

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/SB 2518

INTRODUCER: Governmental Oversight and Productivity Committee and Senator Argenziano

SUBJECT: Procurement of Contractual Services

DATE: March 23, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson	GO	Fav/CS
2.	_____	_____	WM	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill provides that on contracts valued at greater than \$10 million, certain contract amendments may not be executed before the agency first submits a written report on contract performance to the Governor and the Legislature. The bill specifies that when a contract is valued in excess of \$1 million, one of the negotiators must be certified as a contract negotiator by the DMS, and when a contract is valued in excess of \$10 million, one of the negotiators must be certified as a Project Management Professional. The bill requires that solicitations include a provision that respondents to a solicitation may not contact, between the release of the solicitation and the execution of the contract, any employee of the executive or legislative branch concerning the solicitation, except in writing to the procurement officer or as provided in the solicitation.

The bill creates the Council on Efficient Government, and provides for the membership, powers, and duties of the council. The bill requires that an agency develop a detailed business case to outsource before a service or activity may be outsourced, and requires that an agency submit the business case to outsource to the council, the Governor, and the Legislature, before releasing the solicitation or executing the contract, when the contract will cost more than \$1 million in any fiscal year. For proposals to outsource costing more than \$10 million in any fiscal year, the council must conduct an analysis and provide it, before the agency releases the solicitation, to the agency proposing the outsourcing, the Governor, and the Legislature.

The bill provides specific information that must be included in all business cases to outsource, and prescribes specific additional contract requirements applicable to outsourcing contracts.

The bill provides that a contract may not prohibit lobbying by a contractor to the executive or legislative branch concerning the contract, during the contract term.

The bill specifies restrictions on contractor supervision of state employees, and prohibits contractor involvement in procurements in which the contractor has an interest.

The bill repeals s. 14.203, F.S., which provides the duties and functions of the State Council on Competitive Government.

The bill appropriates funds and authorizes positions for the Council on Efficient Government, and for the training of Project Management Professionals.

The bill provides that any agency under the control of the Attorney General, the Chief Financial Officer, or the Commissioner of Agriculture is subject to this act.

The bill amends sections 287.057 and 287.058, creates sections 287.0571, 287.05721, 287.0573, 287.0574, 287.074, creates unnumbered sections, and repeals section 14.203 of the Florida Statutes.

II. Present Situation:

Agency Procurement of Commodities and Services: The comprehensive process contained in ch. 287, F.S., for the procurement of commodities and contractual services by executive agencies¹ sets forth numerous requirements for fair and open competition among vendors, agency maintenance of written documentation that supports procurement decisions, and implementation of monitoring mechanisms. Legislative intent language for the chapter explains that the process is necessary in order to:

- Reduce improprieties and opportunities for favoritism;
- Ensure the equitable and economical award of public contracts; and
- Inspire public confidence in state procurement.²

The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include: overseeing agency implementation of the ch. 287, F.S., competitive procurement process;³ creating uniform agency procurement rules;⁴ implementing the online procurement program;⁵ and establishing state term contracts.⁶ The agency procurement process is partly decentralized in that agencies, except in the case of state term contracts, may procure goods and services themselves in accordance with requirements set forth in statute and rule, rather than placing orders through the DMS.

¹ Section 287.012(1), F.S., provides that the term “agency” for purposes of ch. 287, F.S., “. . . 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 Section 287.001, F.S.

³ Sections 287.032 and 287.042, F.S.

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

⁵ Section 287.057(23), F.S.

⁶ Sections 287.042(2), 287.056 and 287.1345, F.S.

Contract Extensions and Renewals: Section 287, F.S., defines and provides for the use of contract extensions and renewals. “Extension” means an increase in the time allowed for the contract period due to circumstances which, without fault of either party, make performance impracticable or impossible, or which prevent a new contract from being executed, with or without a proportional increase in the total dollar amount, with any increase to be based on the method and rate previously established in the contract.⁷ An extension of a contract for contractual services must be in writing, may not exceed 6 months, and must be subject to the same terms and conditions of the initial contract. There may be only one extension of a contract, unless the failure to meet the criteria set forth in the contract for completion of the contract is due to events beyond the control of the contractor.⁸

“Renewal” means contracting with the same contractor for an additional contract period after the initial contract period, only if pursuant to contract terms specifically providing for such renewal.⁹

Contracts for commodities or contractual services may be renewed for a period that may not exceed 3 years or the term of the original contract, whichever period is longer. Renewal of a contract for commodities or contractual services must be in writing and is subject to the same terms and conditions set forth in the initial contract. If the commodity or contractual service is purchased as a result of a competitive procurement, the price of the commodity or contractual service to be renewed must be specified in the bid, proposal, or reply. A renewal contract may not include any compensation for costs associated with the renewal. Renewals must be contingent upon satisfactory performance evaluations by the agency and subject to the availability of funds.¹⁰

