

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1409 State Contracting
SPONSOR(S): Albritton
TIED BILLS: **IDEN./SIM. BILLS:** SB 1626

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	15 Y, 0 N, As CS	Naf	Williamson
2) Government Operations Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

State procurement of personal property and services is governed by ch. 287, F.S. The Department of Management Services is responsible for maintaining uniform rules for and overseeing agency procurement, as well as for negotiating statewide contracts to leverage the state's buying power.

Effective October 1, 2013, the bill transfers uniform policy authority and oversight of agency procurement to the Department of Financial Services, but leaves with the Department of Management Services the responsibility for the actual procurement of commodities and contractual services for agencies. It makes changes to conform to the transfer of policy and oversight authority and establishes related duties for the Department of Financial Services. It also provides an appropriation to the Chief Financial Officer for the newly-created duties.

The bill makes additional revisions to state agency procurement and contracting provisions, including, but not limited to:

- Revision of the Department of Management Services' power to maintain a vendor list;
- Revision of exemptions from competitive-solicitation requirements;
- Revision of contract manager, grant manager, or contract negotiator qualifications;
- Revision of requirements for agreements funded with federal and state assistance; and
- Revision of reporting requirements for state agency contract information.

The bill revises reporting duties of the Auditor General relating to transparency requirements.

The bill amends the requirement in the Transparency Florida Act that the Chief Financial Officer provide public access to a state contract management system to, among other provisions, require specified governmental entities to post information about their contracts, effective November 1, 2013.

The bill requires the Chief Financial Officer to review and report recommendations relating to the state's system of procurement, and provides an appropriation for completion of the report.

The bill provides for the future repeal of ch. 287, F.S., relating to the procurement of personal property and services.

The bill appears likely to have an indeterminate fiscal impact on state and local governments due to the transfer of duties from the Department of Management Services to the Department of Financial Services and due to the reporting requirements.

This bill may be a county or municipality mandate. See Section III.A.1. of the analysis.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Department of Management Services

The Department of Management Services (DMS) provides administrative and support services to other state agencies and to state employees. The DMS's areas of responsibility include, but are not limited to:

- Employee benefits (retirement and insurance);
- Human resource management;
- Business operations (real estate development and management, state purchasing, and specialized services);
- Telecommunications; and
- Agency administration.¹

Divisions and programs established within the DMS to execute such duties are the:

- Facilities Program;
- Technology Program;
- Workforce Program;
- Support Program;
- Federal Property Assistance Program;
- Administration Program;
- Division of Administrative Hearings;
- Division of Retirement; and
- Division of State Group Insurance.²

State Procurement of and Contracts for Personal Property and Services

Chapter 287, Florida Statutes

Chapter 287, F.S., regulates state agency³ procurement of personal property and services.⁴ The DMS is responsible for overseeing state purchasing activity including professional and contractual services as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology.⁵ 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.

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 include the following:

- "Single source contracts," which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;

¹ See the Department of Management Services website, <http://www.dms.myflorida.com/> (last visited February 3, 2012).

² See s. 20.22(2), F.S.

³ 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.

⁴ Local governments are not subject to the provisions of ch. 287, F.S. Local governmental units may look to the chapter for guidance in the procurement of goods and services, but many have local policies or ordinances to address competitive solicitations.

⁵ See ss. 287.032 and 287.042, F.S.

- "Invitations to bid," which are 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," which are 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," which are used when negotiations are determined to be necessary to obtain the best value and involve a request for high complexity, customized, mission-critical services, by an agency dealing with a limited number of vendors.⁶

Contracts for commodities or contractual services in excess of \$35,000 must be procured utilizing a competitive solicitation process.⁷ However, specified contractual services and commodities are not subject to competitive-solicitation requirements.⁸

The chapter establishes a process by which a person may file an action protesting a decision or intended decision pertaining to contracts administered by the DMS, a water management district, or certain other agencies.⁹

