

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

The bill does not directly implicate any of the House principles.

B. EFFECT OF PROPOSED CHANGES:

Present situation

The Department of Management Services (DMS) functions as the centralized authority overseeing the state procurement process. Part I of Chapter 287, F.S., sets forth the requirements for the procurement of commodities and contractual services by state agencies. State agencies must comply with the competitive procurement requirements of Chapter 287, F.S.¹ and administrative procurement rules adopted by the DMS.² For contractual service procurements valued in excess of \$25,000, one of three types of competitive solicitations must be used: invitation to bid, request for proposals, and invitation to negotiate.

The procurement process is also partly decentralized. Generally, in the absence of a state term contract, each agency may procure commodities and contractual services on their own terms.³ The state has increasingly shifted to external provision of services or “outsourcing.”⁴

Previous Initiatives to Achieve Desired Results in Outsourcing

Governor Bush issued an Executive Order on March 11, 2004, creating the Center for Efficient Government (Center) within DMS.⁵ The executive order stated that the Center was the “enterprise wide gateway for best business practices in order to improve the way state agencies deliver services to Florida’s citizens.”⁶

The Florida Efficient Government Act

In 2006, the Florida Efficient Government Act (the “Act”) enacted by the Legislature became law.⁷ The stated intent of the Act is for each state agency to “focus on its core mission and deliver services effectively and efficiently by leveraging resources and contracting with private sector vendors whenever vendors can more effectively and efficiently provide services and reduce the cost of government.”

The Act does not apply to all contracts.⁸ Some are exempt; for instance, contracts made pursuant to s. 287.057(5) (e),⁹ (f),¹⁰ and (g),¹¹ F.S., as are contracts made under s. 287.057(22), F.S.¹² are exempt.

¹ See generally Ch. 287, F.S. There are, however, numerous exemptions from the competitive solicitation requirements; e.g., emergency purchases, single source purchases, certain specially identified services such as artistic and legal.

² Rule 60A-1.002(3), F.A.C.

³ Section 287.056, F.S.

⁴ The Center for Efficient Government documented at least 138 outsourcing projects undertaken between January 1999 and June 2004.

⁵ Executive Order 04-45.

⁶ The Center began operations in April 2004. The Executive Order stated that it was to continue until January 3, 2007. However, the Governor’s veto of SB 1146 on June 27, 2005, creating the Efficient Government Commission, effectively precluded any further funding of the Center.

⁷ Chapter 2006-224, L.O.F.

⁸ S. 287.0571(4), F.S.

⁹ Certain medical devices.

¹⁰ Personal services contracts (i.e., lectures by individuals, artistic services, legal services).

¹¹ Continuing education events offered to the general public.

In addition, contracts made under the Consultants' Competitive Negotiation Act¹³ are exempt, as are road construction contracts let by the Florida Department of Transportation.

The Act requires state agencies to prepare a business case for outsourcing projects¹⁴ and specifies the required elements of the business case,¹⁵ and directs the Council on Efficient Government (the "Council") to analyze these business cases and issue advisory opinions to the Governor, the Speaker of the House of Representatives, and the President of the Senate. The Act also includes requirements specific to outsourcing contracts.¹⁶ Finally, for any contract in excess of \$1 million dollars, at least one of the individuals negotiating for the state must be a certified contract negotiator.¹⁷ If the value of the contract is in excess of \$10 million dollars, at least one individual conducting negotiations must be a Project Management Professional, as certified by the Project Management Institute.

Contract Management

State agencies typically include various oversight mechanisms for program monitoring and contract management. For example, Department of Juvenile Justice (DJJ) Policy No. 1680 requires program monitoring and contract management for all DJJ contracts. Contract monitors function to make sure contractually required services are delivered in accordance with the terms of the contract, approve corrective action plans for non-compliant providers, and withhold payment when services are not delivered or do not meet quality standards.

According to DJJ, the vast majority of DJJ dollars spent on services, 63 percent, is provided pursuant to contract with third party providers. This amounts to approximately \$431 million in contracted services. The highest percentage of total funds contracted out to private providers is in the area of prevention (20 contracts) where 96 percent of the dollars are spent with third-party providers. Residential (112 contracts) comes in second, with 82 percent of the dollars contracted out to private providers. A majority (54 percent) of dollars for probation are spent with private providers. Detention (67 contracts) is the least privatized, with only 18 percent of funds contracted out to private entities.

Providers have criticized the DJJ practice of modifying provider requirements in a way that increases provider expenditures in excess of those contemplated when the contract was executed. This can occur in the form of DJJ modifications to policies and manuals after contract execution that they then are required to comply with without additional compensation. This can amount to a cost-shift from the DJJ to private providers. The DJJ has acknowledged that this has occurred in the past and is working to address this issue through modifications to its contract form and adoption of agency rules. As recently as January 2007, the DJJ added a provision to its standard contract "providing for the

¹² A contract with an independent, non-profit accredited college or university, when such contract is made "on the same basis as [the agency] may contract with any state university or college."

¹³ Section 287.055, F.S. The CCNA covers architectural, engineering, and other construction-related services.

¹⁴ For contracts less than \$1 million in all fiscal years, a business case must be submitted to the council, the Governor, the President of the Senate, and the Speaker of the House of Representatives after the agency has negotiated with the vendor, but 30 days before the contract is signed with the vendor. For contracts between \$1 million and \$10 million in any fiscal year, an initial business case must be submitted 30 days before the solicitation is released. This must be followed by a final business case, to be submitted at least 30 days before the contract is signed. For contracts in excess of \$10 million in any fiscal year, the initial business case must be submitted 60 days in advance of the agency's solicitation, and the council must respond to the agency by providing its own evaluation of the business case within 30 days of the solicitation. As is required for the other project levels, a final business case must be submitted after negotiation, but before the contract is signed.