Contract Terms: Section 287.058(1), F.S., delineates some requirements that must be included in most contractual services contracts valued at greater than \$25,000.¹¹ Such contracts must be written and include all provisions and conditions of the procurement of the services, which must include but not be limited to:

- A provision that bills for compensation for services or expenses be submitted in detail sufficient for a proper pre- and post-audit.
- A provision that bills for any travel expenses must be submitted in accordance with s. 112.061, though a state agency may establish rates lower than the maximum provided.
- A provision 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 from s. 24(a) of Art. I of the State Constitution and s. 119.07(1).
- A provision dividing the contract into units of deliverables, which shall include, but not be limited to, reports, findings, and drafts, that must be received and accepted in writing by the contract manager prior to payment.

⁷ Section 287.012(14), F.S.

⁸ Section 287.057(13), F.S.

⁹ Section 287.012(20), F.S.

¹⁰ Section 287.057(14)(a), F.S.

¹¹ Contracts for the provision of health and mental health services or drugs in the examination, diagnosis, or treatment of sick or injured state employees or the provision of other benefits as required by the provisions of chapter 440 are exempt from these requirements.

- A provision specifying the criteria and the final date by which such criteria must be met for completion of the contract.
- A provision specifying that the contract may be renewed for a period that may not exceed 3 years or the term of the original contract, whichever period is longer, specifying the renewal price for the contractual service as set forth in the bid, proposal, or reply, specifying that costs for the renewal may not be charged, and specifying that renewals shall be contingent upon satisfactory performance evaluations by the agency and subject to the availability of funds.¹²

The DMS may authorize the use of a purchase order in lieu of a written agreement, if the above provisions are included in the purchase order, or the requirements of the provisions are incorporated by reference.

The written agreement must be signed by the agency head and the contractor prior to the rendering of any contractual service valued at more than \$25,000, except in the case of a valid emergency. If the contract is not signed by the agency head and the contractor prior to rendering the contractual service, and if an emergency does not exist, the agency head must, no later than 30 days after the contractor begins rendering the service, certify the specific conditions and circumstances to the DMS as well as describe actions taken to prevent recurrence of such noncompliance. The agency head may delegate the certification only to other senior management agency personnel. A copy of the certification must be furnished to the Chief Financial Officer with the voucher authorizing payment. The DMS must report repeated instances of noncompliance by an agency to the Auditor General.

Notwithstanding the above provisions, in those cases in which state agencies are unable to procure a written agreement for the providing of health and mental health services or drugs in the examination, diagnosis, or treatment of sick or injured persons in the care or custody of a state agency, those services and drugs may be obtained by purchase order, which must contain sufficient detail for a proper audit and must be signed by purchasing or contracting personnel acting on behalf of the agency.

Section 287.058(4), F.S., requires that every procurement of contractual services contracts valued at \$25,000 or *less* must be evidenced by a written agreement or purchase order. The written agreement or purchase order must contain sufficient detail for a proper audit, must be signed by purchasing or contracting personnel acting on behalf of the agency, and may contain the provisions and conditions provided in subsection (1).

The requirements of s. 287.058, F.S., may be waived by the Chief Financial Officer for those services exempted from the competitive services requirements in s. 287.057(5)(f), F.S., unless otherwise provided in the General Appropriations Act or the implementing bill.

¹² Exceptional purchase contracts pursuant to s. 287.057(5)(a), and (c), F.S., may not be renewed. Those paragraphs provide that competitive solicitation requirements need apply to procurements made when an agency head determines that emergency action is required because of danger to the public health, safety, or welfare, or that commodities or contractual services are only available from a single source.

Outsourcing - Procurement and Contracting: During the past few years, as the pace of the outsourcing¹³ of functions previously performed by governmental entities has increased, the number of audits and reports finding issues and problems in outsourcing procurements and contracts has concurrently increased. During the past two fiscal years, the Auditor General has released numerous operational audit reports identifying deficiencies in agency procurements, outsourcing initiatives, and contract administration and management.¹⁴ Specifically, these reports documented a critical need for greater legislative oversight and improved executive agency performance in the areas of: (1) outsourcing initiative justification and planning; (2) fairness and competition in state procurement; (3) compliance with procurement law; (4) contract drafting; (5) vendor performance monitoring; and (6) risk management. The Office of Program Policy Analysis and Government Accountability released 78 reports from 1996 to 2003 addressing privatization of programs and services.¹⁵ Recent reports by both OPPAGA¹⁶ and agency inspectors general¹⁷ have mirrored the concerns raised in Auditor General reports.