Agreements Funded with Federal and State Assistance

Current law requires an agency agreement that provides state financial assistance to a recipient or subrecipient,¹⁰ or that provides federal financial assistance to a subrecipient,¹¹ to include a provision specifying scope of work that clearly establishes the tasks the recipient or subrecipient is required to perform, and a provision dividing the agreement into quantifiable units of deliverables that must be received and accepted in writing by the agency before payment. Each deliverable must be directly related to the scope of work and must specify the required minimum level of service to be performed and the criteria for evaluating the successful completion of each deliverable.¹²

Reporting of State Agency Contract Information

Current law requires each state agency to report to the Department of Financial Services (DFS) the following information relating to certain contracted activities:

- The nature of the commodities or services provided;
- The term of the contract;
- The final obligation made by the agency;
- A summary of any time constraints that apply to the procurement;
- The justification for not using the competitive solicitation, including any statutory exemption or exception; and
- Other information regarding the contract or the procurement that the DFS requires.¹³

Qualifications for Contract Managers and Contract Negotiators

Current law requires certain contract managers to attend training conducted by the Chief Financial Officer (CFO).¹⁴ It also requires certain contract negotiators to be certified based upon rules adopted by the DMS.¹⁵

⁶ See ss. 287.012(6) and 287.057, F.S.

⁷ Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold contained in s. 287.017, F.S., to be competitively bid. 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.

⁸ See s. 287.057(3)(f), F.S.

⁹ See s. 287.042(2)(c), F.S.

¹⁰ As defined in s. 215.97, F.S.

¹¹ As defined by applicable United States Office of Management and Budget circulars.

¹² See s. 215.971, F.S.

¹³ See s. 216.0111, F.S.

¹⁴ See s. 287.057(14), F.S.

¹⁵ See s. 287.057(16)(b), F.S.

Chief Financial Officer and Department of Financial Services

The CFO is an elected constitutional Cabinet member.¹⁶ The CFO serves as the chief fiscal officer of the state and is responsible for settling and approving accounts against the state and keeping all state funds and securities.¹⁷ Such responsibilities include, but are not limited to, auditing and adjusting accounts of officers and those indebted to the state,¹⁸ paying state employee salaries,¹⁹ and reporting all disbursements of funds administered by the CFO.²⁰

The CFO also serves as the head of the DFS, which executes the duties of the CFO.²¹ The DFS consists of the following divisions:

- The Division of Accounting and Auditing;
- The Division of State Fire Marshal;
- The Division of Risk Management;
- The Division of Treasury;
- The Division of Insurance Fraud;
- The Division of Rehabilitation and Liquidation;
- The Division of Insurance Agents and Agency Services;
- The Division of Consumer Services;
- The Division of Workers' Compensation;
- The Division of Administration;
- The Division of Legal Services;
- The Division of Information Systems;
- The Office of Insurance Consumer Advocate;
- The Division of Funeral, Cemetery, and Consumer Services; and
- The Division of Public Assistance Fraud.²²

The Financial Services Commission;²³ Board of Funeral, Cemetery, and Consumer Services;²⁴ and Strategic Markets Research and Assessment Unit²⁵ also are established within the DFS.

Auditor General

The Auditor General is appointed by the Legislature to conduct audits of records and to perform related duties as prescribed by law.²⁶ Such duties include, but are not limited to:

- Conducting financial audits of state government, state universities, state colleges, and district school boards;
- Conducting operational and performance audits of accounts and records of state agencies, state universities, state colleges, district school boards, the Florida Clerks of Court Operations Corporation, water management districts, and the Florida School for the Deaf and the Blind;
- Conducting performance audits of local government financial reporting systems; and

¹⁶ See art. 4, s. 4(a) and (c), Fla. Const.

¹⁷ See art. 4, s. 4(c), Fla. Const., and s. 17.001, F.S.

¹⁸ See s. 17.04, F.S.

¹⁹ See s. 17.09, F.S.

²⁰ See s. 17.11, F.S.

²¹ See s. 20.121, F.S.

²² Section 20.121(2), F.S.

²³ The Financial Services Commission is composed of the Governor and of the Cabinet members, and includes the Office of Insurance Regulation and the Office of Financial Regulation. The offices are responsible for activities of the commission relating to regulation and investigation of violations of laws relating to insurance and financial institutions. See s. 20.121(3)(a), F.S.

