

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

Present situation

Since the 1950's, Florida has statutorily required competitive bidding in state procurement.¹ Through the years, the Legislature has amended the requirements numerous times with control over the procurement process passing from the State Purchasing Commission to the Department of General Services, now known as the Department of Management Services (DMS).²

Currently, Part I of Chapter 287, F.S., sets forth the requirements for the procurement of commodities and contractual services by state agencies. The law directs DMS, as the centralized authority, to oversee the implementation of competitive bidding requirements and to create uniform rules for procurement. The purchasing process also is partly decentralized. Except in the cases where state term contracts exist, agencies may buy commodities and contractual services themselves.³

As the state has increasingly shifted to external provision of services,⁴ it has occasionally experienced challenges in ensuring that the desired results are achieved. Recent studies and audits suggest that the state's procurement process for large and complex outsourcing initiatives could be improved:

- In June 2003, the Governor's Chief Inspector General released an audit report entitled "A Road Map to Excellence in Contracting."⁵ It found problems with procurement, particularly with performance monitoring, procurement methodologies, and contract writing. The report suggested a variety of solutions, including revising Ch. 287, F.S., establishing a negotiations training program, and facilitating interagency communication among procurement staff.
- In January 2004, the Office of Program Policy Analysis and Government Accountability (OPPAGA) released a report entitled "The Legislature Could Strengthen State's Privatization⁶ Accountability Requirements."⁷ OPPAGA concurred with the Chief Inspector General's June 2003 findings and suggested Legislative actions including mandating the use of business cases, strengthening requirements for performance contracting, and strengthening oversight of agency privatization initiatives.
- Various reports by the Auditor General have identified problems. For example:
 - In the MyFloridaAlliance initiative of the State Technology Office (STO) involving outsourcing multiple functions, the STO had not conducted full feasibility studies, cost analyses, or risk assessments to determine if the outsourcing of these functions would provide the best value to the state. Additionally, the information provided in the solicitation documents did not provide sufficient detail about the STO operations, services, and the

¹ See generally Ch. 287, F.S.

² Relatively recent substantial changes include Ch. 82-196, L.O.F. (submitting contractual services to competition requirements), Ch. 92-279, L.O.F. (creating the Department of Management Services from the previous Department of General Services and Department of Administration), and Ch. 2002-207, L.O.F. (introducing Invitation to Negotiate language and procedures).

³ Section 287.056, F.S.

⁴ The last-available data from the Center for Efficient Government documented at least 138 outsourcing projects undertaken between January 1999 and June 2004.

⁵ Available online here: http://www.myflorida.com/eog/inspector_general/reports.html.

⁶ OPPAGA uses "privatization" as a generic term encompassing such techniques and activities as contracting out, outsourcing, and public-private partnerships.

⁷ Available online here: <http://www.oppaga.state.fl.us/reports/pdf/0402rpt.pdf>.

program requirements to allow for a responsible vendor to adequately respond to the specified key initiatives. The contracts with Accenture and BearingPoint lacked certain provisions to adequately protect state resources.⁸ The STO subsequently cancelled the contracts.

- In the DMS procurement of the MyFloridaMarketplace e-procurement system, the department's planning process did not include timely completion of a cost-benefit analysis or risk assessment.
- In the Department of Business and Professional Regulation On-line Licensing and Call Center Services procurement, the department did not perform a feasibility study for the procurement's Application Management Services component.⁹ Additionally, the contract, which is funded through a shared-savings model, failed to provide specifics about how to calculate cost savings and how the savings would be divided.¹⁰
- The Inspector General of DMS has identified similar problems regarding correctional privatization. In its 2005 internal audit,¹¹ the DMS Inspector General identified serious deficiencies including:
 - Failure to enforce contract provisions;
 - Allowing vendors to waive contract requirements without adjusting payments to vendors;
 - Making over \$1 million in overpayments to vendors without any attempt to recover the overpayments; and
 - Allowing vendors to bill for inflated per-diem and maintenance costs.

Previous Initiatives to Improve Outsourcing

The Governor issued an Executive Order on March 11, 2004, creating the Center for Efficient Government (Center) within DMS.¹² The executive order stated that the Center was the "enterprise wide gateway for best business practices in order to improve the way state agencies deliver services to Florida's citizens." The order required the Center to:

- Establish a five-member oversight panel made up of agency heads;
- Create a centralized, multi-stage, gate process for the review, evaluation, and approval of agency outsourcing¹³ initiatives;
- Provide documentation at the completion of each stage to the Legislature prior to initiation of the next stage;
- Review past outsourcing projects for best business practices and existing outsourcing plans to ensure agency compliance with center standards;
- 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
- Implement a program to transition impacted state employees.