Concise data on outsourcing initiatives undertaken by state agencies is somewhat difficult to come by, though the former Center for Efficient Government released information as of June 2004, stating that there were 138 outsourced projects between January, 1999, and June, 2004. Of those, four projects alone account for at least \$2.25 billion.¹⁸

¹³ Neither “outsource” nor “privatize” is currently defined for general applicability in Florida statute. Section 409.1671, F.S., defines “outsource” to mean to contract with competent, community-based agencies, for the purposes of the section.

¹⁴ Among those Auditor General operational audit reports are the following: *Real Estate Strategic Planning and Management Contract*, Department of Management Service, Report No. 2005-015, July 2004; *MyFlorida Alliance*, State Technology Office, Report No. 2005-008, July 2004; Department of Veterans’ Affairs, Report No. 2005-023, August 2004; *Selected Administrative Functions*, Department of Management Services, Report No. 2005-035, September 2004; *Pharmaceutical Contracts*, Department of Corrections, Report No. 2005-037, September 2004; *Deferred Compensation Program*, Department of Financial Services, Report No. 2005-038, September 2004; *Pharmaceuticals at County Health Departments*, Department of Health, Report No. 2005-039, October 2004; *Contracts and Other-Personal-Services Employment*, Department of Revenue, Report No. 2005-041, October 2004; *Outsourcing of Canteen Operations*, Department of Corrections, Report No. 2005-044, October 2004; *People First*, Department of Management Services, Report No. 2005-047, October 2004; *MyFloridaMarketPlace*, Department of Management Services, Report No. 2005-116, October 2004; *Asset Management and Monitoring*, Department of Transportation, Report No. 2005-129, February 2005; *Procurement Process for Commodities and Contractual Services and Other Administrative Matters*, Agency for Workforce Innovation, Report No. 2006-027, September 2005; *Contract Management*, Department of Agriculture and Consumer Services, Report No. 2006-029, September 2005; *Contract Administration*, State Board of Administration, Report No. 2006-045, October 2005; *Pharmaceutical Contracts and Follow-Up on Audit Report No. 2005-037*, Department of Corrections, Report No. 2006-080, January 2006.

¹⁵ OPPAGA Report No. 04-02.

¹⁶ See *Progress Report: DJJ Prevention Makes Progress; More Analysis and Contract Monitoring Needed*, Department of Juvenile Justice, Report No. 04-47, July 2004; and *Progress Report: Inmate Health Care Consolidation Progressing; Privatization Requires Agency Vigilance*, Department of Corrections, Report No. 04-61, August 2004; *Workspace Management Initiative Can Benefit State, But DMS Not Taking Adequate Steps to Ensure Goals Are Met*, Department of Management Services, Report No.06-06, January 2006.

¹⁷ See *Department Contract Management*, Department of Management Services, Office of Inspector General, Report No. 2004-01, April 19, 2004 (finding that the Department of Management Services: has no methods to track, monitor or report on contracts; has insufficient policies and procedures to guide staff through the procurement and management of service contracts; and has failed in some cases to comply with purchasing statutes and to maintain documentation that justify purchasing actions); State of Florida, Chief Inspector General’s Office, Case No. 200403230002, July 14, 2004 (finding that Department of Children and Families’ staff had committed procurement improprieties).

¹⁸ Department of Children and Families’ Community-Based Care privatization of foster care valued at \$1.4 billion; Department of Corrections’ comprehensive health care services to inmates in Region IV valued at \$300 million; Department of Management Services’ human resources outsourcing initiative valued at \$300 million; Department of Corrections’ food service operations outsourcing valued at \$275 million.

State Council on Competitive Government: In 1994, s. 14.203, F.S.,¹⁹ was enacted to create the State Council on Competitive Government (council), which is composed of the Governor and Cabinet sitting as the Administration Commission,²⁰ for the purpose of identifying and evaluating opportunities for outsourcing and privatization in executive branch agencies.²¹ The terms “outsourcing” and “privatization” are not specifically utilized; instead, the section uses the term “commercial activity,” defined as, “. . . an activity that provides a product or service that is available from a private source.”²² The Legislature delegated authority to the council to identify, upon its own initiative or upon identification by the OPPAGA, commercial activities that are currently being performed by state agencies. When the council determines that a commercial activity might be better provided by requiring competition with private sources or other state agency service providers,²³ the section permits the council to recommend that a state agency engage in any process, including competitive bidding, which creates competition for the activity with private sources or other state agency service providers.

Additionally, the section authorizes the council to:

- Adopt rules to implement any provision of the section.
- Hold public hearings or conduct studies.
- Consult with private sources.
- Require a state agency to conduct an in-house cost estimate, a management study, or any other hearing, study, review, or cost estimate concerning any aspect of an identified state service.
- Develop and require for use by state agencies methods to accurately and fairly estimate and account for the cost of providing an identified state service.
- Require that an identified state service be submitted to competitive bidding or another process that creates competition with private sources or other governmental entities.
- Prescribe, in consultation with affected state agencies, the specifications and conditions of purchase procedures that must be followed by a state agency or a private source engaged in competitive bidding to provide an identified state service.
- 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. In awarding such a contract, the council must:
- Give consideration as to how to transfer the program back if the bidder is not successful in carrying out the requirements of the contract; and
- Require bids to 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.