¹⁵ A business case must include such elements as a description of the service to be provided; an analysis of the agency's current "in-house" performance of the service; the goals and rationale of the project; a description of available options for achieving the stated goals; an analysis of the advantages and disadvantages of each option; a description of the current marketplace for the services; and a detailed cost-benefit analysis. See s. 287.0574(4), F.S.

¹⁶ These include a detailed scope of work; a service level agreement describing all requirements and responsibilities of the contractor; a cost-schedule, payment terms, and other financial items; a specific transition implementation schedule; clear and specific identification of all required performance standards; specific accounting requirements; clear and specific access provisions regarding accounting records; and a contingency plan in the event of nonperformance by the contractor. See s. 287.0574(5), F.S.

¹⁷ Additional requirements for negotiation teams can be found at s. 287.057(17)(b), F.S.

renegotiation of a contract when changes are made which impact the provider's obligations under the contract."¹⁸

The DJJ is also required to conduct Quality Assurance reviews of all of its programs and services.¹⁹

Regarding payment disputes, under the Florida prompt payment law, a vendor ombudsman is provided through the Department of Financial Services (DFS).²⁰ In the case of DJJ contracts, the contract manager or the Assistant Secretary for the program area are assigned the responsibility for resolving disputes with providers. Agencies are permitted to make partial payments to a provider under contract upon partial delivery of goods or services.²¹

DJJ Review of Contracting Practices and Processes

At the request of DJJ Secretary McNeil, the Department of Financial Services (DFS) has agreed to undertake a "detailed administrative process review and customized training" for DJJ staff. According to the DFS, the review will encompass contract and grant solicitation, award, management, and payment processes. This review is already underway, with a training session scheduled for April 23-24, 2007.²²

Effect of Proposed Changes

Under the bill, the outsourcing of mental health, substance abuse, child welfare, and juvenile justice services by the Departments of Juvenile Justice, Corrections, and Children and Family Services, and the Agency for Health Care Administration, would be exempt from the requirements of the Florida Efficient Government Act and instead be made subject to a separate set of requirements proposed in the bill. In order to outsource these services, these agencies would be required to:

- recognize and accept accreditation by national accreditation organizations as appropriate credentials for service providers;
- establish model rates of payment for services provided based on differences in costs among different parts of the state, and implement a mechanism for annual rate adjustments based on the Consumer Price Index;
- prohibit cost reimbursement as a method of payment, but reimburse providers for the extra day of service provided during a leap year, and reimburse on a monthly basis within prescribed timeframes;
- require the agency to reopen negotiations with the provider in order to modify the scope of work of an executed contract; use a cost-benefit analysis as part of any negotiation, and justify the need for any contract amendments resulting from negotiations;
- establish and require reasonable time periods for negotiating and executing a contract once it has been awarded;
- provide an ombudsman and a procedure for resolving contract disputes;
- submit an annual report to the Legislature based on certain specified practices and standards; and,

¹⁸ Letter from Secretary McNeil, DJJ, to State Representative Mitch Needelman, April 12, 2007.

¹⁹ Section 985.632, F.S.

²⁰ Section 215.422(7), F.S.

²¹ Section 215.422(2)(c), F.S.

²² Letter from Douglas Darling, Department of Financial Services, to State Representative Mitch Needelman, April 12, 2007.

- not treat funds required for cash flow and program expansion and development as excess revenue.

In addition, these agencies would be required to include certain specified terms in contracts with providers . These include provisions to:

- require contract deliverables to be based on the requirements of the contracting agency or, as applicable, the primary contracting agency, applicable state laws, and national outcome-related standards or measures. In the absence of any best practices or standards, the initial contract must be used to establish baseline measures and deliverables.
- include clear measures and specifications when deliverables are specified in a contract, and that those be stated within established parameters.
- limit annual monitoring visits to a reasonable number, allowing for more if warranted by the performance of the managing entity or provider.
- require all financial audits to be conducted in accordance with generally accepted accounting standards.

C. SECTION DIRECTORY:

WHEREAS clauses are provided as a preamble to the bill.

Section 1 amends s. 287.0571(4), F.S., to exempt the outsourcing of certain human services related to mental health, substance abuse, child welfare, and juvenile justice from the provisions of the Florida Efficient Government Act.

Section 2 creates s. 287.0575, F.S., imposing requirements upon certain specified state agencies pertaining to the outsourcing of certain human services.

Section 3 provides the bill will take effect on July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The departments of Children and Family Services (DCF), Juvenile Justice (DJJ) and Corrections (DOC) estimate the following additional costs if HB 495 were to pass:

Agency	FTE	FY 2007-08	FY 2008-09 and beyond
DCF	15	5,094,081	965,901
DJJ	46	4,203,952	2,993,897
DOC	95	6,812,386	6,641,908
Total	156	16,110,419	10,601,706

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate.

D. FISCAL COMMENTS:

Cost figures cited above include \$994,138 for DJJ and \$4.1 million for DCF for an extra day payment for February 29, 2008. Additional leap-year payments will be required once every four years thereafter.

The Agency for Health Care Administration estimates that it would experience no additional costs if HB 495 were to pass.

The House version of the General Appropriations Act does not contain increased funding for DCF, DJJ or DOC for the increased costs they have identified. If additional funding is not provided, these agencies would be expected to absorb these costs within their overall budget. The extent to which this would impact their ability to successfully carry out their primary missions is not known.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to require cities or counties to spend funds or take actions requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement was submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES