

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 225 All-American Flag Act

**SPONSOR(S):** Cortes and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 590

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local Government Affairs Subcommittee	9 Y, 0 N	Darden	Miller
2) Government Operations Appropriations Subcommittee	12 Y, 0 N	White	Topp
3) Local & Federal Affairs Committee		Darden	Kiner

### SUMMARY ANALYSIS

Current law requires the display of the United States and state flags in certain venues, but does not specify any requirements for the manufacturing or source of materials for United States or state flags purchased by the state or local governments.

The bill requires all United States and state flags purchased by the state, a county, or a municipality for public use, after January 1, 2016, to be made in the United States entirely from domestically grown, produced, and manufactured materials.

The bill is not anticipated to have a fiscal impact on state government. The bill may have an insignificant negative fiscal impact local governments, depending on the extent to which local governments are currently purchasing flags that do not comply with the requirements of the bill and the cost difference between compliant and non-compliant flags.

The effective date of the bill is July 1, 2015.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### BACKGROUND

###### Display of United States and State Flags

The United States and state flags must be displayed in certain venues under current law. The United States flag must be displayed at the state capitol<sup>1</sup> and at every county courthouse,<sup>2</sup> public auditorium,<sup>3</sup> polling station on election days,<sup>4</sup> and on the grounds and in the classrooms of public K-20 educational institutions.<sup>5</sup> The state flag must be displayed on the grounds of every public K-20 educational institution in the state.<sup>6</sup> Display of the state flag is otherwise governed by protocols adopted by the Governor.<sup>7</sup>

###### Procurement of Flags

Purchases by the executive branch are regulated by the provisions of Chapter 287, F.S. The Department of Management Services (DMS) is responsible for the procurement of goods and services for all state agencies.<sup>8</sup> DMS employs state-wide purchasing rules to coordinate purchases across the various agencies of the state, utilizing the buying power of the state to promote efficiency and savings in the procurement process.<sup>9</sup> Agencies are defined by Chapter 287 as "any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government." <sup>10</sup> State universities and colleges, including their boards of trustees, are specifically excluded from this definition of agency.<sup>11</sup>

Accounting requirements for purchases vary depending on the value of the services. Formal competitive bidding is required for all contracts in excess of \$35,000.<sup>12</sup> For contracts between \$2,500 and \$35,000, agencies should receive informal bids when practical, but may conform to "good purchasing practices," such as written quotations or written records of telephone quotations.<sup>13</sup> For contracts less than \$2,500, agencies are only required to conform to good purchasing practices.<sup>14</sup>

While there is currently no specific state law on flag procurement, most flags purchased by DMS are manufactured in the United States from domestically-sourced materials. Of the 772 flags purchased by agencies via MyFloridaMarketPlace<sup>15</sup> in fiscal year 2012-13, 682 were produced by RESPECT of Florida.<sup>16</sup> RESPECT of Florida is a 501(c)3<sup>17</sup> non-profit organization under contract with DMS<sup>18</sup> to

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<sup>1</sup> S. 256.01, F.S.

<sup>2</sup> S. 256.01, F.S.

<sup>3</sup> S. 256.11, F.S.

<sup>4</sup> S. 256.011(1), F.S.

<sup>5</sup> S. 1000.06(1), F.S.

<sup>6</sup> S. 1000.06(1), F.S.; *see also* s. 256.032, F.S. (requiring state flag to be displayed on grounds of every elementary and secondary public school).

<sup>7</sup> S. 256.015(1), F.S.

<sup>8</sup> S. 287.042(1)(a), F.S.

<sup>9</sup> S. 287.032, F.S.

<sup>10</sup> S. 287.012(1), F.S.

<sup>11</sup> S. 287.012(1), F.S. Other statutes define the word "agency" differently in different contexts. *See*, s. 120.52(1), F.S.

<sup>12</sup> S. 287.057, F.S.

<sup>13</sup> Rule 60A-1.002(3), F.A.C.

<sup>14</sup> Rule 60A-1.002(2), F.A.C.

<sup>15</sup> The online procurement system operated by DMS through which agencies may make certain types of purchases, at [http://www.dms.myflorida.com/business\\_operations/state\\_purchasing/myfloridamarketplace](http://www.dms.myflorida.com/business_operations/state_purchasing/myfloridamarketplace) (accessed January 30, 2015).

<sup>16</sup> HB 201 Bill Analysis, Department of Management Services, March 6, 2014.

<sup>17</sup> 26 U.S.C. s. 501(c)(3).