¹⁹ See Chapter 94-249, s. 50, L.O.F.

²⁰ See section 14.202, F.S. (creating the Administration Commission as part of the Executive Office of the Governor and requiring action by the commission to be approved by the Governor and at least two other members of the commission).

²¹ The terms “outsourcing” and “privatization” are not defined in Florida statute for purposes of general applicability.

²² Section 14.203, F.S.

²³ The section refers to the consideration of such commercial activities as “identified state service.” This term is defined as, “. . . a service provided by the state that is under consideration to determine whether the service may be better provided through competition with private sources.” Section 14.203(1)(b), F.S.

- Determine the terms and conditions of a contract for service or interagency contract to provide an identified state service or other commercial activity, including requiring that a minimum level of health insurance coverage for employee and employee family coverage, whether employer-paid or employee-paid, or a combination thereof, is available to employees.²⁴
- Require the state agency to encourage state employees to organize and submit a bid for the identified state service.

In determining whether an identified state service should be submitted to competitive bidding, the council must consider, at a minimum:

- Any constitutional and legal implications that may arise as a result of such action.
- The cost of supervising the work of any private contractor.
- The total cost to the state agency of such agency's performance of a service, including all indirect costs related to that state agency and costs of such agencies as the Chief Financial Officer, the Attorney General, and other such support agencies to the extent such costs would not be incurred if a contract is awarded. Costs for the current provision of the service shall be considered only when such costs would actually be saved if the contract were awarded to another entity.

State agencies must perform any activities required by the council in the performance of its duties or the exercise of its powers under the section. Contracts entered into by the council to implement the current section, and any decision regarding whether a state agency shall engage in competitive bidding, are exempt from state law regulating or limiting purchasing practices and decisions, including ch. 120, F.S. A contract entered into under the section constitutes an executive branch recommendation, and does not take effect until a specific appropriation is provided by law to fund the contract, and must include language that its effect is contingent upon a specific appropriation.

The council has not met since the late 1990s and during the past several years, agency outsourcing and privatization projects have been initiated and executed at the individual agency level, rather than through any direction by the council. The procurements and ensuing contracts resulting from this approach have often been the subject of the reports and audits discussed above.

Agency-Vendor Communication during Procurement: Current Florida law addresses some aspects of communication between public officials and vendors during the public procurement process. The descriptions of “invitation to bid,” “request for proposal,” and “invitation to negotiate” in ch. 287, F.S., all require that such solicitations be made available simultaneously to all vendors.²⁵ The DMS has promulgated a form, PUR 1001, which must be included in all

²⁴ See, s. 110.107, F.S. (defining the term “layoff” for purposes of ch. 110, F.S., as the, “. . . termination of employment due to a shortage of funds or work, or a material change in the duties or organization of an agency, including the outsourcing or privatization of an activity or function previously performed by career service employees.”); and s. 110.227(2), F.S. (requiring the Department of Management Services to adopt rules governing career service layoffs requiring that consideration be given to comparative merit, demonstrated skills, and the employee's experience).

²⁵ Sections 287.057(1)(a), (2)(a), and (3)(a), F.S.

formal solicitations issued by an agency.²⁶ In relevant part, relating to questions, PUR 1001 requires that: “Respondents shall address all questions regarding [the] solicitation to the Procurement Officer. . . . All questions submitted shall be published and answered in a manner that all respondents will be able to view. Respondents shall not contact any other employee of the Buyer or the State for information with respect to this solicitation.”

Section 838.022(1)(a), F.S., relating to bid tampering, provides that “it is unlawful for a public servant, with corrupt intent to influence or attempt to influence the competitive bidding process undertaken by any state, county, municipal, or special district agency, or any other public entity, for the procurement of commodities or services, to disclose material information concerning a bid or other aspects of the competitive bidding process when such information is not publicly disclosed.” Violation of the section is a felony of the second degree.

Training for Negotiators and Contracting Personnel: Currently, s. 287.057(17), F.S., provides that for contracts in excess of \$150,000, an agency head shall appoint: (a) at least three persons to evaluate proposals who collectively have experience and knowledge in the program areas and service requirements for which commodities or services are sought; and (b) at least three persons to conduct negotiations during a competitive procurement who collectively have experience and knowledge in negotiating contracts, contract procurement, and the program areas and service requirements for which commodities and services are sought.