²⁴ The Board of Funeral, Cemetery, and Consumer Services is created within the Division of Funeral, Cemetery, and Consumer Services, and regulates licenses issued under ch. 497, F.S. (Funeral, Cemetery, and Consumer Services). See ss. 20.121(4) and 497.103, F.S.

²⁵ The Strategic Markets Research and Assessment Unit creates reports on issues, trends, and threats that broadly impact the condition of the financial services industries. See s. 20.121(6), F.S.

²⁶ See art. III, s. 2, Fla. Const., and s. 11.45(2)(a), F.S.

- Conducting performance audits of the Department of Revenue's administration of the ad valorem tax laws.²⁷

The Auditor General also must engage in certain reporting activities, such as:

- Notification of the Legislative Auditing Committee²⁸ of any local governmental entity, district school board, charter school, or charter technical career center that does not comply with annual financial audit reporting requirements;²⁹ and
- Annual notification of the President of the Senate, the Speaker of the House of Representatives, and the Department of Financial Services of all educational entities and water management districts that have failed to comply with transparency requirements as identified in certain audit reports.³⁰

Transparency Florida Act

The Transparency Florida Act (act)³¹ created financial reporting requirements for certain public entities for the purpose of making that information publicly available. Among other provisions, it required:

- The Executive Office of the Governor to establish a website making certain information relating to state financial expenditures available to the public;³²
- Each water management district to make a monthly financial statement available on its website;³³ and
- The CFO to provide public access to a state contract management system providing information and documentation relating to government contracts. The act specifies data that must be collected in the system and provides that in the event of a major contract change or a new contract, the affected state governmental entity must update the system within 30 days.³⁴

Prison Rehabilitative Industries and Diversified Enterprises

Prison Rehabilitative Industries and Diversified Enterprises, Inc. (PRIDE) was founded in 1981, as a private, non-profit inmate training company that operates general manufacturing and services facilities.³⁵ In calendar year 2010, PRIDE operated 45 inmate work programs (including 4 culinary arts training programs) that manufactured products such as office furniture, clothing, and eyeglasses, and that provided services such as printing, graphics, and data entry. PRIDE receives no appropriated funding from the Legislature and depends entirely on the sale of its products and services to financially support its statutory missions.³⁶

Current law requires all products offered for purchase to a state agency by PRIDE to be produced in majority part by inmate labor.³⁷ It provides an exception for products not made by inmates that are contractually allied to products made by inmates that are offered by PRIDE, if the value of the products not made by inmates does not exceed 2 percent of PRIDE's total sales in any year.³⁸

²⁷ See s. 11.45(2)(a), F.S.

²⁸ The Legislative Auditing Committee is a joint committee authorized to take under investigation any matter within the scope of an audit, review, or examination either completed or then being conducted by the Auditor General or the Office of Program Policy Analysis and Government Accountability and, in connection with such investigation, may exercise subpoena powers. See s. 11.40(1), F.S.

²⁹ See s. 11.45(7)(a), F.S.

³⁰ See s. 11.45(7)(i), F.S.

³¹ Chapter 2009-74, s. 2, L.O.F. (codified at s. 215.985, F.S.).

³² See s. 215.985(3), F.S.

³³ See s. 215.985(12), F.S.

³⁴ See s. 215.985(16), F.S.

³⁵ Information taken from the Office of Program Policy and Government Accountability program summary of PRIDE, available at <http://www.oppaga.state.fl.us/profiles/1037/> (last visited February 8, 2012).

³⁶ *Id.*

³⁷ See s. 287.095(3), F.S.

³⁸ *Id.*

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.³⁹

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act⁴⁰ provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

EFFECT OF PROPOSED CHANGES

State Procurement of and Contracts for Personal Property and Services

Authority over State Procurement and Contracts

The bill transfers the following authority from the DMS to the DFS, effective October 1, 2013:

- To provide uniform commodity and contractual service procurement policies, rules, procedures, and forms for use by agencies and eligible users; and
- To monitor agencies for compliance with established policies, rules, and procedures.

