

STORAGE NAME: h1549a.sa.doc
DATE: April 3, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: HB 1549
RELATING TO: Outsourcing
SPONSOR(S): Representative(s) Kilmer and others
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
- (2) FISCAL POLICY & RESOURCES
- (3) COUNCIL FOR SMARTER GOVERNMENT
- (4)
- (5)

I. SUMMARY:

Current law establishes the State Council on Competitive Government. This council is made up of the Governor and Cabinet, sitting as the Administrative Commission. The council's purpose is to encourage competition, innovation, and creativity among service providers to the state; and, is authorized to adopt rules, hold public hearings, consult with private sources, and require any state agency to perform a review of an aspect of that agency. The council may also award contracts for certain services to bidders with the best and most reasonable bid.

This bill changes the composition of the council to require that the Governor appoint nine members, subject to confirmation by the Senate, and specifies certain requirements regarding the council members.

This bill adds that in determining the best and most reasonable bid among private entities, the council must give preference to a business entity which has its primary place of business in Florida, and which agrees to provide employment opportunities to state employees who will be displaced as a result of the outsourcing of the identified service. See "*Other Comments*" section for concerns.

This bill prohibits the council from entering into a contract or series of contracts, unless the council determines that the contract, or series of contracts in total, for an identified state service will result in a cost savings to the state of at least 10 percent over the public provision of the same service.

This bill also requires the Auditor General to develop and implement an evaluation of the costs and benefits of each contract awarded by the council. The evaluation must compare the costs and benefits of the agency providing the identified service versus the contractor providing the identified service. See "*Other Comments*" section for concerns.

This bill prohibits a bidder or potential bidder from having any contact with any member or employee of or consultant to the council regarding a request for proposal, a proposal, or the evaluation or selection process during a certain period of time.

This bill states that the provisions of the bill only apply to contracts executed on, or after, the effective date of the bill, which is July 1, 2001.

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

This bill requires that all contracts, within one exception, must be awarded through the State Council on Competitive Government.

B. PRESENT SITUATION:

Section 14.203, F.S., establishes the State Council on Competitive Government. The Legislature in creating this council stated:

It is the policy of this state that all state services be performed in the most effective and efficient manner in order to provide the best value to the citizens of the state. The state also recognizes that competition among service providers may improve the quality of services provided, and that competition, innovation, and creativity among service providers should be encouraged.

The council is comprised of the Governor and Cabinet, sitting as the Administration Commission. The council may "identify commercial activities currently being performed by state agencies and, if it is determined that such services may be better provided by requiring competition with private sources or other state agency service providers, may recommend that a state agency engage in any process, including competitive bidding, that creates competition with private sources or other state agency service providers."¹ In performing its duties, the council may adopt rules, hold public hearings, consult with private sources, and require any state agency to perform a review of an aspect of that agency.

The council may also

[a]ward a contract to a state agency currently providing the service, another state agency, a private source, or any combination of such entities, if the bidder presents the best and most reasonable bid, which is not necessarily the lowest bid. It is intended that consideration be given as to how to transfer the program back if the bidder is not successful in carrying out the requirements of the contract. The bid shall also include an analysis of health care benefits, retirement, and workers' compensation insurance for employees of the contractor which are reasonably comparable to those provided by the state.

¹ s. 14.203(2), F.S.

Contracts entered into by the council, or any decision regarding whether a state agency can engage in competitive bidding is exempt from state law regulating or limiting purchasing practices and decisions, including Chapter 120, F.S., the Administrative Procedure Act.

Chapter 287, F.S., provides for the procurement of personal property and services for the state. The Department of Management Services is the department that is charged

- 1) To promote efficiency, economy, and the conservation of energy and to effect coordination in the purchase of commodities for the state.
- 2) To provide uniform contractual service procurement policies, rules, procedures, and forms for use by the various agencies in procuring contractual services.
- 3) To procure and distribute state-owned surplus tangible personal property and federal surplus tangible personal property allocated to the state by the Federal Government.

C. EFFECT OF PROPOSED CHANGES:

See "Section by Section Analysis."

D. SECTION-BY-SECTION ANALYSIS:

Section 1:

Amends s. 14.203, F.S., on the State Council on Competitive Government.

This bill adds the definition of "Council" to mean the State Council on Competitive Government. This bill also adds to the definition of "Identified state service" as follows: a service provided by the state that is under consideration to determine whether the service may be better provided through competition with private sources, *or which the Legislature, through the General Appropriations Act or other law, has directed to be competitively bid.*

This bill changes the composition of the council from the Governor and Cabinet sitting as the Administration Commission, to a nine member council appointed by the Governor, each member subject to confirmation by the Senate. This bill prohibits any member of the council from being an employee of or consultant to a state agency, or an employee, contract vendor, or consultant to a bidder, for 2 years prior to appointment to the council, and prohibits the same within 2 years after termination from the council.

The Governor is required to seek to provide reasonable racial, ethnic, regional, and gender diversity in appointing members to the council.

This bill states that the term of office for members of the council is 4 years. The members are limited to 8 consecutive years on the council. A vacancy on the council is to be filled by appointment by the Governor and will be for the remainder of the filled term only. The Governor must appoint a chair and vice chair from among the members for 2 year terms. This bill provides that the members will serve without compensation, but are entitled to reimbursement for per diem and travel expenses.

This bill allows the council to employ an executive director and staff as necessary within the limits of legislative appropriation, as well as retain consultants, within the same employment experience limitations as the members of the council.

The council meets upon the call of the chair or a majority of the members of the council. A majority of the council constitutes a quorum.

The council may also lease office space as is necessary, within the limits of legislative appropriation.