Chapter 287, F.S., also provides that for each contractual services contract, an agency shall designate a contract manager responsible for enforcing performance of the contract terms and conditions, and at least one employee as contract administrator responsible for maintaining a contract file and financial information on all contractual services contracts. The contract administrator shall serve as a liaison with the contract managers and the Department of Management Services.

Audit Report No. 2003-3, by the Inspector General of the Executive Office of the Governor, recommended that the DMS undertake a statewide training initiative for contract managers and monitors. In its response to that report, the DMS agreed with the recommendation, and subsequently developed a training and certification program for purchasing professionals. The DMS’ training and certification manual²⁷ states that the purposes of the program are to both provide Florida purchasing professionals training, and encourage and recognize professional development in the field. The training program is based upon standards developed by the National Institute of Governmental Purchasing (NIGP),²⁸ and contains Florida-specific training. The training program can lead ultimately to both nationally-recognized and state-recognized certifications. One of the certifications resulting from the DMS training program is a “Florida

²⁶ The form is incorporated by reference in Rule 60A-1.002(7), F.A.C. The DMS has authority to promulgate such a rule by operation of s. 287.042(3), F.S., which gives the duty to the department to “establish a system of coordinated, uniform procurement policies, procedures, and practices to be used by agencies in acquiring commodities and contractual services....”

²⁷ Available on March 10, 2006, at http://dms.myflorida.com/dms/purchasing/florida_s_public_purchasing_training_and_certification/training_and_certification_manual

²⁸ The NIGP “is a not-for-profit education and research organization dedicated to helping governments manage tax dollars wisely.” NIGP website at <http://www.nigp.org/>.

Certified Negotiator.” As of March 10, 2006, the DMS has trained and recognized 31 agency employees as “Florida Certified Negotiators.”

Former Center for Efficient Government: On March 11, 2004, the Governor entered an executive order²⁹ creating the Center for Efficient Government (center) within the DMS. Directives in the order included requiring the center to: (a) establish a five-member oversight panel of agency heads; (b) create a centralized, multi-stage, gate process for the review, evaluation, and approval of agency outsourcing initiatives; (c) provide documentation of the completion of each stage to the Legislature prior to initiation of the next stage; (d) review past outsourcing projects for best business practices and existing outsourcing plans to ensure agency compliance with center standards; (f) maintain a database with information about initiatives being performed by contractors that includes a description of the work being performed, applicable performance measures, and contractor and subcontractor identification; and (g) implement a program to transition impacted state employees.³⁰

Pursuant to the Governor’s order, the center began its operations in April 2004. The Secretary of the DMS chaired the Center for Efficient Government Oversight Board (board) and its four other members consisted of the Secretaries for the Departments of Health and Transportation and the Executive Directors for the Department of Revenue and the Agency for Workforce Innovation. The center’s policies required that all agency outsourcing projects go through a sequential review and validation process, referred to as the “Gate Process.” The board, however, only reviewed and validated projects estimated to be valued at more than \$10 million per fiscal year and enterprise wide projects that were proposed by the center. The term “outsourced function” was defined by the center as “one which was previously performed by state employees and is now operated by a third party entity while the state remains fully responsible for the provision of affected services and maintains control over management and policy decisions.”³¹

The center published process standards for the five stages of the Gate Process established by the center: (1) Business Case Development; (2) Procurement Process; (3) Contract Management; (4) Transition Management: Training, Communications, Workforce; and (5) Post Implementation. As an agency completes each stage, the board was to review the agency’s progress and determine whether to validate that progress so that the agency could continue to the next stage. Center materials indicated that statutory authority was required for agency outsourcing projects.³²

Since the center was not created in statute, did not have statutorily-assigned functions and duties, and did not have general or specific statutory authority to enact rules, the standards and guidelines it enacted did not flow from a legislative delegation of authority. Further, even though the center process was “voluntary,” the center standards and guidelines conflicted with the

²⁹ Executive Order No. 04-45.

³⁰ *Id.* at 1-2; *See also* Executive Order No. 04-89 (entered on April 30, 2004, and directing agencies to address state employee transition in its business case and to develop job placement policies that include requiring contractor employment interviews for impacted employees and reemployment and retraining assistance plans for employees not retained by the agency or hired by the contractor).

³¹ *See* Center Frequent Questions and Answers, February 16, 2005, posted at http://dms.myflorida.com/dms/administration/center_for_efficient_government/center_for_efficient_government_faqs.

³² *Id.*

specific legislative provisions contained in s. 14.203, F.S., which provide a different process and standard.

Furthermore, the scope of powers of the center under the executive order did not extend throughout the executive branch. The executive order by its own terms applied only to those agencies whose heads are appointed by the Governor.³³ Other agencies were requested in the executive order to cooperate with the center.³⁴ Application of the center's outsourcing requirements only to those agencies with heads that are appointed by the Governor was inconsistent with the application of statutory procurement requirements, such as those contained in ch. 287, F.S.,³⁵ to all state agencies regardless of whether the agency head is appointed by the Governor or the Governor and Cabinet, or where the agency head is a constitutional officer or collegial body.