The Center's policies required all agency outsourcing projects to undergo a sequential review and validation process, referred to as the "Gate Process." The oversight board, however, only reviewed and validated projects with an estimated value of more than \$10 million per fiscal year and enterprise-wide projects proposed by the center. As an agency completed each stage, the oversight board was to review the agency's progress and determine whether to validate that progress so that the agency could

⁸ Auditor General Report No. 2005-08, *State Technology Office: MyFlorida Alliance Operational Audit*, July 2004.

⁹ Auditor General Report No. 2002-112, *On-Line Licensing System & Call Center Services Agreement- Department of Business & Professional Regulation - Operational Audit*, December 2001.

¹⁰ Auditor General Report No. 2004-112, *Department of Business & Professional Regulation - On-Line Licensing System & Call Center Services Agreement Operational Audit*, January 2004.

¹¹ Department of Management Services Internal Audit Report Number 2005-61, *Contract Management of Private Correctional Facilities*, June 30, 2005, pages i - iii.

¹² Executive Order 04-45.

¹³ The center defined an "outsourced function or service" 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." *Center for Efficient Government FAQ's*.

continue to the next stage. However, the board had no authority to accept or deny a project, or challenge the documentation provided by an agency.

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

As a result of the 2003 "Road Map to Excellence" report, DMS began a series of training classes for purchasing employees. The Public Purchasing Training and Certification program¹⁴ trains Purchasing Agents, Purchasing Managers, Certified Contract Managers, and Certified Negotiators. DMS reports that 108 employees out of approximately 700 have completed at least one of these series.¹⁵

Proposed Changes

The Florida Efficient Government Act

The bill implements the Florida Efficient Government Act (the "Act"). The intent of the Act is to ensure that state agencies, including cabinet agencies, focus on core missions and contract with private-sector vendors, "whenever vendors can more effectively and efficiently provide services and reduce the cost of government." In order to ensure this efficiency, the Act requires agencies to create detailed business cases for all outsourcing projects. These projects are broken down into three levels: those under \$1 million in all years of the contract, those between \$1 million and \$10 million in any fiscal year, and those over \$10 million in any fiscal year. Each level has its own set of requirements.

Some contracts are exempt from the Act. Contracts made pursuant to s. 287.057(5) (e),¹⁶ (f),¹⁷ and (g),¹⁸ F.S., are exempt, as are contracts made under s. 287.057(22), F.S.¹⁹ In addition, contracts made under the Consultants' Competitive Negotiation Act²⁰ are exempt, as are road construction contracts let by the Department of Transportation.

The Council for Efficient Government

The Act creates the Council on Efficient Government (the "council"). The council is tasked with reviewing business cases submitted by agencies, advising agencies on outsourcing projects, and issuing advisory opinions to the Governor, the Speaker of the House of Representatives, and the President of the Senate. The council consists of seven members:

- The Secretary of DMS;
- A cabinet member other than the Governor;
- Two executive-branch agency heads; and
- Three members from the private sector, having complex, large-scale project-implementation experience.

The council is appointed by the Governor and confirmed by the Senate, pursuant to s. 20.052(5), F.S. The bill directs the council to comply with all necessary requirements contained in s. 20.052(3) and (4), F.S., including staggered appointments and compliance with all public records and public meetings laws. The council is chaired by the Secretary of DMS, and DMS is tasked with administrative support.

¹⁴ See generally http://dms.myflorida.com/purchasing/florida_s_public_purchasing_training_and_certification.

¹⁵ Names of the employees certified under each category are available online at:

http://dms.myflorida.com/dms/purchasing/florida_s_public_purchasing_training_and_certification/florida_purchasing_certification_holders.

¹⁶ Certain medical devices.

¹⁷ Personal services contracts (i.e., lectures by individuals, artistic services, legal services).

¹⁸ Continuing education events offered to the general public.

¹⁹ A contract with an independent, non-profit accredited college or university, when such contract is made "on the same basis as [the agency] may contract with any state university or college."

²⁰ Section 287.055, F.S. The CCNA covers architectural, engineering, and other construction-related services.

Business Case Requirements

The council is directed to receive business cases from an agency for each outsourcing project the agency wishes to undertake. The contents of the required business case include:

- A description of the service to be provided;
- An analysis of the agency's current "in-house" performance of the service;
- The goals and rationale of the project;
- A citation of the legal authority underpinning the project;
- A description of available options for achieving the stated goals;
- An analysis of the advantages and disadvantages of each option;
- A description of the current marketplace for the services;
- A detailed cost-benefit analysis;
- A change management plan regarding the current and future processes involved, among all potentially affected agencies;
- A description of appropriate performance standards;
- Projected timeframes for key events;
- Public records compliance plans;
- Contingency plans for non-performance;
- A transition plan for affected state employees; and
- A description of legislative and budgetary actions necessary to accomplish the project.