The bill creates related duties of the DFS, effective October 1, 2013, including, but not limited to:

- Establishment of a system of uniform policies, procedures, and practices;
- Prescription of methods of securing solicitation responses and procuring information technology services;
- Governance of the purchase by an agency of any commodity or contractual service;
- Education of governmental entities and other stakeholders regarding procurement; and
- Establishment and maintenance of a list of vendors allowed to do business with the state.

Effective July 1, 2012, the bill authorizes the CFO to review and approve contracts before execution of such contracts, and provides that the CFO may establish dollar thresholds and other criteria for sampling the contracts that are to be reviewed.

The bill leaves with the DMS the responsibility for the actual procurement of commodities and contractual services for agencies. It makes changes to conform to the transfer of policymaking and oversight authority.

Process for State Procurement

Effective October 1, 2013, the bill:

- Adds to current provisions governing the DMS's power to establish and maintain a vendor list to require the DMS to develop a list of interested vendors that must be maintained by classes of

³⁹ Article I, s. 24(c) of the Fla. Const.

⁴⁰ See s. 119.15, F.S.

commodities and contractual services. It prohibits a vendor barred by the CFO from inclusion on the list.

- Adds to current provisions governing the use of products by PRIDE to require the DMS to issue a commodity number for all products of PRIDE that meet or exceed the DMS's specifications.

Exemptions from Competitive Solicitation Requirements

The bill removes the following contractual services from the category of those that are not subject to competitive solicitation requirements:

- Artistic services;
- Certain academic program reviews;
- Lectures by individuals; and
- Training and education services provided to injured employees.

It also authorizes an agency to purchase commodities or services through another agency's existing contract instead of through competitive solicitation if the use of such contract is in the best interest of the state.

Protest of Procurement Decisions

The bill specifies that, effective October 1, 2013, the statutory requirements for a protest of procurement decisions or intended decisions do not apply to protests filed by the Office of Supplier Diversity.

Agreements Funded with Federal and State Assistance

The bill amends the provision governing agreements funded with federal and state assistance to:

- Create a definition for "performance measure" from current statutory language;
- Require review and approval of such an agreement in accordance with rules adopted by the DFS before execution, effective October 1, 2012;
- Authorize the CFO to establish dollar thresholds and other criteria for sampling the agreements that are to be reviewed;
- Require an agency entering into such an agreement to designate a grant manager, and specify required certification for certain grant managers; and
- Require the CFO to create uniform procedures for payment requests to ensure that services are rendered in accordance with the agreement terms before the agency processes an invoice for payment.

Reporting of State Agency Contract Information

The bill repeals the existing section of law governing state agency contract information that must be reported to the DFS. It requires the types of information that must be reported under that section to be posted to the CFO's intergovernmental contract tracking system that is modified by the bill, and subjects *all* contracts to the reporting requirements, instead of only those that meet a certain dollar threshold.

Contract or Grant Manager Qualifications

The bill requires the DFS to establish a certification program for certain contract or grant managers and for contract negotiators. It provides that only a certified manager may manage an agreement in excess of a certain threshold amount. It specifies areas of training for the program, allows the DFS to revoke a manager's certification under specified circumstances, and authorizes the DFS to adopt rules to administer the section.

The bill changes the threshold for which a contract manager must meet certain training requirements and also requires certification pursuant to the program created by the bill instead of training. It requires a contract negotiator to be certified by the program instead of pursuant to rules established by the DMS.

Reporting Requirements for the Auditor General

The bill amends the provision requiring the Auditor General (AG) to notify the Legislative Auditing Committee (LAC) of a local governmental entity's or a certain educational entity's failure to comply with annual financial audit reporting requirements to also require the AG to notify the LAC of such entities' failure to comply with the reporting requirements of the Transparency Florida Act.

The bill also amends the provision requiring the AG to notify the presiding officers of the Legislature and the DFS of the failure of certain entities to comply with transparency requirements as identified in certain audit reports to specify that the transparency requirements are those located in the Transparency Florida Act.

