

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.

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, a delay of receiving funds or competitively bidding the project cannot be materially contributed to by the local government 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, a local governing board must proceed by holding a publicly noticed meeting and decide by a majority vote to perform the project

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.

using its own resources. The bill further provides a set of facts a local government must find before it may perform a project using its own services or resources:

- The local government's estimated cost of the project in the bid documents must reasonably represent the fair market cost of a project using private-sector contractors.
- The local government must demonstrate that it can perform the project using its own resources at a cost equal to or less than its estimated cost using generally accepted accounting principles.

The bill voids any 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. The bill explicitly excludes reasonable liquidated damages provisions from the voiding of "no damage for delay" clauses.

The bill specifically excludes airports, seaports, and public transit systems from the provision of the bill that requires projects to be competitively bid and from the provision that voids no "damage for delay" clauses.

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 as counties. 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. Rather, the bill sets a cap of \$250,000 on construction, reconstruction, full-scale mineral seal coating and major bridge and bridge system repair projects for which a local government will use its own forces. The bill further prohibits a local government from dividing projects to avoid exceeding the cap or conflicting with other provisions in the subsection and requires that all materials for projects be purchased from a commercial source. The bill excludes from the \$250,000 cap projects of paving dirt roads.

³ The Department of Transportation Standard Specifications states "[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.*

The bill explicitly prohibits a local government from owning or operating an asphalt plant or any kind of concrete batch plant that has an independent mixer.

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.

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:

The mandates provision does not appear to apply because this bill is not expected to require counties and municipalities to spend funds or to take an action requiring the expenditure of funds, reduce the percentage of a state tax shared with counties or municipalities, or reduce the authority that municipalities have to raise revenue.

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

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.

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

Committee on State Affairs

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.

Government Efficiency & Accountability Council

On April 8, 2008, the Government Efficiency & Accountability Council reported HB 683 favorably as a Council Substitute to incorporate the substitute amendment to the strike-all amendment adopted by the Committee on State Affairs. The substitute amendment clarifies that a local government project is exempt from the competitive bid process when a loss or diminishment of funds will occur because of the process, but only when the local government does not materially contribute to a delay in funding or a delay in competitively awarding.

The substitute amendment removes the 1 mile limit on emergency work, construction, and reconstruction that may be performed by a local government under the amendment, but prohibits projects from being divided into more than one project to avoid falling under other requirements of the subsection. Further, the substitute amendment sets forth an exception to the monetary cap on projects that a local government may perform for paving dirt roads.

The substitute amendment expands an exception that excludes local government owned or operated airports from the competitive-award requirement to also exclude local government seaports and public transit systems. In addition, these facilities are made exempt from the provision voiding "no damage for delay" clauses.