

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 Governmental Oversight and Accountability

BILL: SPB 7042

INTRODUCER: For consideration by the Governmental Oversight and Accountability Committee

SUBJECT: Commodities Produced by Forced Labor

DATE: January 26, 2024

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Limones-Borja</u>	<u>McVaney</u>	_____	Pre-meeting

I. Summary:

SPB 7042 creates a new provision in ch. 287, F.S., preventing contracts with companies for commodities produced, in whole or in part, by forced labor. For purposes of this legislation, “forced labor” means work or service exacted from any person, including a minor, under the menace of a penalty for nonperformance and for which the worker does not offer himself or herself voluntarily or an activity that violates s. 787.06, F.S.

The bill requires the Department of Management Services (DMS) to create and maintain a forced labor vendor list that identifies companies that are disqualified from public contracting and purchasing process for 365 days. The DMS shall publish an updated version of the list quarterly, and electronically post the list on its website.

A company is considered disqualified from the public contracting and purchasing process as of the date a final order is entered. Once placed on the forced labor vendor list, a company may not:

- Submit a bid, proposal, or reply on a contract to provide any commodities to an agency;
- Be awarded a contract or perform work as a contractor, supplier, or subcontractor; or
- Transact business pertaining to the provision of commodities with an agency.

Likewise, an agency (a state executive branch entity generally) may not (1) accept a bid, proposal, or reply from; (2) award a contract to; or (3) transact business with a company on the forced labor vendor list. These prohibitions apply for a period of 365 days after the date the company was placed on the list, unless the company is removed from the list earlier.

The bill requires all invitations to bid, requests for proposals, invitations to negotiate, and any written contracts for the provision of commodities by an agency to include a statement informing companies of such requirements related to forced labor. Contracts with an agency for the provision of commodities entered into or renewed on or after July 1, 2024, must contain a provision that allows the awarding agency to terminate the contract if the company is placed on the forced labor vendor list.

Prior to putting a company on the forced labor vendor list, the DMS must investigate reasonable and credible information that a company has submitted a false certification or provided a commodity produced by forced labor. If good cause exists, and if placement on the list is in the public interest, the DMS must notify the company in writing of its intent to place the company on the list. The notice must include a notice of ch. 120, F.S., hearing rights and of the applicable hearing procedures and time requirements.

A company that submits a false certification that the commodities it offered to the agency had not been produced, in whole or in part, by forced labor and is subsequently placed on the forced labor vendor list must be assessed a fine by the DMS.

The bill clarifies that placement on the forced labor vendor list does not affect any rights or obligations under any contract, franchise, or other binding agreement which predate such placement.

The bill is not expected to impact state or local government revenues and expenditures.

The bill takes effect July 1, 2024.

II. Present Situation:

Government Contracting and Procurement

Chapter 287, F.S., regulates state agency¹ procurement of personal property and services. The Department of Management Services (DMS) is responsible for overseeing state purchasing activity including professional and contractual services as well as commodities needed to support agency activities.² Its responsibilities include creating uniform agency procurement rules,³ implementing the online procurement program,⁴ and procuring state term contracts.⁵ The DMS is also responsible for registering vendors that wish to provide goods or services to the state⁶ and maintaining lists of vendors who may not submit bids, proposals, or replies to agency solicitations.⁷ The Division of State Purchasing in the DMS establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.⁸

¹ As defined in s. 287.012(1), F.S., "agency" means 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. "Agency" does not include the university and college boards of trustees or the state universities and colleges.

² See ss. 287.032 and 287.042, F.S.

³ See ss. 287.032(2) and 287.042(3), (4), and (12), F.S.

⁴ See s. 287.057(24), F.S. See ss. 287.032 and 287.042, F.S.

⁵ See ss. 287.042(2) and 287.056, F.S.

⁶ See ss. 287.032 and 287.042, F.S.; see also Department of Management Services, *Vendor Registration and Vendor Lists*, https://www.dms.myflorida.com/business_operations/state_purchasing/state_agency_resources/vendor_registration_and_vendor_lists (last visited Jan. 23, 2024).

⁷ See ss. 287.1351, 287.133, 287.134, and 287.137, F.S.

⁸ Chapter 287, F.S., provides requirements for the procurement of personal property and services. Part I of that chapter pertains to commodities, insurance, and contractual services, and part II pertains to means of transport.