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**DATE:** 3/17/2015

administer the State Use Program, designed to provide employment opportunities for handicapped individuals.<sup>19</sup> All United States and state flags sold by RESPECT are assembled in the organization's Miami employment center from materials produced in the United States.<sup>20</sup>

The legislative and judicial branches have separate procurement processes. The purchase of flags for the House of Representatives and Senate are handled by each chamber's administrative offices. Procurement for the judicial branch falls under the aegis of the Office of State Courts Administrator.<sup>21</sup>

The procurement of goods and services by counties, municipalities, and school districts are not governed by the provisions of Chapter 287, F.S.<sup>22</sup> Generally, flags purchased by counties, municipalities, or school districts would only be subject to local ordinance. Current law, however, does authorize the Department of State to provide state flags to schools, governmental agencies, and other groups and organizations at no cost, up to an annual cost for the Department of \$15,000 per year.<sup>23</sup>

Current law gives a preference to Florida businesses in the awarding of competitive bids, equal to either the preference given by the lowest out-of-state vendor's home state or five percent (if no preference is given by the lowest out-of-state vendor's home state).<sup>24</sup> State agencies, universities, colleges, school districts, and other political subdivisions are required to give this preference,<sup>25</sup> but counties and municipalities are specifically excluded from the requirement.<sup>26</sup>

While it is possible that some of the flags purchased by state and local governments are foreign-made, the quantity is likely to be small. The Flag Manufacturers Association of America estimates that 95 percent of United States flags are manufactured entirely in the United States.<sup>27</sup> According to the Census Bureau, 302.7 million dollars of "fabricated flags, banner, and similar emblems" were produced in the United States in 2007,<sup>28</sup> while four million dollars' worth of flags was imported in 2013.<sup>29</sup>

#### Procurement of Flags by the Federal Government and Other States

The federal government is required to purchase domestically manufactured goods if the contract amount exceeds a minimum threshold.<sup>30</sup> These requirements can be waived by the President of the United States under the Trade Agreements Act of 1979, if a waiver is necessary for the purpose of entering into trade agreements with other countries.<sup>31</sup> According to the Congressional Research Service, waivers under the Trade Agreement Act of 1979 are heavily used, resulting in little remaining scope for the Buy American Act provisions.<sup>32</sup>

Other provisions of federal law, however, require domestically produced goods. The Berry Amendment<sup>33</sup> requires a "super percentage" of certain types of goods (including flags) to be wholly

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<sup>18</sup> See Rule 60E-1.003, F.A.C. (authorizing DMS to designate a "Central, Non-Profit Agency" to provide services specified in ss. 413.032-413.037, F.S.).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Fla. R. Jud. Admin. 2.205(e)(2).

<sup>22</sup> Cf. S. 287.055(2)(b), F.S. (including "a municipality, a political subdivision, a school district, or a school board" in the definition of "agency" for the purposes of procuring architectural, engineering, and surveying services).

<sup>23</sup> S. 256.031(1), F.S.

<sup>24</sup> S. 287.084(1)(a), F.S.

<sup>25</sup> *Id.*

<sup>26</sup> S. 287.084(1)(c), F.S.

<sup>27</sup> Flag Manufacturers Association of America, *FAQ's*, <http://fmaa-usa.com/info/FAQ.php> (last visited January 29, 2015).

<sup>28</sup> U.S. Census Bureau News, *Profile America Facts for Features, The Fourth of July 2013*, <http://www.census.gov/newsroom/facts-for-features/2013/cb13-ff14.html> (last visited January 29, 2015).

<sup>29</sup> U.S. Census Bureau News, *Profile America Facts for Features, The Fourth of July 2014*, <http://www.census.gov/newsroom/facts-for-features/2014/cb14-ff16.html> (last visited January 29, 2015).

<sup>30</sup> 41 U.S.C. s. 8301, *et seq.* ("Buy American Act of 1933")

<sup>31</sup> 41 U.S.C. s. 2501, *et seq.*

<sup>32</sup> *Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law*, Congressional Research Service, January 6, 2014, available at <http://www.hsdl.org/?view&did=749327>.