The CS for CS for Senate Bill 1146, passed by the Florida Legislature in the 2005 Regular Session, created a Center for Efficient Government within the DMS, and a Commission on Efficient Government to oversee the center. Together, the entities were required to review and evaluate certain types of contractual services procurements, via the gate process, and make determinations at each gate as to whether the procurement should move forward. The bill also contained an appropriation to fund the activities of the center and the commission. The Governor vetoed the bill on June 27, 2005. Section 216.179, F.S., provides, in relevant part, that after the Governor has vetoed a specific appropriation for an agency, neither the Governor, nor a state agency, may authorize expenditures for or implementation in any manner of the programs that were authorized by the vetoed appropriation. By operation of the statute, the DMS was prohibited from authorizing expenditures for or implementing the programs of the Center for Efficient Government.

III. Effect of Proposed Changes:

Section 1. Amends s. 287.057, F.S., by adding provisions relating to contract amendments, contract negotiations, and vendor contact with agencies during procurements.

The bill amends s. 287.057(14)(a), F.S., by adding a requirement that if an amendment to a contract results in a longer contract term or increased payments, an agency may not renew or amend a contract for the outsourcing of a service or activity that has an original term value exceeding the sum of \$10 million before submitting to a written report on contract performance to the Governor, the President of the Senate, and the Speaker of the House at least 90 days before execution of the renewal or amendment. The provision exempts extensions made pursuant to s. 287.057(13), F.S.³⁶

³³ The process established in s. 14.203, F.S., applies to all executive branch entities and the entity responsible is the Governor and Cabinet sitting as the Administration Commission.

³⁴ See Executive Order No. 04-45 at Section 2. (providing for the order's applicability).

³⁵ Chapter 287, F.S., contains statutory requirements for the procurement of commodities and contractual services.

³⁶ Contract extensions for contractual services must be in writing for a period not to exceed 6 months and must be subject to the same terms and conditions set forth in the initial contract. There may be only one contract extension, unless the failure to meet the criteria set forth in the contract for completion of the contract is due to events beyond the control of the contractor.

The bill amends s. 287.057(17), F.S., by adding a requirement that when conducting negotiations for contracts valued at greater than \$1 million in a fiscal year, at least one of the persons conducting the negotiations must be certified as a contract negotiator based on rules adopted by the DMS. The rules must address the qualifications and method for certification and the procedure for involving the certified negotiator.

The bill adds new subsection (26), which requires that in procurements of commodities or contractual services, the solicitation must include a specific provision that respondents to the solicitation or their representatives may not contact, between the release of the solicitation and execution of the resulting contract, any employee of the executive or legislative branch concerning the solicitation, except in writing to the procurement officer or as provided in the solicitation documents. Violation of the provision may be grounds for rejecting a response.

Section 2. Creates s. 287.0571, F.S., which provides that new sections 287.0571 through 287.0574, F.S., may be cited as the “Florida Efficient Government Act.” The bill provides that it is the intent of the Legislature that state agencies focus on their core missions 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, and that business cases to outsource be evaluated for feasibility, cost-effectiveness, and efficiency before a state agency proceeds with an outsourcing. The bill provides that the Florida Efficient Government Act does not apply to procurements of:

- prescriptive medical devices for the purpose of medical, developmental, or vocational rehabilitation of clients;
- artistic services;
- academic program reviews;
- lectures by individuals;
- auditing services;
- legal services;
- health services involving examination, diagnosis, treatment, prevention, medical consultation, or administration;
- services provided to persons with mental or physical disabilities by not-for-profit corporations;
- Medicaid services delivered to an eligible Medicaid recipient;
- family placement services;
- prevention services related to mental health operated by not-for-profit corporations;
- training and education services provided to injured employees pursuant to s.440.491(6);
- contracts entered into pursuant to s. 337.11;
- services or commodities provided by governmental agencies;
- continuing education events or programs that are offered to the general public and for which fees have been collected that pay all associated expenses;
- contracts with any independent, nonprofit college or university located in the state and accredited by the Southern Association of Colleges and Schools;
- contractual services subject to s. 287.055;
- a contract in support of the planning, development, implementation, operation, or maintenance of the road, bridge, and public transportation construction program of the Department of Transportation; or

- commodities or contractual services which do not constitute an outsourcing of services or activities.

Section 3. Creates s. 287.05721, F.S., which provides definitions for use in the Florida Efficient Government Act. “Outsource” means the process of contracting with a vendor to provide a service as defined in s. 16.011(1)(f), F.S., in whole or in part, or an activity as defined in s. 216.011(1)(rr), F.S., while a state agency retains the responsibility and accountability for the service or activity and there is a transfer of management responsibility for the delivery of resources and the performance of those resources. “Council” means the Council on Efficient Government.