Current law requires contracts for commodities or contractual services in excess of \$35,000 to be procured utilizing a competitive solicitation process.^{9,10} These competitive procurement provisions apply to an agency, defined as “any of the various state officers, departments, board commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive boards of state government.¹¹ This definition does not include municipalities and local governments; and university and college boards of trustees, and the state universities and colleges are specifically excluded from this definition.¹²

State agencies may use a variety of procurement methods, depending on the cost and characteristics of the needed good or service, the complexity of the procurement, and the number of available vendors. These methods include the following:

- Invitations to bid,¹³ used when an agency determines that standard services or goods will meet needs, wide competition is available and the vendor’s experience will not greatly influence the agency’s results;
- Requests for proposals,¹⁴ used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- Invitations to negotiate,¹⁵ used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services, by an agency dealing with a limited number of vendors.

A competitive solicitation for contractual services in excess of \$35,000 must be evidenced by a written agreement (contract) embodying all provisions and conditions of the procurement.¹⁶ The contract must include, but not be limited to, provisions on the following:

- Bills for fees or other compensation for services or expenses must be submitted in detail sufficient for a proper preaudit and postaudit of such items;¹⁷
- Bills for any travel expenses be submitted in accordance with the law on per diem and travel expenses of public officers, employees, or authorized persons;¹⁸
- Allowing unilateral cancellation by the agency for refusal by the contractor to allow public access to all documents, papers, letters, or other material made or received by the contractor in conjunction with the contract, unless the records are exempt;¹⁹

⁹ Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold provided in s. 287.017, F.S., to be competitively bid.

¹⁰ As defined in s. 287.012(6), F.S., “competitive solicitation” means the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement.

¹¹ Section 287.012(1), F.S.

¹² *Id.*

¹³ Section 287.057(1)(a), F.S.

¹⁴ Section 287.057(1)(b), F.S.

¹⁵ Section 287.057(1)(c), F.S.

¹⁶ Section 287.058(1), F.S., provides an exception for the written agreement for contractual services that provide health and mental health services or drugs in the examination, diagnosis, or treatment of sick or injured state employees or provide other benefits as required by ch. 440, F.S.

¹⁷ Section 287.058(1)(a), F.S.

¹⁸ Section 287.058(1)(b), F.S.

¹⁹ Section 287.058(1)(c), F.S.

- Specifying a scope of work clearly establishing all tasks the contractor is required to perform;²⁰
- Dividing the contract into quantifiable, measurable, and verifiable units of deliverables that must be received and accepted in writing by the contract manager before payment;²¹
- Specifying the performance criteria and the final date by which such criteria must be met for completion of the contract;²²
- Specifying the conditions that must be met for a renewal of the contract, including, but not limited to:²³
 - The contract may be renewed for a period not exceeding three years or the term of the original contract, whichever is longer;
 - The renewal price for the contractual service as set forth in the bid, proposal, or reply;
 - Specifying that contract renewals are contingent upon satisfactory performance evaluations by the agency and subject to the availability of funds;
- Specifying the financial consequences if the contractor fails to perform in accordance with the contract;²⁴ and
- Addressing the property rights of any intellectual property related to the contract and the specific rights of the state regarding the intellectual property if the contractor fails to provide the services or is no longer providing services.²⁵

The contract must be signed by the agency head or designee and the contractor before the rendering of any contractual service in excess of \$35,000.²⁶ The Chief Financial Officer (CFO) may waive the contracting requirements for the procurement of certain specified commodities or services, unless otherwise provided in the annual General Appropriations Act (GAA) or the substantive bill implementing the GAA.²⁷ A contract may not prohibit a contractor from lobbying the executive or legislative branch concerning the scope of services, performance, term, or compensation regarding any contract to which the contractor and a state agency are parties, after contract execution and during the contract term.²⁸ Each public agency contract for services must authorize the public agency to inspect the following records within 10 days after the agency makes a request:²⁹

- Financial records, papers, and documents of the contractor that are directly related to the performance of the contract or the expenditure of state funds.³⁰
- Programmatic records, papers, and documents of the contractor that the public agency determines are necessary to monitor the performance of the contract or to ensure that the terms of the contract are being met.³¹

²⁰ Section 287.058(1)(d), F.S.

²¹ Section 287.058(1)(e), F.S.