Transparency Florida Act

The bill amends the provision in the Transparency Florida Act requiring the CFO to provide public access to a state contract management system to:

- Make a terminology change to instead provide that the CFO must “establish a secure, shared, intergovernmental contract tracking” system.
- Authorize the CFO to make information on the system available to the public, instead of requiring it.
- Revise time frames and requirements for information that must be posted relating to a new contract or a major change in a contract.
- Add each local governmental entity and independent special district, each district school board, the Board of Governors of the State University System, and each Florida College System institution board of trustees to the entities required to comply with the posting requirements, effective November 1, 2013.
- Create provisions governing redaction of any exempt or confidential information contained in documents posted on the system.
- Create requirements and authorizations relating to the CFO's ability to make certain information posted on the system publicly available via website.
- Specify that the posting of information on the system or on the website does not eliminate the duty of a governmental entity to provide a public record upon request.
- Authorize the DFS to adopt rules to administer the subsection.

Other Provisions

Prison Rehabilitative Industries and Diversified Enterprises

The bill repeals a requirement that certain products offered for purchase to a state agency by PRIDE be produced in majority part by inmate labor.

Procurement Review and Report

The bill creates an unnumbered section of law to require the CFO to review the current situation of procurement. It specifies areas that the CFO must investigate and authorizes the CFO to obtain certain information. The bill requires the CFO to submit a report of findings and recommendations for changes in procurement to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2012.

The bill appropriates a nonrecurring sum of \$400,000 to contract for the review.

Future Repeal of Chapter 287, Florida Statutes

The bill provides that ch. 287, F.S., will repeal effective July 30, 2014.

Appropriations to the CFO for Newly-Created Duties

The bill appropriates \$4,067,000 in recurring funds and 36 full-time equivalent positions and associated salary rate of 1,902,588 to the CFO for the purpose of implementing expanded contract auditing responsibilities under the act.

The bill also appropriates a nonrecurring sum of \$375,000 to contract for the CFO's administration of the certified contract manager and negotiator programs.

B. SECTION DIRECTORY:

Section 1 amends s. 11.45, F.S., relating to reporting requirements of the Auditor General.

Section 2 amends s. 215.971, F.S., relating to agreements funded with state and federal assistance.

Section 3 amends s. 215.985, F.S., relating to transparency in government.

Section 4 repeals s. 216.0111, F.S., relating to state agency contracts; required information to be provided to the Department of Financial Services.

Section 5 amends s. 287.032, F.S., relating to responsibilities of the Department of Management Services, effective October 1, 2013.

Section 6 amends s. 287.042, F.S., relating to the powers, duties, and functions of the Department of Management Services, effective October 1, 2013.

Section 7 creates s. 287.044, F.S., relating to powers, duties, and functions of the Department of Financial Services, effective October 1, 2013.

Section 8 amends s. 287.057, F.S., relating to procurement of commodities or contractual services.

Section 9 amends s. 287.058, F.S., relating to contract documents.

Section 10 repeals subsection (3) of s. 287.095, F.S., relating to products produced by inmate labor.

Section 11 creates s. 287.1312, F.S., relating to contract manager, grant manager, and contract negotiator certification.

Section 12 amends s. 287.133, F.S., relating to denial or revocation of the right to transact business with public entities.

Section 13 amends s. 255.25, F.S., making drafting changes and conforming a cross-reference.

Section 14 amends s. 287.012, F.S., making drafting changes and conforming a cross-reference.

Section 15 amends s. 402.7305, F.S., making drafting changes and conforming a cross-reference.

Section 16 amends s. 427.0135, F.S., conforming a cross-reference.

Section 17 amends s. 946.515, F.S., making drafting changes and conforming cross-references.

Section 18 creates an unnumbered section of law, relating to a procurement review and report.

Section 19 repeals ch. 287, F.S., effective July 30, 2014.

Section 20 makes appropriations for the procurement review and report, for the Chief Financial Officer's administration of certain training programs, and for the Chief Financial Officer's contract auditing responsibilities under the act.

Section 20 provides an effective date of July 1, 2012, except as otherwise provided in the act.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill provides the following appropriations:

- For the 2012-2013 fiscal year, a nonrecurring appropriation of \$400,000 from the Administrative Trust Fund in the DFS to contract for the CFO's review of the state's procurement process.
- For the 2012-2013 fiscal year, a nonrecurring appropriation of \$375,000 from the Administrative Trust Fund in the DFS to contract for the CFO's administration of the certified contract manager and negotiation programs.
- For the 2012-2013 fiscal year, a recurring appropriation of \$4,067,000 from the General Revenue fund to the CFO for implementation of the CFO's expanded contract auditing responsibilities under the act.