Section 4. Creates s. 287.0573, F.S., creating the Council on Efficient Government within the DMS to review, evaluate, and issue advisory reports on business cases submitted to the council. The council will consist of seven members appointed by the Governor pursuant to s. 20.052, F.S., to include:

- the Secretary of the DMS, who will serve as chair;
- a cabinet member other than the Governor, or his or her senior management or executive staff designee;
- two heads of executive branch agencies; and
- three members of the private sector with experience in procurement, increasing operational efficiency, and implementing complex projects. Private sector members must be confirmed by the Senate, and may not be registered as lobbyists.

The bill provides a schedule for the initial appointment of the members, and that they are entitled to reimbursement for travel and per diem expenses pursuant to s. 112.061, F.S. A member may not participate in the review of a business case if his or her agency is conducting the proposed outsourcing, or in the case of a private-sector member, if he or she has a business relationship with an entity that is or may be involved in the proposed outsourcing. Vacancies are to be filled in the same manner as the original appointment.

The bill specifies that the council must:

- employ a standard process for reviewing business cases to outsource;
- review and evaluate business cases to outsource as requested, or as required by the Florida Efficient Government Act or by law;
- provide to the Governor and the Legislature an advisory report on agency business cases to outsource valued at \$10 million or more, at least 30 days before agency issuance of a solicitation;
- recommend and implement standard processes for review and evaluation of business cases to outsource;
- develop standards and best-practice procedures for use by agencies in evaluating business cases to outsource, and standards and processes for use by agencies in developing business cases;
- Incorporate lessons learned from outsourcing activities into council standards and procedures, and disseminate to agencies information regarding best practices in outsourcing efforts;

- Develop, in consultation with the Agency for Workforce Innovation, guidelines for assisting state employees whose jobs are eliminated as a result of outsourcing;
- Identify and report yearly to the Legislature on innovative methods of delivering government services, and the outsourcing efforts of each state agency, to include the number of business cases, solicitations, and outsourcing contracts, an explanation of agency progress on achieving the cost-benefit analysis required by the bill, and the status of extensions, renewals, and amendments of outsourcing contracts.

The bill provides that the DMS must employ an adequate number of staff to carry out the responsibilities of the act, that the council must be headed by a director appointed by the secretary of the DMS, and that agencies must submit to the council all materials required by the council or the act.

Section 5. Creates s. 287.0574, F.S., which requires that a business case to outsource be undertaken by agencies prior to outsourcing, provides the requirements for such business cases, and provides additional contract terms to be used in outsourcing contracts.

Submission of Business cases to outsource: Business cases to outsource having a projected cost exceeding \$10 million in any fiscal year require:

- An initial business case analysis conducted by the agency and submitted to the council, the Governor, and the legislature at least 60 days prior to release of the solicitation.
- Evaluation of the agency business case by the council submitted to the agency, the Governor, and Legislature at least 30 days before solicitation is issued.
- A final business case analysis conducted by the agency after negotiation and before contract execution, submitted at least 30 days prior to execution of the contract to the council, the Governor, and the Legislature.

Business cases to outsource having a projected cost between \$1 million and \$10 million in any fiscal year require:

- An initial business case analysis conducted by the agency and submitted to the council, the Governor, and the Legislature at least 30 days prior to release of the solicitation.
- A final business case analysis conducted by the agency after negotiation and before contract execution, submitted at least 30 days prior to execution of the contract to the council, the Governor, and the Legislature.

Business cases to outsource having a projected cost under \$1 million in any fiscal year require a final business case analysis conducted by the agency after negotiation and before contract execution submitted to the council at least 30 days prior to execution of the contract. The council will include such business cases in its annual report to the Legislature and the Governor.

Business Case Requirements: Subsection (3) delineates the business case requirements with which an agency must comply before the outsourcing of a service or function. The business case is not subject to challenge pursuant to s. 120.54, F.S, and the council may allow an agency to submit the business case in the form required by the budget instructions issued pursuant to s. 216.023(4)(a)11., F.S. The business case must include the following:

- A detailed description of the service or activity for which the outsourcing is proposed.