²² Section 287.058(1)(f), F.S.

²³ Section 287.058(1)(g), F.S.

²⁴ Section 287.058(1)(h), F.S.

²⁵ Section 287.058(1)(i), F.S.

²⁶ Section 287.058(2), F.S.

²⁷ Section 287.058(5), F.S., incorporates s. 287.057(3)(e), F.S., which lists 13 specific types of commodities or services for which the contracting requirement may be waived, including, for example, artistic services, lectures by individuals, certain health services, family placement services, and services or commodities provided by governmental entities.

²⁸ Section 287.058(6), F.S.

²⁹ Section 216.1366(1), F.S.

³⁰ Section 216.1366(1)(a), F.S.

³¹ Section 216.1366(1)(b), F.S.

Department Vendor Lists

The DMS maintains a vendor list based on the vendor registration process,³² and may remove from the vendor list any source of supply that fails to fulfill any of its duties specified in a contract.³³ The DMS also maintains the following lists of disqualified, scrutinized, or removed vendors:

- Suspended Vendor List;³⁴
- Convicted Vendor List;³⁵
- Discriminatory Vendor List;³⁶
- Scrutinized List of Prohibited Companies; and³⁷
- Antitrust Violator Vendor List.³⁸

Forced Labor

The term “forced labor” is defined as part of the Tariff Act of 1930 (Act), to mean “all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily, including forced or indentured child labor.”³⁹ The Act also prohibits importing any product into the U.S. that was mined, produced, or manufactured wholly or in part by forced labor, with some limited exceptions.⁴⁰

Florida Law includes the term “forced labor” within the context of human trafficking⁴¹, finding that that victims of human trafficking are subjected to force, fraud, or coercion for the purpose of sexual exploitation or forced labor.⁴² Human trafficking occurs in many forms of labor exploitation including domestic servitude, restaurant work, janitorial work, sweatshop factory work, and migrant agricultural work.⁴³ Any person who knowingly, or in reckless disregard of the facts, engages in human trafficking, attempts to engage in human trafficking, or benefits financially by receiving anything of value from participation in a venture that has subjected a

³² Section 287.042, F.S. See also The Department of Management Services, *Vendor Resources*, available at https://www.dms.myflorida.com/business_operations/state_purchasing/vendor_resources (last visited Jan. 23, 2024).

³³ Section 287.042(1)(b), F.S.

³⁴ Section 287.1351, F.S.

³⁵ Section 287.133, F.S.

³⁶ Section 287.134, F.S.

³⁷ Section 287.135, F.S.

³⁸ Section 287.137, F.S.

³⁹ 19 U.S.C. § 1307.

⁴⁰ *Id.*

⁴¹ Section 787.06 (2)(d), F.S., defines “human trafficking” as transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, purchasing, patronizing, procuring, or obtaining another person for the purpose of exploitation of that person.

⁴² Section 787.06(1)(a), F.S.

⁴³ Section 787.06(1)(b), F.S.

person to human trafficking for labor,⁴⁴ services,⁴⁵ or commercial sexual activity, commits a crime.⁴⁶

Administrative Procedures Act

The Administrative Procedures Act (APA) provides that a party who wishes to challenge an agency determination of his or her substantial interests must file a petition for a hearing with the agency. An agency request for an administrative law judge (ALJ) must be made to the Division of Administrative Hearings within 15 days after receiving the petition.^{47,48} All parties shall be given an opportunity for a hearing after reasonable notice.⁴⁹ Generally, agency determinations that impact a party's substantial interests are subject to either an informal hearing in which the petitioner does not dispute any material facts of the agency's final action,⁵⁰ or a formal hearing, in which the petitioner disputes a material fact of the agency's final action.⁵¹

III. Effect of Proposed Changes:

Section 1 creates s. 287.1346, F.S., to define the following terms:

- “Forced labor” means work or service exacted from any person, including a minor, under the menace of a penalty for nonperformance and for which the worker does not offer himself or herself voluntarily or an activity that violates s. 787.06.
- “Forced labor vendor list” or “list” means the list required to be created and maintained by the DMS pursuant to paragraph (4)(d).
- “Senior management” includes chief executive officers; assistant chief executive officers, including, but not limited to, assistant presidents, vice presidents, or assistant treasurers; chief financial officers; chief personnel officers; or any employee of an entity performing similar functions.

