

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill increases the number of local government construction projects subject to competitive bidding.

Ensure lower taxes – The bill subjects more projects to competitive bidding and requires local governments to determine whether performing public construction projects with its own labor is less than the lowest responsible bidder. These changes may lower the costs of public construction projects.

B. EFFECT OF PROPOSED CHANGES:

Local Bids and Contracts for Public Construction Works

Background

Section 255.20, F.S., requires a county, municipality, special district, or other political subdivision of the state seeking to improve a public building, structure, or other public construction work to competitively award construction projects that cost more than \$200,000. The requirement does not apply, for example, when the:

- Funding source of the project will be diminished or lost because the time required to competitively award the project after the funds become available exceeds the time within which the funding source must be spent; or
- Governing board of the local government, upon a majority vote finds that it is in the public's best interest to perform the project using its own services, employees, and equipment.¹

Some local governments use “no damage for delay” clauses,² which prohibit contractors from recovering costs or damages caused by delay through no fault of the contractor.

Effect of Bill

The bill expands the current requirement that certain public construction projects be competitively bid to include repair or maintenance of a public building or facility. It also requires that, if the political subdivision is awarding the project without competitive bidding pursuant to the exception for expiration of available funds, the diminishment or loss of those funds cannot be the fault of the governmental entity.

The bill imposes certain requirements before a local government can use its own services, employees, or equipment to perform a project. First, the bids or proposals received must be at least 10 percent greater than the local government's estimated cost of the project. Then, the local government is

¹ See s. 255.20(1)(c), F.S.

² Notwithstanding any provision in the Contract Documents to the contrary, an extension of the Contract Time shall be the Contractor's sole and exclusive remedy for any delay of any kind or nature, unless the delays were caused solely by acts constituting intentional interference by the Owner with the Contractor's performance of the Work, and such acts continue after the Contractor's written notice to the Owner of such interference. Intentional interference is an act or omission by the Owner by which it intentionally, willfully or knowingly seeks to delay the progress of the Work. The Owner's exercise of any of its rights or privileges under the Contract Documents, including, but not limited to (1) rights under Article 7, Changes in the Work, regardless of the extent or number of changes, (2) rights under Paragraphs 2.3 and 2.4 to Suspend the Work and carry out the Work, or (3) rights under Article 14 to terminate or suspend the Work shall not under any circumstances be construed as intentional interference with the Contractor's performance of the Work. In no event, including circumstances in which the Owner has intentionally interfered with the Contractor's performance of the Work, shall the Contractor be entitled to recover from the Owner any indirect, incidental, special, or consequential damages in any proceeding arising out of or relating to this Contract or breach thereof.

authorized to request a professional engineer not affiliated with the local government to prepare an independent estimate of the fair market cost of the project. If the estimate is within 10 percent of one of the bids or proposals, the local government must competitively award the project. If the engineer's estimate is not within 10 percent of one of the proposals, the local government may request a certified public accountant not affiliated with the local government to prepare, with the engineer, an estimate of the cost of the project if performed by the local government. Only if the accountant's estimate is less than the lowest-priced responsive bid or proposal may the local government vote to perform a project using its own services, employees, or equipment.

The bill prohibits the use of "no damage for delay" clauses by prohibiting any public construction contract for a political subdivision from containing any provision that purports to limit, waive, release, or extinguish the rights of a contractor to recover costs or damages for delay in performing such contract, if the delay is caused by acts or omissions of the political subdivision.³ The decision of a political subdivision concerning the additional compensation or time to which a contractor is entitled is subject to de novo review in a court of appropriate jurisdiction.

Labor and Road Equipment

Background

Current law authorizes counties to employ labor and provide road equipment under certain circumstances;⁴ however, certain construction and reconstruction projects performed by utilizing proceeds from the constitutional gas tax must be awarded to the lowest bidder.⁵ Counties must competitively award all projects for construction and reconstruction of roads and bridges, including resurfacing, which utilize the proceeds of the 80 percent portion of the surplus of the constitutional gas tax. A county, however, may use its own forces for construction and maintenance in emergencies and when construction and reconstruction projects have a total cumulative annual value not to exceed 5 percent of its 80 percent portion of the constitutional gas tax or \$400,000, whichever is greater.⁶ In addition, if after proper advertising the county receives no bids for a specific project, the county may use its own forces to construct the project. A county is not prohibited from performing routine maintenance as authorized by law.⁷

Effect of Bill

The bill subjects municipalities to the same competitive bid requirements. The bill changes language referencing the "constitutional gas tax" to the "constitutional fuel tax."