- A description and analysis of the state's current performance, based on existing performance metrics.
- The goals to be achieved by the proposed outsourcing and the rationale for those goals.
- A citation to the legal authority for the outsourcing.
- A description of available options for achieving the goals. If state employees are currently performing the service, at least one option involving maintaining state provision of the service must be included.
- An analysis of the advantages and disadvantages of each option.
- A description of the current market for the contractual services under consideration for outsourcing.
- A cost-benefit analysis documenting costs,³⁷ savings,³⁸ and benefits, including a schedule necessary to realize expected benefits. The agency head must attest that, to the best of his or her knowledge, all costs, savings, and benefits are valid and achievable.
- A description of differences among agency policies and procedures and a description of plans to standardize or revise them, if appropriate.
- A description of the performance measures that must be met to ensure adequate performance.
- The projected timeline for key events from procurement through expiration of contract.
- A plan to ensure compliance with public-records law.
- A contingency plan addressing contractor noncompliance.
- A transition plan for addressing relevant changes in the number of agency personnel, affected business processes, and employee transition issues. The plan must include a reemployment plan for employees not retained by the agency or hired by the contractor.
- A plan for ensuring access for persons with disabilities in compliance with applicable state and federal law.
- A description of legislative and budgetary actions necessary to accomplish the proposed outsourcing.

Contract Requirements: Subsection (5) delineates the specific terms that must be included in contracts resulting from outsourcings. In addition to the provisions required by s. 287.058, F.S., such contracts must include:

- a detailed scope of work provision, including a clause that provides that if a service performed by the state is inadvertently left out of the contract, the service will be provided by contractor via the contract amendment process;
- a service level agreement provision, including a clause that allows the agency to retain the right to perform the service, if service levels are not being achieved;
- a provision that identifies all costs, payment terms and schedules, and financial incentives and disincentives;

³⁷ Defined for the purpose of the section as the reasonable, relevant, and verifiable cost, which may include, but is not limited to, elements such as personnel, materials and supplies, services, equipment, capital depreciation, rent, maintenance and repairs, utilities, insurance, personnel travel, overhead, and interim and final payments.

³⁸ Defined for the purpose of the section as the difference between the direct and indirect actual annual baseline costs compared to the projected annual cost for the contracted functions or responsibilities in any succeeding state fiscal year during the term of the contract.

- a specific transition implementation schedule addressing the transfer provision of the service or activity to the contractor;
- specific identification of all performance standards, including measurable acceptance criteria, a method for monitoring progress, and penalties for nonperformance;
- a requirement that the contractor and its subcontractors maintain accounting records which comply with state and federal laws, and generally accepted accounting principles.
- a requirement authorizing state access to and audit of all records related to the contract and subcontracts;
- a requirement that the contractor interview and consider for employment each displaced state employee who is interested in such employment; and
- a contingency plan for continuing the operation of the service or activity if the contractor fails to perform and the contract is terminated.
- a provision that requires the contractor and its subcontractors to comply with public-records laws;
- a provision that specifies ownership of intellectual property;
- a provision that the agency retains the right to co-negotiate any third-party or subcontractor contracts; and
- a provision, if applicable, that allows the agency to purchase from the contractor assets used in the performance of the contract.

Section 6. Adds to s. 287.058, F.S., subsection (6), which provides that a contract may not prohibit a contractor from lobbying the executive or legislative branch concerning issues regarding any contract to which the contractor and a state agency are parties. This provision is supplemental to a provision that prohibits the use of state funds in lobbying,³⁹ and provision that prohibits the use of grants and aids in lobbying.⁴⁰

Section 7. Creates new s. 287.074, F.S., which prohibits contractor personnel from:

- selecting state employees;
- approving position descriptions, performance standards, or salary adjustments for state employees; and
- hiring, promoting, disciplining, demoting, and dismissing a state employee.

Only a public officer may commission and appoint state officers.

Section 8. Provides that no contractor, or its employees, agents, or subcontractors, may knowingly participate in a procurement process for the procurement of commodities or contractual services from an entity in which the contractor, or its employees, agents, or subcontractors, has a material interest.

Section 9. Repeals s. 14.203, F.S., the statutory basis for the State Council on Competitive Government.

³⁹ Section 11.062, F.S.

⁴⁰ Section 216.347, F.S.

Section 10. Appropriates \$1.25 million in recurring funds from the General Revenue Fund in a qualified expenditure category and 10 FTE positions and the DMS to carry out the activities of the Council on Efficient Government.

Section 11. Provides that the DMS may implement a program to train agency personnel as Project Management Professionals, and appropriates \$500,000 in recurring funds from the General Revenue Fund for that purpose. The DMS must consult with agencies to identify employees to participate in the training.

Section 12. Provides that notwithstanding any law to the contrary, any agency under the control of the Attorney General, the Chief Financial Officer, or the Commissioner of Agriculture is subject to this act.

Section 13. Provides that the act will take effect upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The DMS is appropriated \$1.25 million in recurring funds from the General Revenue Fund in a qualified expenditure category and 10 FTE positions and the DMS to carry out the activities of the Council on Efficient Government, and \$500,000 in recurring funds from the General Revenue Fund for training agency personnel as Project Management Professionals.

The cost to agencies of complying with the more detailed business case and contractual term requirements of the bill, if any, may be offset by the savings generated for the state by contracts resulting from well-crafted business cases and contracts.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