Also see FISCAL COMMENTS.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The state may incur indeterminate costs associated with the transfer of oversight authority of state procurement from the DMS to the DFS and the additional reporting requirements created by the bill.

Local governments will likely incur indeterminate costs associated with the Florida Transparency Act reporting requirements created by the bill.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of Art. VII, s. 18, of the Florida Constitution may apply because this bill requires local governmental entities to redact and submit documentation for *all* contracts to the CFO's intergovernmental contract tracking system; however, an exemption may apply if the bill results in an insignificant fiscal impact to county or municipal governments. The exceptions to the mandates provision of Art. VII, s. 18, of the Florida Constitution appear to be inapplicable because the bill does not articulate a threshold finding of serving an important state interest.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The constitutional separation of powers doctrine⁴¹ prevents the Legislature from delegating its constitutional duties.⁴² Because legislative power involves the exercise of policy-related discretion over the content of law,⁴³ any discretion given an agency to implement a law must be “pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.”⁴⁴ The bill grants rulemaking authority to the DFS to implement the provisions of the bill. It also authorizes the CFO to establish dollar thresholds and other criteria for sampling grant agreements and contracts for review, but does not provide any standards or guidelines for the establishment of such parameters.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Drafting Comments

The “relating to” clause of the bill’s title provides that it is “an act relating to state contracting.” However, the bill also applies to local government contracting in that it requires specified units of local government to post contract information to the CFO’s intergovernmental contract tracking system. The Legislature may wish to consider amending the clause to read “an act relating to government contracting.”

Chapter 287, F.S., defines “department” to mean the DMS. However, Section 7 of the bill creates a new section in ch. 287, F.S., and refers to both the DFS and to the “department.” The Legislature may wish to clarify the definition and use of “department.”

The bill requires certain contract managers, certain grant managers, and contract negotiators to be certified by a training program conducted by the DFS. The bill specifies that grant managers and contract managers must be certified pursuant to the statutory section of the newly-created certification program, but provides that contract negotiators must be certified based upon rules adopted by the DFS.⁴⁵ The Legislature may wish to insert a cross-reference to the certification program in reference to contract negotiators. In addition, the bill states the certification program applies to grant managers, contract managers, and contract negotiators, but does not refer to contract negotiators throughout the section.⁴⁶ The Legislature may wish to add such references.

Other Comments: Implementation of Proposed Changes

The bill directs the CFO to provide recommendations on state procurement by December 31, 2012. It appears that the intent is that these recommendations will provide the basis for a new statutory system of state procurement. However, the bill proposes significant changes to ch. 287, F.S., over the next two years without knowing what recommendations will be made as part of that report.

In addition, the bill provides for significant changes to ch. 287, F.S., that will require rulemaking and of which some of the changes will take effect in October 2013. The bill goes on to repeal ch. 287, F.S., effective July 30, 2014. Considering that rulemaking requires months to complete, the effect of the bill would be to effectuate many significant changes to ch. 287, F.S., which would be in effect for less than a year before the entire chapter repeals.

⁴¹ Article II, s. 3, Fla. Const.

⁴² See *Florida State Bd. Of Architecture v. Wasserman*, 377 So.2d 653 (Fla. 1979).

⁴³ See *State ex rel. Taylor v. City of Tallahassee*, 177 So. 719 (Fla. 1937).

⁴⁴ See *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978).

⁴⁵ Lines 869-873 of the bill.

⁴⁶ Section 11 of the bill.

Other Comments: Office of the Auditor General

The bill requires the Auditor General to notify the Legislative Auditing Committee of any local governmental entity or certain educational entity that does not comply with the Transparency Florida Act.⁴⁷ The Office of the Auditor General provided the following comments on that requirement:⁴⁸

Section 215.985(12), F.S., requires each water management district to provide a monthly financial statement to its governing board and make such statement available for public access on its website. The primary duty the Auditor General has currently related to the Transparency Florida Act [act] is to review audit reports of the independent water management district auditors to verify that the districts have complied with the act.

