party is to file a notice with the local government setting forth the specific facts of the case. The local government has 30 days after receipt to respond. Failure to follow this procedure

does not bar a temporary restraining order to prevent irreparable harm. No injunctive relief is to be granted if the action bears a reasonable relationship to the health, safety, or welfare of the citizens of the local government, unless the court finds that the anti-competitiveness outweighs the public benefits of the action.

A local government that provides solid waste services outside its jurisdiction which is in direct competition with private companies is subject to the same statutory regulations against predatory pricing which apply to private companies under ss. 542.18 and 542.19, F.S. A person that is injured due to a violation of predatory pricing, may sue in circuit courts and shall be entitled to injunctive relief and recovery of damages and costs. Certain procedures and requirements for these lawsuits are set forth in this subsection. Services provided in response to natural disasters are exempt from such suits. For purposes herein, the jurisdiction of a local government includes all incorporated and unincorporated areas within their authority.

CS/HB 1425 provides regulations for displacement of private waste companies. Displacement is defined to mean a local government's provision of a collection service which prevents a private company from continuing to provide collection services that it was previously providing. Displacement does not include:

- competition between the public and private sectors for individual contracts,
- actions by a local government where the local government refuses to renew a contract at the end of the contract period,
- actions taken against private companies as the result of the company acting in a manner that is threatening to the public or which materially breaches their contract,
- refusal by the company to continue its contract during the three year notice period,
- entering into a contract with a company which does not displace another company,
- where the property owners petition the governing body to take over services, and
- annexations.

Prior to displacing a private company, a local government must hold a public hearing and provide at least 45 days notice of the hearing to private companies and notice to the public.

A local government must provide 3 years notice to a private company before it engages in the provision of the service that displaces the company. As an alternative, the local government may pay the private company an amount equal to its previous 15 months' gross receipts for the service.

The CS/HB 1425 provides definitions of "in competition" and "private company".

In addition, this bill also addresses annexation. A party that has a contract in effect for at least 6 months prior to the initiation of the annexation to provide solid waste services in an unincorporated area may continue to provide these services to an annexed area for five years or the remainder of the contract, whichever is shorter. This subsection does not address contracts or services that exceed the five year period.

In relation to the incorporation of a new municipality through merger of existing municipalities and unincorporated areas, the plan for merger must honor existing contracts pursuant to the contracts clause in the constitution. However, the plan for merger may contain a provision that existing contracts for solid waste collection services shall be honored only for 5 years or the remainder of the contract term, whichever is shorter. This section also does not address contracts greater than five years.

This bill amends state law to comply with federal RBCA law in requiring post closure permits and clean up approvals instead of pre-closure permits.

In addition, this bill provides that local governments are authorized to grant a solid waste fee waiver to certain nonprofit organizations that donate goods to charity, and have a recycling or reuse rate of 50 percent or better.

Lastly, CS/HB 1425 clarifies that the prohibitions of predatory pricing in which the local governments are subject to are found in ss. 542.18 and 542.19, F.S.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Creates into chapter law, the requirement that local governments are to comply with the same provisions as private companies regarding collection services; an action for injunctive relief against local governments and the procedures and condition precedents relating to such action; requirements for solid waste collection services outside a local government jurisdiction; a provision subjecting local governments to statutory predatory pricing prohibitions; an action for injunctive relief for predatory pricing and procedures and condition precedents relating to such action; the requirements and conditions for displacing a private company for collection services; a provision defining of "in competition" and "private company".

Section 2: Creates a new subsection in s. 171.062, F.S., which provides pay out requirements for annexations. A party who has a contract in effect for at least 6 months prior to the initiation of the annexation to provide solid waste services in an unincorporated area may continue to provide these services to an annexed area for five years or the remainder of the contract, whichever is shorter.

Section 3: Creates a new paragraph in s. 165.061, F.S., which provides requirements for collection services for new municipalities formed through mergers of existing municipalities and unincorporated areas. The plan for merger must honor existing contracts pursuant to the contracts clause in the constitution. However, the plan for merger may contain a provision that existing contracts for solid waste collection services shall be honored only for 5 years or the remainder of the contract term, whichever is shorter.

Section 4: Amends s. 403.087, F.S., to clarify that certain hazardous waste closure permits are "post" closure permits, or a "clean closure plan approval."

Section 5: Creates a new paragraph in s. 403.706, F.S. which provides that local governments are authorized to grant a solid waste fee waiver to certain nonprofit organizations that donate goods to charity, and have a recycling or reuse rate of 50 percent or better.