For contracts less than \$1 million in all fiscal years, a business case must be submitted to the council, the Governor, the President of the Senate, and the Speaker of the House of Representatives after the agency has negotiated with the vendor, but 30 days before the contract is signed with the vendor. For contracts between \$1 million and \$10 million in any fiscal year, an initial business case must be submitted 30 days before the solicitation is released. This is followed by a final business case, to be submitted at least 30 days before the contract is signed. For contracts in excess of \$10 million in any fiscal year, the initial business case must be submitted 60 days in advance of the agency's solicitation, and the council must respond to the agency by providing its own evaluation of the business case within 30 days of the solicitation.²¹ As in the other project levels, a final business case must be submitted after the negotiation but before the contract is signed.

Contract Requirements

The Act also addresses contracts issued by agencies. In addition to current contract requirements,²² outsourcing contracts must contain:

- A detailed scope of work;
- A service level agreement describing all requirements and responsibilities of the contractor;
- A cost-schedule, payment terms, and other financial items;
- A specific transition implementation schedule;
- Clear and specific identification of all required performance standards;
- Specific accounting requirements;
- Clear and specific records-access provisions;
- A requirement that the contractor interview and consider for employment all affected state employees;
- A contingency plan in the event of nonperformance by the contractor;
- A requirement that the contractor abide by the state's public records law;
- A statement that the state retains the right to co-negotiate any subcontractor contracts;
- Term for performance bonds; and
- A signature by the agency's licensed attorney.

²¹ The council's report also is sent to the Governor, the Speaker of the House of Representatives, and the President of the Senate.

²² See generally s. 287.058, F.S.

The bill specifies that if the contract does not include all of the above elements it will be considered null and void.

The bill provides that contractors may not be prohibited from lobbying the executive or legislative branch with regard to a current contract held by the contractor. A contractor may not knowingly be involved in the agency's purchase of services from a company in which the contractor has a material interest.

Negotiation & Rulemaking

For any contract in excess of \$1 million dollars, at least one of the persons conducting the negotiations for the state must be certified as a contract negotiator.²³ If the value of the contract is in excess of \$10 million dollars, at least one of the persons conducting negotiations must be a Project Management Professional, as certified by the Project Management Institute.

As part of the negotiation certification process, DMS is granted rulemaking authority to ensure that certified contract negotiators are knowledgeable about negotiation strategies, capable of effectively implementing those strategies, and involved appropriately in the larger procurement process. The rulemaking authority is specifically detailed to address:

- The qualifications required for certification;
- The method of certification; and
- The procedure for involving the certified negotiator.

The bill specifies that at a minimum the certification requirements must include 3 years of experience, a bachelors degree, 48 classroom hours, and successful completion of a written examination.

Other Issues

All solicitations are required to contain a "no contact" provision ensuring that contractors do not attempt to influence or discuss an active solicitation with purchasing employees. Inappropriate contact may be grounds for rejecting a bidder's submission. Current statutes do not address the issue of improper contact, although DMS forms contain language implementing a specific question-and-answer process.²⁴

Renewals and extensions of current contracts over \$10 million are not permitted before the agency submits a written report regarding the contractor's performance to the Governor, the Speaker of the House of Representatives, and the President of the Senate.

The bill prohibits contract personnel from serving in a supervisory role for state employees.

The bill repeals s. 14.203, F.S., establishing the State Council on Competitive Government.

The bill modifies s. 119.071, F.S., to conform this section of statute with the repeal of s. 14.203, F.S., in the bill.

C. SECTION DIRECTORY:

Section 1 amends s. 287.057, F.S., relating to the procurement of commodities or contractual services.

Section 2 creates s. 287.0571, F.S., creating the Florida Efficient Government Act.

Section 3 creates s. 287.05721, F.S., providing definitions for the Florida Efficient Government Act.

²³ Additional requirements for negotiation teams can be found at s. 287.057(17)(b), F.S.

²⁴ See Form PUR 1001, paragraph 5.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

DMS is granted rulemaking authority to establish a negotiation certification program. DMS is authorized to set the qualifications required for negotiation certification, the method by which employees attain certification, and the procurement procedures for involving a certified negotiator, during the purchasing process.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On April 4, 2006, the State Administration Appropriations Committee adopted five amendments to the bill. One amendment clarifies that an executive director is appointed by the Secretary of DMS. Minimum requirements were established for the certification of contract negotiators. The Council on Efficient Government's annual report was expanded to include a section on the performance of existing outsourcing contracts. Sanctions were added for noncompliance with the act. The appropriation was reduced to 8 positions and \$1 million. The contract requirements were expanded to:

- Include the signature of a licensed agency attorney;
- Include performance bonding;
- Provide for the nullification of the contract if this section of statute is not adhered to;
- Require that the contractor and subcontractors must abide by the public-records laws;
- Stipulate that the state owns any intellectual property created as a result of the contract;
- Stipulate that the state retains the right to co-negotiate any subcontractor contracts; and
- Provide that the state retains the right to purchase any hardware procured by the contractor at a depreciated value.