



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to directly implicate any of the House principles.

#### B. EFFECT OF PROPOSED CHANGES:

Chapter 287, F.S., governs the procurement of personal property and services by state agencies. The statement of legislative intent in section of ch. 287, F.S., states that the Legislature “recognizes that fair and open competition is a basic tenant of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically; and that documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in the process by which commodities and contractual services are procured.”<sup>1</sup>

Currently, contracts for the purchase of most commodities and services are to be procured by competitive solicitation when the dollar amount is above \$25,000.<sup>2</sup> Purchases between \$2,500 and \$25,000 may be made using written quotations, written records of telephone quotations, or informal bids to be opened upon receipt, whenever practical.<sup>3</sup>

Before the 2002 Regular Session, statute required the Department of Management Services (DMS) to annually adjust the purchasing category amounts pursuant to rule that set forth an adjustment process and designated a nationally recognized price index.<sup>4</sup> These adjustments were never made, however, and during the 2002 Regular Session, legislation requested by DMS was enacted which retained the requirement for rule adjustment of the categories, but which repealed the requirement that the adjustment occur annually.<sup>5</sup> A DMS rule currently provides for the adjustment of the categories by State Purchasing within DMS based upon the April publication of the United States Department of Commerce Survey of Current Business Table 7.11B Price Index for State and Local Government.<sup>6</sup> To date, DMS has not made the adjustment to the thresholds required by statute; accordingly, the operative category amounts for agency procurements are those currently set forth in statute, as indicated above.

#### Revenue-Generating Contracts

Though used infrequently, state agencies enter into contracts with vendors which do not require the direct outlay of state funds to the contractor, but generate a financial benefit to the vendor or the agency, or both.

One such contract, between the Department of Corrections (DOC) and a contractor for the operation of DOC canteens, has recently been the subject of intense scrutiny. DOC did not competitively procure the contract with Keefe Commissary Network in accordance with ch. 287, F.S., stating that since the contract was revenue generating and not a purchase under ch. 287, F.S., competitive solicitation was not required.<sup>7</sup> In 2006, a former Secretary and Regional Director of DOC pleaded guilty to accepting kickbacks from a subcontractor on the canteen services contract.

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<sup>1</sup> Section 287.001, F.S.

<sup>2</sup> Sections 287.057(1)(a), & 287.017(1)(b), F.S.

<sup>3</sup> Rule 60A-1.002(3), F.A.C.

<sup>4</sup> Section 287.017(2), F.S. (2000 Supp.)

<sup>5</sup> Chapter 02-2-7, Laws of Florida

<sup>6</sup> Rule 60A-1.012, F.A.C.

<sup>7</sup> *Outsourcing of Canteen Operations*, Department of Corrections, Auditor General Report No. 2005-44. October 2004.

In October 2004, the Auditor General recommended that the Legislature consider revising current law to include provisions for the competitive procurement of revenue-generating contracts.

CS/HB 1451 adds a new subsection in s. 287.057, F.S., to require agencies to procure by competitive solicitation any contract that authorizes a contractor to use governmental authority to provide a service, or authorizes a contractor to use government property for the purpose of selling goods or services, if the sum of estimated gross revenues to be generated under the contract for the state, the contractor, or both exceed \$25,000. The current exemptions from competitive solicitation requirements provided s. 287.057(5), F.S., remain unchanged.<sup>8</sup>

### Public Notice

CS/HB 1451 creates a new section of statute that authorizes an additional form of public notification on a public notice website whenever notice or advertisement is required by law. The bill provides that with the exception of notice requiring personal service or notice requiring service by registered mail, a notice that is substantially identical to that required by current law may be posted on a public notice website. The website is to be established by DMS and must be “. . . freely accessible to the public and shall be operated by the website provider at no cost to the state.” The bill authorizes the website provider to charge a reasonable fee of not more than \$10 for the posting of the notice on this additional or alternative website, but the fee must not charge for public access to, or use of, any of the website’s browsing features. The website provider must remit to the clerks of the court 15% of the revenues “that would have been generated through the posting of notice by traditional means in the courts within the state.” It is unclear how the determination of revenues that “would have been generated” is to be made.

### Design-Build Contracts

Except for certain contracts entered into by the Department of Transportation, s. 287.055(9), F.S., requires DMS and other state agencies to adopt rules for the award of “design-build” contracts.<sup>9</sup> Under this subsection of statute, municipalities, political subdivisions, school districts and school boards are required to award design-build contracts either by the use of a competitive proposal or by a qualifications-based selection process pursuant to s. 287.055(3),(4), and (5),F.S.<sup>10</sup>

CS/HB 1451 amends s.287.055(9), F.S., the design-build contract subsection of the statute, relating to the acquisition of architectural, engineering, landscape architectural, or surveying and mapping services by DMS, other agencies and political subdivisions, to authorize contracts awarded under this subsection to establish the compensation or method by which compensation is to be paid for professional services to be rendered by the firm selected and, the method by which it will subsequently establish a guaranteed maximum price, and a guaranteed completion date. Current law does not expressly provide that the contract may state the method by which compensation shall be paid.