Section 6: Amend s. 403.722, F.S., to clarify that closure permits are "post" closure permits, or "clean closure plan approvals."

Section 7: This act shall take effect October 1, 2000.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

It is not anticipated that this bill will generate additional revenue.

2. Expenditures:

In providing 3 years notice to a displaced company, local government is unable to take advantage of potentially lower bids for this fixed period. In the alternative, local government may "pay out" a company for 15 months worth of work. This cost is indeterminate at this time.

There may be an increased cost in litigation.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Providing for notice or "pay out" enables the displaced company to anticipate and plan for economic losses, or gains.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The CS/HB 1425 alleviates the constitutional concern which arose from the original bill relating to the mandate clause, in that: this bill, is exempt from the mandate clause under Article VII, Section 18 of the Florida Constitution for two reasons, the fiscal impact may be insignificant and it equally effects all local governments that are similarly situated. Also, the CS/HB 1425 removes the provision relating to maintaining separate accounts and provides that the payout of gross receipts is not a requirement and instead is an option for the local government. Therefore, this CS/HB 1425 also alleviates the mandate concern.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the amount of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Committee on Community Affairs:

This bill, as introduced, may raise a constitutional concern as relates to potential interference with contracts. There is no exemption from the provisions of the bill for existing contracts. Article I, Section 10 of the Florida Constitution provides, "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." In re Advisory Opinion to the Governor, 509 So.2d 292 (Fla.1987), the Court issued an advisory opinion (non-binding) addressing the application of a newly-created statute to an existing contract. In this case, the legislation required prime contractors to pay a tax on certain services provided. Though contract rights are certainly subject to state taxation, the Court conceded, retroactive application unconstitutionally impairs contracts.

Existing contract rights are not untouchable, however. Legislative action which alters existing remedies, such as statute of limitations, will most likely be found constitutional as applies to existing contracts. Ruhl v. Perry, 390 So.2d 353 (Fla. 1980). In this case, the Court did note the existence of a one-year savings clause, however.

The Third District Court of Appeal employed a balancing test in analyzing the issue of contract impairment. Yellow Cab Co. Of Dade County v. Dade County, 412 So.2d 395 (Fla. 3d DCA 1982). Here, the Court balanced the nature and extent of impairment with the level of importance of the state's interest. Incorporating the language in the Pompano decision, the Court offered a detailed inquiry:

- (a) Was the law enacted to deal with a broad generalized economic or social problem?

(b) Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by this state?

(c) Does the law affect a temporary alteration of the contractual relationship...or does it work a severe, permanent, and immediate change...irrevocably and retroactively?
Pompano v. Cladrige of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1980).

Here, this legislation addresses a specific type of contract, that of waste management services. As this bill does not alter a general provision, such as a statute of limitations time period, Ruhl may not be relevant. Under the Yellow Cab Co. analysis, if challenged, the state must first show that this legislation addresses an economic or social issue. Arguably, this bill cures local government's unfair economic advantage over private industry. However, this criteria likely refers to the economic concerns of the local government, not the private provider. Under the second prong, it does not appear that any regulation currently exists which limits local government's ability to choose a provider for these services. Regarding the last factor, change to the contractual relationship, the five year notice and pay out provisions provide a unilateral benefit to the provider, to the permanent detriment of local government.

Committee on Environmental Protection:

The CS/ HB 1425 alleviates constitutional concerns relating to the contracts clause. In relation to incorporated areas, the bill provides that the plan for merger or incorporation must honor existing contracts. However, the plan for merger may include a provision that protects contracts for a period of five years, or the remainder of the contract term, whichever is shorter. This is agreed upon by the parties.

In relation to unincorporated areas, the party who has a contract to provide solid waste collection services is protected for a five year period, or the remainder of the contract, whichever is shorter. The statute is silent on services beyond five years. Therefore, this provision would probably not raise a contractual concern.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 12, 2000, the Committee on Environmental Protection adopted a substitute strike everything amendment and an amendment thereto. The committee then passed a committee substitute which makes the following changes:

- clarifies that certain hazardous waste closure permits are "post" closure permits or "clean closure plan approvals",
- provides that local governments are authorized to grant a solid waste fee waiver to certain nonprofit organizations that donate goods to charity and have a recycling or reuse rate of 50 percent or better, and
- makes additional technical clarifications.

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VII. SIGNATURES:

COMMITTEE ON COMMUNITY AFFAIRS:

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Prepared by:

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