This bill amends s. 14.203(3)(h), F.S., which allows the council to award "a contract to a state agency currently providing the service, another state agency, a private source, or any combination of such entities, if the bidder presents the best and most reasonable bid, which is not necessarily the lowest bid," to add that in determining the best and most reasonable bid among private entities, the council must give preference to a business entity which:

- Has its primary place of business in Florida, and
- Agrees to provide employment opportunities to state employees who will be displaced as a result of the outsourcing of the identified service.

A number of constitutional concerns may arise when legislation creates contractual preferences: equal protection and interference with interstate commerce. A similar preference provision exists in s. 283.35, F.S., which provides:

Every agency shall give preference to bidders located within the state when awarding contracts to have materials printed, whenever such printing can be done at no greater expense than the expense of awarding a contract to a bidder located outside the state and can be done at a level of quality comparable to that obtainable from the bidder located outside the state.

Note, however, the differences between s. 283.55, F.S., and the preference provision of this bill: This bill does not require "no greater expense" and "comparable level of quality."

This bill also provides that no state agency is prohibited from bidding on any contract to be awarded by the *commission*. *The use of the word "commission" instead of "council" appears to be a typographical error.*

This bill states that no state agency is prohibited from bidding on any contract awarded by the council.

This bill adds that no contract for the provision of an identified state service will be awarded by the state except pursuant to the provisions of this section, except that contracts relating to correctional facilities or programs subject to the provisions of Chapter 957, F.S.,² are not be subject to these provisions. This appears to significantly expand the duties and responsibilities of the council. This bill does not limit the application of this provision to any particular type of contract or to any contract amount, simply to an "identified state service." "Identified state service" is a defined term, but that definition does not delimit the scope of contracts to which it applies. It is also unclear whether the agency or the council actually enters into the contract.

This bill does not consistently use the defined term "identified state service," instead it says "service", "identified service", or "program." This could cause confusion as these provisions are implemented.

² Chapter 957, F.S., provides for the Correctional Privatization Commission.

Section 2:

Creates s. 14.2031, F.S., which provides cost-saving requirements.

This bill creates s. 14.2031, F.S., establishing certain cost-saving requirements for the State Council on Competitive Government. This bill prohibits the council from entering into a contract or series of contracts, unless the council determines that the contract or series of contracts in total for an identified state service will result in a cost savings to the state of at least 10 percent over the public provision of the same service.

This bill requires that such cost savings, as determined by the council, must be based upon the actual costs associated with the service as determined pursuant to the methods established pursuant to s. 14.203(3), F.S. Cost savings determinations must include, but are not limited to, corporate income and sales tax payments, or any other payment to the state for which the private entity is required to pay, as well as the cost of any contract monitor.

Section 3:

Creates s. 14.2032, F.S., which provides for the evaluation of costs and benefits of contracts awarded by the council.

This bill creates s. 14.2032, F.S., which requires the Auditor General to develop and implement an evaluation of the costs and benefits of each contract awarded by the council. The evaluation must compare the costs and benefits of the agency providing the identified service (before the contract) versus the contractor providing the identified service.

The Auditor General must also evaluate the performance of the contractor at least once every 3 years and 1 year prior to the termination of each contract and make recommendations to the Speaker of the House of Representatives and the President of the Senate as to whether to continue the contract.

The Office of the Auditor General has expressed concerns as to the types of costs that are to be included in comparing the delivery of the service by the agency and by the contractor.³ If the council were required to adopt specific rules identifying the various cost factors to be considered, the Auditor General would be able to more effectively make these cost comparisons.

Section 4:

Creates 14.2033, F.S., which prohibits certain contacts between a bidder and the members of the council.

This bill creates s. 14.2033, F.S, to prohibit a bidder or potential bidder from having any contact with any member or employee of or consultant to the council regarding a request for proposal, a proposal, or the evaluation or selection process from the time a request for proposals for the provision of an identified service is issued until the time a notification of intent to award is announced, except if such contact is in writing or in a meeting for which notice was provided in the Florida Administrative Weekly.

³ Meeting with Auditor General staff, April 2, 2001.

Section 5:

This bill states that the provisions of the bill only apply to contracts executed on, or after, the effective date of the bill.

Section 6:

This bill provides an effective of July 1, 2001.

III. **FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:**

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

IV. **CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:**

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

This bill provides that no state agency is prohibited from bidding on any contract to be awarded by the *commission*. *The use of the word "commission" instead of "council" appears to be a typographical error.* There will be an amendment filed to correct this error.

This bill requires the council, when awarding contracts, to give preference to certain business entities. A number of constitutional concerns may arise when legislation creates contractual preferences: equal protection and interference with interstate commerce. A similar preference provision exists in s. 283.35, F.S., which provides:

Every agency shall give preference to bidders located within the state when awarding contracts to have materials printed, whenever such printing can be done at no greater expense than the expense of awarding a contract to a bidder located outside the state and can be done at a level of quality comparable to that obtainable from the bidder located outside the state.

Note, however, the differences between s. 283.55, F.S., and the preference provision of this bill: This bill does not require "no greater expense" and "comparable level of quality."

The Office of the Auditor General has expressed concerns as to the types of costs that are to be included in comparing the delivery of the service by the agency and by the contractor.⁴ If the council were required to adopt specific rules identifying the various cost factors to be considered, the Auditor General would be able to more effectively make these cost comparisons.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On April 3, 2001, the Committee on State Administration heard HB 1549 and adopted one technical amendment. That amendment changed incorrect references from "commission" to "council."

This bill, as amended, was reported favorably. The amendment is traveling with the bill.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Staff Director:

Jennifer D. Krell, J.D.

J. Marleen Ahearn, Ph.D., J.D.

⁴ *Id.*