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<sup>8</sup> Subsection (5) of s. 287.057, F.S., lists numerous exemptions to the competitive solicitation requirement including contractual services for health services, legal services, family placement services, prevention services related to mental health, artistic services and other services.

<sup>9</sup> Section 337.11(7), F.S., referenced in the bill relates to contracts in which in the head of the Department of Transportation determines that it is in the public interest to combine right-of way services and design and construction phases of any project into a single contract.

<sup>10</sup> Section 287.055(3), F.S., requires uniform public notice by a governmental developer when professional services must be purchased for a construction project that the Department of Management Services estimates will exceed \$250,000 or when the professional service fee for a planning or study activity exceeds \$25,000. That subsection also requires the professional service professional to be certified as fully qualified according to the laws and regulations of the governmental developer. It also sets forth specific criteria and considerations for each governmental developer to utilize in evaluating professional service providers. Subsection (4) relates to the requirement of agencies to select, in order of preference, at least three of the most qualified firms to perform the work performed. Subsection (5) relates to the requirements of agencies to negotiate a contract with the most qualified professional services provider.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 287.055, F.S, relating to provisions of design-build contracts.

**Section 2.** Amends s. 287.057, F.S., to require agencies to procure contracts for the state through competitive solicitation.

**Section 3.** Creates and undesignated section of statute relating to a public notice website.

**Section 4.** Contains a severability clause.

**Section 5.** Provides an effective date.

## II. 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:

There are indeterminate costs that contractors may incur in responding to competitive solicitations.

D. FISCAL COMMENTS:

There are indeterminate costs that state agencies may incur in the competitive solicitation process.

At committee staff's request, DMS submitted a tentative preliminary estimate of the development, implementation and ongoing support of a Public Notice Website to serve as alternative replacement of posting public notices through the clerk of the courts. Their estimate is broken down into three categories:

- Assumptions - Gathered from House Bill No. 1451 and speculation of technical elements needed for pricing and storage calculations.
- Costs to Build, Integrate, and Implement.
- Recurring Costs.

DMS made the following assumptions in providing their estimate:

1. The website will support all public notice and advertisements required by law for all state agencies and local and county governments.

2. Integration may need to occur for each application that currently provides information to the public.
3. A User ID/password and account will be setup for each agency or government wishing to post notices or advertisement. Uploading notices and advertisements will be the responsibility of each entity wishing to post notices and advertisements. This can be done either manually or by integration with the website.
4. Notices or advertisements will be stored as PDFs (portable document format).
5. Each PDF will have an average size of 1 megabyte.
6. Each Notice will be defined by Category, Date Posted, and County. There may be other requirements determined during Requirements Definition and the development of the Scope of the Project.
7. There will be an average of 100 notices or advertisements posted each business day from each source.
8. Notices or advertisements will be stored as PDFs (portable document format).
9. The development, integration and initial implementation costs are the only charges being accessed to the State of Florida for this new Website. Recurring maintenance and support costs are to be recovered by the fee charged for posting each notice or advertisement.
10. The general public will have free accessibility to the website for purposes of searching, viewing, and downloading public notices and advertisements.

Based on the foregoing assumptions, DMS arrived at the following costs for implementation:

1. <u>For website creation/integration</u>		
Requirements and design -		\$ 10,476
Web application development -		\$ 62,856
Deployment and documentation -		\$ 6,984
2. <u>Equipment</u>		
Server -		<u>\$ 6,000</u>
	Total	\$ 83,316
Number of websites to be integrated		x 25
	Total	\$2,082,900

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

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

##### 2. Other:

CS/HB 1451 may be susceptible to a single subject challenge under Article III, Section 6 of the Florida Constitution which provides that “[e]very law shall embrace but one subject and matter properly connected therewith, and the subject will be briefly explained in the title.”

The title for CS/HB 1451 indicates that the bill relates to “procurement of personal property and services.” Section 1 of the bill amends provisions relating to state and local government entity procurements of design-build contracts. Section 2 specifically addresses the procurement of goods and contractual services through the competitive solicitation process. These two sections of the bill are directly related to the subject described in the bill title’s “relating to” clause.