Agency Procurement of Commodities

The bill prevents a company on the forced labor vendor list from:

- Submitting a bid, proposal, or reply on a contract to provide any commodities to an agency;
- Being awarded a contract or performing work as a contractor, supplier, subcontractor, or consultant with an agency for the provision of commodities; or
- Transacting business pertaining to the provision of commodities with any agency.

Likewise, an agency cannot (1) accept a bid, proposal, or reply from; (2) award a contract to; or (3) transact business with a company on the forced labor vendor list. These prohibitions apply for

⁴⁴ Section 787.06(2)(e), F.S., defines “labor” as: work of economic or financial value.

⁴⁵ Section 787.06(2)(h), F.S., defines “services” as: any act committed at the behest of, under the supervision of, or for the benefit of another. The term includes, but is not limited to, forced marriage, servitude, or the removal of organs.

⁴⁶ Section 787.06(3), F.S.

⁴⁷ Section 120.569(2)(a), F.S.

⁴⁸ Section 120.569, F.S., applies except when mediation is elected by all parties pursuant to s. 120.573, or when a summary hearing is elected by all parties pursuant to s. 120.574, F.S.

⁴⁹ The notice must contain a statement of (1) time, place, and nature of the hearing; and (2) the legal authority and jurisdiction under which the hearing is to be held. Section 120.569(2)(b), F.S.

⁵⁰ Section 120.57(2), F.S.

⁵¹ Sections 120.569 and 120.57(1), F.S.

a period of 365 days after the date the company was placed on the list, unless the company is removed from the list earlier.

The bill requires all invitations to bid, requests for proposals, invitations to negotiate, and any written contracts for the provision of commodities by an agency to include a statement informing companies of such requirements related to forced labor. Contracts with an agency for the provision of commodities entered into or renewed on or after July 1, 2024, must contain a provision that allows the awarding agency to terminate the contract if the company is placed on the forced labor vendor list.

A member of a company's senior management must certify in writing that, to the best of his/her knowledge, the commodities offered to the agency have not been produced, in whole or in part, by forced labor when a company submits a bid, proposal, or reply for a contract and before the company enters into or renews a contract with an agency for the provision of commodities. A company must notify the Department of Management Services (DMS) within 30 days of gaining knowledge that it provided a commodity produced, in whole or in part, by forced labor. Additionally, an agency that learns that it received a commodity produced, in whole or in part, by forced labor must report this information to the DMS in writing within 10 days.

Forced Labor Vendor List

The DMS must create and maintain a forced labor vendor list. The list must contain the name and address of each company that has been disqualified from the public contracting and purchasing process. The DMS shall publish an updated version of the list quarterly, and electronically post the list on its website. A company is disqualified from the public contracting and purchasing process as of the date a final order is entered. A company is removed automatically from the list 366 days after the date of the final order placing the company on the list.

The DMS must investigate reasonable and credible information that a company has submitted a false certification or provided a commodity produced by forced labor. If good cause exists, and if placement on the list is in the public interest, the DMS must initiate a proceeding to place the company on the forced labor vendor list, and notify the company in writing of its intent. The DMS's notice must include a notice of ch. 120, F.S., hearing rights and of the applicable hearing procedures and time requirements.

The bill provides specific guidance on when it is not in the public interest to place a company on the forced labor list. Specifically, a company cannot be placed on the list if any of the following apply:

- The company did not provide to an agency a commodity produced, in whole or in part, by forced labor;
- The company's senior management did not have actual or constructive knowledge that its employee provided an agency a commodity produced, in whole or in part, by forced labor;
- The member of the company's senior management responsible for the contract under which the company provided to the agency a commodity produced, in whole or in part, by forced labor did not have actual or constructive knowledge that the commodity was produced, in whole or in part, by forced labor and a reasonable person under similar circumstances to that

of such member would not have known that the commodity was produced, in whole or in part, by forced labor;

- The member of the company's senior management responsible for the contract under which the company provided to the agency a commodity produced, in whole or in part, by forced labor is no longer an employee of the company; or
- One of the following occur:
 - For a contract with an executive agency, the Governor makes a public finding that, absent the provision of such commodities by the company, the agency would be unable to obtain the commodities.
 - For a contract with an agency of a state constitutional officer other than the Governor, that officer makes a public finding that, absent the provision of such commodities by the company, the agency would be unable to obtain the commodities.