Current law authorizes counties to use 80 percent of the surplus from the constitutional gas tax to pay for those construction and reconstruction projects that are competitively bid. The bill removes the 80 percent cap thus authorizing counties and municipalities to use a greater portion of the surplus for those projects. It also expands the provision to include projects funded by the county fuel tax, municipal fuel tax, ninth-cent fuel tax, and the local option fuel tax.

C. SECTION DIRECTORY:

Section 1 amends s. 255.20, F.S., to revise requirements for local governments to competitively award contracts for certain construction projects.

³ The Department of Transportation Standard Specifications provides "[f]or any delay claim, the Contractor shall only be entitled to monetary compensation for the actual idle labor and equipment, and indirect costs, expenses, and profit thereon, as provided for in 4-3.2(d) and solely for costs incurred beyond what reasonable mitigation thereof the Contractor could have undertaken."

⁴ See s. 336.41, F.S.

⁵ Section 336.41(3), F.S.

⁶ *Id.*

⁷ *Id.*

Section 2 amends s. 336.41, F.S., to revise provisions relating to local governments employing labor and providing road equipment for repair and maintenance of roads and bridges.

Section 3 provides an effective date of July 1, 2008.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See FISCAL COMMENTS.

2. Expenditures:

See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Private companies could see increased revenues as local governments will be required to competitively bid more construction and reconstruction projects.

D. FISCAL COMMENTS:

The Florida League of Cities believes the fiscal impact to local governments will be significant; however, it is difficult for the cities to quantify the fiscal impact in any meaningful way. Different cities have different thresholds for when it is appropriate to conduct maintenance and repair activities themselves.⁸

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Impairment of Contract

Section 10, Art. I of the State Constitution prohibits the passage of laws impairing the obligation of contracts. If this bill were found to impair the obligation of current contracts, then this issue may be raised.

⁸ Email from the Florida League of Cities, March 17, 2008.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS / COUNCIL SUBSTITUTE CHANGES

On March 19, 2008, the Committee on State Affairs adopted a strike-all amendment and reported the bill favorable with amendment.

The bill expanded the requirement in current law that certain public construction projects be competitively bid to include repair or maintenance of a public building, structure, or other public construction works. The bill also added "facility" to that list. The strike-all amendment removes facilities from the list of public structures affected by the bill.

The bill set forth a detailed appraisal process for local governments to follow in order to determine all bids received were above a 10 percent threshold before the local governments could use their own services, employees, or equipment to perform a project. The strike-all amendment removes the detailed appraisal process but still requires local governments to exceed the 10 percent threshold before proceeding with their own resources. It also requires a local government to provide factual support that a project meets the 10 percent threshold requirement in order to perform a project using its own resources. The following are the factual findings:

- The local government's estimated cost using private sector contractors reasonably represents the fair market cost of the project; and
- The local government can perform the project with its own resources at a cost equal to or less than the estimated cost of private sector contractors.

The bill prohibits the use of "no damage for delay" clauses by prohibiting any public construction contract for a political subdivision from containing any provision that purports to limit, waive, release, or extinguish the rights of a contractor to recover costs or damages for delay in performing such contract, if the delay is caused by acts or omissions of the political subdivision. The strike-all amendment specifies that the provision cannot be construed to void clauses providing for reasonable liquidated damages. In addition, it voids "no damage for delay clauses" in contracts governed by s. 336.44, F.S.

The bill required that all construction and reconstruction of roads and bridges be competitively awarded to a private contractor. The strike-all amendment adds to the list the repair of roads and bridges.

The bill provided that emergency work, construction, and reconstruction could be performed by the local government so long as the total cumulative annual value did not exceed 5 percent of its 80 percent portion of the constitutional gas tax or \$400,000, whichever was greater. The strike-all amendment removes this requirement and instead provides that the local government can perform such work using their own forces if:

- No single project exceeds the use of \$250,000 worth of materials;
- No single project or combination of adjacent projects exceed 1 mile in length; and
- All materials for the projects are purchased or furnished from a commercial source (except for government owned pits for sand, gravel and rock already in existence).

The strike-all amendment prohibits a local government from owning or operating an asphalt plant or a portable or stationary concrete batch plant with an independent mixer.

Public airports owned and operated by local governments are excluded from the requirements of the strike-all amendment.