The third section of the bill, however, addresses public notice in all instances wherever notice and advertisement is required by law, “[n]otwithstanding any other provision of law to the contrary.” Such a sweeping provision of law that applies in this manner supersedes every other statute directing public notice and advertisement on every subject which has specific provisions and requirements that are tailored to meet the individual circumstances addressed by specific statutes. Although section three’s language is designed as a supplement or perhaps an alternative to existing notice provisions, the fact that it would apply broadly to every type of notice and advertisement provision in existence provides a plausible basis to assert a single subject challenge to the bill. This is particularly true when one considers the fact that there currently exists a central “hub” for compliance with public notice and advertisement requirements with respect state procurements within the State’s current MyFloridaMarketPlace.com website.

The standard to review legislation against a single subject challenge is highly deferential. “Should any doubt exist that an act is in violation . . . the presumption is in favor of constitutionality. To overcome the presumption, the invalidity must appear beyond a reasonable doubt, for it must be assumed the [L]egislature intended to enact a valid law. Therefore, the act must be construed, if fairly possible, as to avoid unconstitutionality and to remove grave doubts on that score.”<sup>11</sup>

In Franklin v. State, the Florida Supreme Court developed a two step approach to determine whether legislative acts violate the single subject requirement of the Florida Constitution.<sup>12</sup> The first step starts from the basic principle that the subject of the bill is the one stated in the title, specifically the language immediately following “an act relating to” but before the title begins indexing the act’s provisions. The second step is an analysis of the provisions of the bill to determine whether they are “properly connected” to the single subject. A provision is properly connected to the subject if: 1) the connection is reasonable and logical; or 2) there is a reasonable explanation for how the provision is either necessary to the subject, or tends to make effective or promote the objects and purposes of the legislation included in the subject. A matter “properly connected with the subject” has been construed as broader than the language limiting Constitutional amendment by citizen initiative to matters “directly connected with the subject.”<sup>13</sup>

The Franklin case involved a challenge to Florida’s “Three-Strike Violent Felony Offender Act.”<sup>14</sup> The strongest argument raised against the act was that although virtually all of the act’s provisions related to criminal sentencing or sentencing requirements in some fashion, one provision only expanded the definition of burglary of a conveyance to include burglary to a “railroad vehicle.”<sup>15</sup> The argument against the act asserted that expanding the definition of “conveyance” in the burglary statute was a separate subject from criminal sentencing. The Court, found that the title of the act was “an act relating to sentencing,” and reasoned that defining burglary of a conveyance to include railroad vehicles also expanded the definition of the crime of armed burglary which was an offense included in the habitual offender sentencing statute which was amended elsewhere in the act.<sup>16</sup>

A reviewing court applying the Franklin single subject analysis to this bill would ultimately have to determine whether the broadly applicable public notice provision contained in section three, is properly connected with the title of “procurement of personal property and services.”

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

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<sup>11</sup> Franklin v. State, 887 So.2d 1063, at 1073 (Fla. 2004), (quoting State v. ex rel. Flink v. Canova, 94 So.2d 181, 184-85 (Fla. 1957)).

<sup>12</sup> 887 So.2d 1063 (Fla. 2004).

<sup>13</sup> Id.; Art. XI, Section 3, Fla. Const.

<sup>14</sup> Chapter 99-188, Laws of Florida.

<sup>15</sup> Id.

<sup>16</sup> Id.

It is unclear from the language of the bill whether the provision creating the public notice website is meant to establish an alternative to satisfying other public notice requirements, or if the newly created website is to serve as an additional means of providing notice.

Currently, with respect to notices and advertisements for purposes of state purchases of services and commodities, the state relies on the MyFloridaMarketPlace.com website operated and maintained by Accenture on contract with DMS. It is unclear how the existence of an alternative or additional public notice website will coordinate notice and advertisements that are posted on MyFloridaMarketPlace.com for the same purpose.

Section 4 of the bill is commonly referred to as a severability clause which essentially provides that if any provision of the bill is held to be invalid, such invalidity shall not affect other provisions of the bill which can be given effect without the invalid provision. Such severability clauses are not effective or necessary for salvaging valid sections of legislation from invalid ones. Courts will analyze legislative acts according to the applicable constitutional standard and will not be prevented from invalidating legislative acts in their entirety if, in the opinion of the court, leaving only the remaining valid provisions would produce unreasonable or unconstitutional results. Conversely, the absence of a severability clause will not prevent courts from preserving valid provisions of legislation by separately striking invalid provisions.

#### D. STATEMENT OF THE SPONSOR

No statement submitted.

### **IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

A strike-all amendment was adopted by the Government Efficiency & Accountability Council on March 28, 2007. The amendment added provisions to the bill as originally filed relating to creating a website established by DMS to serve as an alternative or additional means of providing public notice whenever it is required by law. The amendment also added a provision relating to design-build contracts to authorize such contracts to establish the method by which compensation may be paid.