The amendments to s. 11.45(7)(a), F.S., could be read to require the Auditor General to report to the auditing committee the failure of any local governmental entity, district school board, charter school, or charter technical career center to post the data now required by s. 215.985(16), F.S.⁴⁹ This interpretation would require the Auditor General to report on compliance with the act by entities the Auditor General does not audit and that may not be audited at all. The resources required to comply with this requirement would be significant and this interpretation of the bill appears inconsistent with the title to the bill, which indicates the amendment to s. 11.45, F.S., is only to conform provisions to changes made by the act.

The Office of the Auditor General proposed an amendment to address the concern.

Other Comments: Public Records

The bill specifies certain governmental entities that must participate in the government contract tracking system established by the CFO and requires them to redact exempt or confidential information⁵⁰ from documents posted on the system.⁵¹ It also provides a process by which a posted document that has not been properly redacted under the bill's provisions may be replaced. However, case law provides that once protected information has been made publicly available, it may no longer be withheld by a custodial agency. Therefore, if the document containing the exempt or confidential information is posted to the public website, the custodial agency may no longer be able to protect the information.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 6, 2012, the Government Operations Subcommittee adopted a strike-all amendment and passed HB 1409 as a committee substitute. The strike-all amendment made the following substantive changes to the originally-filed bill:

- Removed "whereas" clauses.
- Revised the CFO's authority to review grant agreements and contracts by authorizing the CFO to establish dollar thresholds and other criteria for sampling of such agreements and contracts, and

⁴⁷ Section 1 of the bill.

⁴⁸ See "Re: Senate Bill 1626," Office of the Auditor General (dated January 19, 2012) (on file with the Government Operations Subcommittee). Although the analysis is written to the Senate companion to HB 1409, the bills were identical at the time the analysis was submitted.

⁴⁹ The requirements in s. 215.985(16), F.S., are those relating to the CFO's duty to provide public access to a state contract management system that provides information and documentation relating to government contracts.

⁵⁰ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (See Attorney General Opinion 85-62, August 1, 1985).

⁵¹ Section 3 of the bill.

reducing the time limit for the CFO's review of grant agreements and contracts from 90 days to 30 days.

- Removed examples of exempt or confidential and exempt information that must be redacted from documents posted to the intergovernmental contract tracking system.
- Removed drafting changes relating to bond posting for bid protests.
- Removed a requirement that state agencies provide an explanation for why an unsuccessful bidder did not win, upon request.
- Removed a requirement that the DFS develop a methodology to calculate cost savings or cost avoidance under a contract and a requirement that agencies annually report such savings or avoidance using the DFS's methodology.
- Expanded the scope of the DFS's procedures for maintaining documentation for a contract to apply to all contracts, instead of only those meeting a certain threshold.
- Expanded the categories of contracts for which the DFS's review must include certain information to include all contracts, instead of only those meeting a certain threshold.
- Removed a requirement that each contract include a clause providing that the contract is not effective unless approved by the DFS.
- Removed the CFO's authority to waive certain deviations from standard procedures and to work with state agencies to use different contracting methods under specified circumstances.
- Removed a requirement that agencies consider all purchases of the same commodity or service during one year to be part of a single purchase.
- Transferred the rulemaking responsibility for certifying contract negotiators from the DMS to the DFS and subjected contract negotiators to the training program created for grant managers and contract managers.
- Relocated provisions relating to the CFO's duties.
- Extended effective dates of certain provisions.
- Removed policy statements of the state relating to procurement.
- Revised the bill's appropriations to add a nonrecurring appropriation for the CFO's administration of the certified contract manager and negotiator programs, and to increase the recurring appropriation and to specify the number of positions and salary rate for implementation of the CFO's expanded contracting auditing responsibilities.

The strike-all amendment also made drafting changes and added repeal of an existing requirement that certain products offered for purchase to a state agency by PRIDE be produced in majority part by inmate labor.

The analysis has been drafted to the committee substitute as passed by the Government Operations Subcommittee.