

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1451 Competitive Solicitation of Contracts
SPONSOR(S): Policy & Budget Council; Attkisson
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1976

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|--|-------------------------|------------------|------------------|
| 1) <u>Committee on Audit & Performance</u> | <u>6 Y, 0 N</u> | <u>De La Paz</u> | <u>De La Paz</u> |
| 2) <u>Government Efficiency & Accountability Council</u> | <u>12 Y, 0 N, As CS</u> | <u>De La Paz</u> | <u>Cooper</u> |
| 3) <u>Policy & Budget Council</u> | <u>28 Y, 0 N, As CS</u> | <u>Leznoff</u> | <u>Hansen</u> |
| 4) _____ | _____ | _____ | _____ |
| 5) _____ | _____ | _____ | _____ |

SUMMARY ANALYSIS

CS/CS/HB 1451 revises a number of provisions relating to construction contracting and contracting for goods and services.

The bill:

- Adds the services of a “construction management entity” and a “program management entity” to the types of services that are not required to be awarded through the competitive bid process by local governments.
- Requires that unless statutorily exempt from competitive solicitation requirements, a state agency must 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.
- 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. This bill amends this section to require that a firm selected by a local government for a design-build contract provide either a guaranteed maximum price and guaranteed completion date, or a lump-sum price and guaranteed completion date after competitive negotiations.
- Provides that a construction management entity and a program management entity is simply authorized, not mandated, to use the competitive selection process under s. 287.055, F.S., for the purpose of retaining the services of a design professional which are now subject to procurement by means of competitive bid. A broad interpretation of the use of the term “may” in this provision could be construed to authorize a construction management entity or a program management entity to hire the services of design professionals by other nonspecific means.

The bill has no fiscal impact on state government.

The effective date of the bill is July 1, 2007

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Personal responsibility – this bill increases the services related to construction projects which local governments may award by means other than competitive bid. On the other hand, the bill also extends the use of competitive bidding in certain state contracting awards.

B. EFFECT OF PROPOSED CHANGES:

Local Government Contracting

Generally speaking, s. 255.20 F.S., requires that counties, municipalities, special districts and other political subdivisions award contracts for public construction projects through the submission of sealed bids. Exceptions to the competitive bid process for local governments are found in s. 287.055, F.S., relating to the procurement of architectural, engineering, landscape architectural or surveying and mapping services. Section 287.055, F.S. establishes a “competitive selection” process where the government entity selects, in order of preference, no less than three of the most highly qualified service providers to furnish the required service. The contracting entity must then enter “competitive negotiations” with the most highly qualified service provider to determine compensation that is fair, competitive and reasonable for the service. If the contracting entity is unable to negotiate a satisfactory contract with the most qualified service provider they must then undertake negotiations with the second most qualified, and if that is also unsuccessful, enter negotiations with the third most qualified.¹

CS/CS/HB 1451 adds the services of a “construction management entity” and a “program management entity” to the types of services that are not required to be awarded through the competitive bid process. Neither of these terms are defined in the bill, but the bill does describe the responsibilities of both entities. A construction management entity is responsible for construction project scheduling and coordination in the preconstruction and construction phases of the project. They are also responsible for the successful, timely and economical completion of the construction project. A program management entity is responsible for schedule control, cost control and coordination in providing or procuring planning design and construction services. Specifically, the bill authorizes local governments to acquire such services through the competitive selection process under s. 287.055, F.S., but does not require it in lieu of competitive bidding.

CS/CS/HB 1451 allows local governments, at their option, after having selected a construction management entity or a program management entity under s. 287.055, F.S., to require the selected entity to offer either:

- a guaranteed maximum price and a guaranteed completion date; or
- a lump-sum price and guaranteed completion date secured with a surety bond.

In those circumstances where the project involves a grouping of substantially similar construction, rehabilitation or renovation activities, local governments may require the selected entity to provide:

- a separate guaranteed maximum price, or
- a lump-sum price,

along with a guaranteed completion date for each grouping of substantially similar construction, rehabilitation or renovation activities within a project.

¹ If the contracting entity is unable to successfully negotiate a contract with the initial list of ranked service providers, they must select additional firms in order of competence and qualifications and continue negotiations as prescribed under this section until an agreement is reached. Section 287.055((5)(c), F.S.

State Government Contracting

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."²

Currently, contracts for the purchase of most commodities and services by state agencies are to be procured by competitive sealed bid when the dollar amount is above \$25,000.³ 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.⁴

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.⁵ 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.⁶ 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.⁷ 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.⁸ In 2006, a former Secretary and Regional Director of DOC pleaded guilty to accepting kickbacks from a subcontractor on the canteen services contract.

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/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

² Section 287.001, F.S.

³ Sections 287.057(1)(a), & 287.017(1)(b), F.S.

⁴ Rule 60A-1.002(3), F.A.C.

⁵ Section 287.017(2), F.S. (2000 Supp.)

⁶ Chapter 02-2-7, Laws of Florida

⁷ Rule 60A-1.012, F.A.C.

⁸ *Outsourcing of Canteen Operations*, Department of Corrections, Auditor General Report No. 2005-44. October 2004.

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.⁹

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.¹⁰ 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.¹¹

CS/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. This bill amends this section to require that a firm selected by a local government for a design-build contract provide either a guaranteed maximum price and guaranteed completion date, or a lump-sum price and guaranteed completion date after competitive negotiations.

CS/CS/HB 1451 also revises the definition of a “continuing contract” under s. 287.055(2), F.S., to increase the cost of contracts which will meet the definition. For construction contracts the amount is raised from \$1 million to \$1.5 million, and for contracts relating to study activity, the amount is raised from \$50,000 to \$150,000 for the professional service fee.

C. SECTION DIRECTORY:

Section 1. Creates s. 287.046, F.S., authorizing local governments to procure services of contract management entities and program management entities by means other than competitive bid.

Section 2. Amends s. 287.055, F.S, relating to provisions of design-build contracts.

Section 3. Amends s. 287.057, F.S., to require agencies to procure contracts for the state through competitive solicitation.

Section 4. Contains a severability clause.

Section 5. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

⁹ 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.

¹⁰ 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.

¹¹ 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 provider 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.

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.

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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

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.

Under this bill a construction management entity and a program management entity is simply authorized, not mandated, to use the competitive selection process under s. 287.055, F.S., for the purpose of retaining the services of a design professional which are now subject to procurement by means of competitive bid. A broad interpretation of the use of the term "may" in this provision could be

construed to authorize a construction management entity or a program management entity to hire the services of design professionals by other nonspecific means.

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.

The committee substitute adopted by the Policy and Budget Council on April 23, 2007, made the following changes to the bill as passed by the Government Efficiency & Accountability Council:

- Removed the section of the bill creating an additional public notice website.
- Added a section to the bill authorizing local governments to procure the services of a “construction management entity” and a “program management entity” for construction projects by means other than the competitive bid process.
- Provides local governments the option of requiring selected contract management entities and program management entities to provide a guaranteed maximum price and guaranteed completion date or a lump-sum price and guaranteed completion date on the basis of entire projects or phases of projects.
- Revises the definition of a “continuing contract” under s. 287.055(2), F.S.