<sup>33</sup> 10 U.S.C. s. 2533a.

domestic in origin.<sup>34</sup> Another statute prohibits the Department of Veterans Affairs from procuring burial flags that were not domestically produced and manufactured.<sup>35</sup>

Several states have existing statutes requiring the use of domestically manufactured flags. Oklahoma requires all flags purchased by the state and all political subdivisions to be manufactured in the United States.<sup>36</sup> Massachusetts has a similar law that applies to all public institutions.<sup>37</sup> Arizona requires a domestically-manufactured United States flag to be displayed in all public school classrooms.<sup>38</sup> Tennessee requires any United States or state flag purchased under a state contract to be manufactured in the United States.<sup>39</sup> Minnesota prohibits the sale of United States flag produced outside the United States.<sup>40</sup>

## **EFFECT OF PROPOSED CHANGES**

The bill provides that the act may be cited as the “All-American Flag Act.”

The bill requires any United States or state flag purchased for public use by the state, a county, or municipality, on or after January 1, 2016, must be wholly made in the United States, including the growth of materials, production, and manufacturing.

### **B. SECTION DIRECTORY:**

Section 1: Provides the act may be cited as “All-American Flag Act.”

Section 2: Creates s. 256.014, F.S., relating to purchase of a United States flag or state flag for public use, requiring flags purchased by the state, a county, or a municipality to be manufactured in the United States from materials grown, produced, and manufactured in the United States.

Section 3: Provides an effective date of July 1, 2015.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

See FISCAL COMMENTS.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

See FISCAL COMMENTS.

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<sup>34</sup> *Domestic Content Legislation: The Buy American Act and Complementary Little Buy American Provisions*, Congressional Research Service, April 25, 2012, available at <http://fas.org/sgp/crs/misc/R42501.pdf>.

<sup>35</sup> 38 U.S.C. s. 2301(h)(1).

<sup>36</sup> Okla. Stat. tit. 25, s. 158.

<sup>37</sup> Mass. Gen. Laws ch. 2, s. 6.

<sup>38</sup> Ariz. Rev. Stat. s. 15-1626(17).

<sup>39</sup> Tenn. Code Ann. s. 4-1-301(d).

<sup>40</sup> Minn. Stat. s. 325E.65.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill could have a positive economic impact on businesses selling United States and state flags that are domestically-produced and sourced. The bill could have a negative impact on businesses selling United States and state flags that are either imported or produced domestically from foreign materials.

### D. FISCAL COMMENTS:

The bill is not anticipated to have a fiscal impact on state government. The bill may have an insignificant negative fiscal impact local governments, depending on the extent to which local governments are currently purchasing flags produced outside of the United States or made from foreign materials and the cost difference between those flags and domestically-produced and sourced flags. Most state government entities currently purchase their flags through the RESPECT of Florida DMS State Term Contract, whose flags are assembled in Miami from materials produced in the United States. Local governments can also purchase flags through this contract, which has competitive pricing. DMS purchases all flags through RESPECT and does not anticipate any fiscal impact as a result of the bill.<sup>41</sup>

## 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 expenditures 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:

##### Impairment of Contract

Both the United States<sup>42</sup> and Florida<sup>43</sup> constitutions prohibit the state from passing laws impairing existing contractual rights. Contractual rights are impaired to the extent the law changes the substantive rights of the parties in the existing contract.<sup>44</sup> For an impairment of contractual rights to be constitutionally valid, the law must balance the state's objective against the harm to the contract, intruding on the contractual right no more than is necessary to achieve the public purpose of the law.<sup>45</sup> The ability of the state to modify contractual obligations is most limited when a final agreement has been reached between a party and the state.<sup>46</sup>

While the bill only applies to purchases of flags by state or local governments after January 1, 2016, it is possible the state or a local government may have existing contracts that are not compliant with the bill that extend beyond that date.

### B. RULE-MAKING AUTHORITY:

The bill does not provide rulemaking authority or require executive branch rulemaking.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill requires the state, counties, and municipalities to purchase American-produced and sourced United States and state flags. The bill does not require United States or state flags purchased by special districts to meet these requirements.

<sup>41</sup> Email on file with the House Government Operations Appropriations Subcommittee (February 19, 2015).

<sup>42</sup> U.S. Const. art. 1, § 9, cl. 10. ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.")

<sup>43</sup> Fla. Const. art. I, s. 10. ("No . . . law impairing the obligation of contracts shall be passed.")

<sup>44</sup> *Manning v. Travelers Ins. Co.*, 250 So. 2d 872, 874 (Fla. 1971).

<sup>45</sup> *Pomponio v. Claridge of Pomapano Condominium, Inc.*, 378 So. 2d 774, 779-80 (Fla. 1979).

<sup>46</sup> *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 672 (Fla. 1993).

The bill does not contain a method of verification to ensure the flags purchased by state and local governments are manufactured in the United States from domestic materials.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.