The bill also requires the following factors be considered when determining whether it is in the public interest to place a company on the forced labor vendor list:

- The nature and details of the provision of the commodity produced, in whole or in part, by forced labor.
- The degree of culpability of the company proposed to be placed on the forced labor vendor list.
- Prior or future self-policing by the company to prevent the provision of a commodity produced, in whole or in part, by forced labor.
- The company's compliance with the notification requirements.
- The needs of agencies for additional competition in the procurement of commodities in their respective markets.
- Mitigation based upon any demonstration of good citizenship by the company, including, but not limited to, the adoption of a formal plan to cease producing or providing commodities produced, in whole or in part, by forced labor.

A company may file a petition for a hearing to dispute issues of material fact pursuant to the agency's determination within 21 days of its receipt of the DMS's notice of intent to place the company on the forced labor vendor list. The bill specifically prevents a company from filing a petition for a hearing unless it involves disputed issues of material fact. If a company does not request a hearing, the DMS is required to enter a final order, which places the company on the list.

The bill requires that ch. 120, F.S., applies to such hearings, but sets the following exceptions:

- The petition must be filed with the DMS. The DMS shall be a party to the proceeding for all purposes.
- Within 5 days after the filing of the petition, the department shall notify the Division of Administrative Hearings (DOAH) of the request for a hearing. DOAH shall, within 5 days after receipt of notice from the DMS, assign an administrative law (ALJ) judge to the proceeding. The ALJ, upon request by a party, may consolidate related proceedings.
- The ALJ shall conduct the hearing within 30 days after being assigned, unless otherwise stipulated by the parties.
- Within 30 days after the hearing or receipt of the hearing transcript, whichever is later, the ALJ shall enter a final order, which shall consist of findings of fact, conclusions of law,

interpretation of agency rules, and any other information required by law or rule to be contained in the final order. The final order must determine whether or not to place the company on the forced labor vendor list.

- The ALJ's final order constitutes final agency action for purposes of s. 120.68, F.S.
- At any time after the filing of the petition, the parties may opt to informally dispose of the matter pursuant to s. 120.57(4), F.S. In that event, the ALJ shall enter a final order adopting the stipulation, agreed settlement, or consent order.

The DMS must prove by clear and convincing evidence that it is in the public interest to place the company on the forced labor vendor list. The bill creates a rebuttable presumption, wherein proof that the company provided a commodity produced, in whole or in part, by forced labor to an agency constitutes a presumption that it is in the public interest for the company to be placed on the forced labor vendor list. The company may rebut this presumption by proving, by a preponderance of the evidence, that it is not in the public interest for such company to be placed on the list based upon evidence required in the bill.

The ALJ must issue a final order, which constitutes final agency action, determining whether to place the company on the forced labor vendor list.

Removal from the Forced Labor Vendor List

The bill allows a company placed on the forced labor vendor list to petition for its removal after 6 months since the date a final order is entered placing them on the list. Such petition must be filed with the DMS.

An ALJ may remove a company from the forced labor vendor list upon a determination that removal is in the public interest. The ALJ must consider any relevant factors, including whether the company has prepared a corrective action plan that addresses the original grounds for placement on the list as well as any additional evidence that the company has in good faith taken significant remedial action.

A company cannot petition for another hearing if a petition for removal is denied. The bill allows the DMS to petition for removal prior to the 365-day period.

False Certification

A company that submits a false certification that the commodities it offered to the agency were not been produced, in whole or in part, by forced labor and is subsequently placed on the forced labor vendor list must be assessed a fine by the DMS. Specifically, the bill requires the fine be the greater of \$1,000, or an amount equal to 20 percent of the value of the commodity provided to the agency under the contract.

Miscellaneous

The bill clarifies that placement on the forced labor vendor list does not affect any rights or obligations under any contract, franchise, or other binding agreement which predate such placement.

The bill provides that any fines collected be deposited into the General Revenue Fund.

Section 2 provides that the bill will take effect on July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

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

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The DMS may incur additional workload for the oversight and management for maintaining and administering the forced labor vendor list; however, such, workload should be absorbed within the current resources of the DMS. The bill may have an indeterminate positive fiscal impact on the General Revenue Fund by fines collected under the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 287.1346 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.