

The Florida Senate
PROFESSIONAL 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: General Government Appropriations Committee

BILL: CS/CS/SB 1972

INTRODUCER: General Government Appropriations Committee, Governmental Operations Committee, and Governmental Operations Committee

SUBJECT: Leasing of Private Property by State Agencies

DATE: April 13, 2007 REVISED: _____

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

I. Summary:

This bill provides for state agency use of invitations to negotiate when soliciting for leased space in privately owned buildings, by creating a definition of the term “competitive solicitation” to include invitations to negotiate and using the term in sections 255.249 and 255.25, Florida Statutes. An invitation to negotiate may be used only when an invitation to bid or a request for proposal will not result in the best value to the state.

The bill makes permanent four provisions that would otherwise expire:

- A requirement that the Department of Management Services (DMS) annually publish a master leasing report concerning agency leases.
- A requirement that lease terms include certain specified clauses.
- A requirement that the DMS may not approve agency amendment of standard lease terms unless a comprehensive financial analysis demonstrates that the amendment is in the state’s long-term best interest.
- A requirement that the DMS annually update its plan for implementing stated legislative policy of using state-owned buildings before leasing privately-owned buildings.

The bill requires the DMS to implement a strategic leasing plan for state agencies, and allows the DMS to use the services of a tenant broker in implementing the plan. The bill allows agencies to use the services of a tenant broker in procuring leased space if the tenant broker is an awarded vendor on a term contract that contains specified provisions. Payments made to a tenant broker must be made by the state, not a lessor, subject to appropriation by the Legislature.

This bill substantially amends the following sections of the Florida Statutes: 255.248, 255.249, and 255.25.

II. Present Situation:

According to the DMS, the state leases a total of 8.4 million square feet in private sector leases with an annual rent of \$140 million.¹ Of that total, 7.3 million square feet requires competitive solicitation.² The annual rent for the competitively solicited leases is \$119 million.³ The total amount of leased space in the private sector is 95 percent office space and 5 percent warehouse space.

Leasing Provisions in Chapter 255, F.S.

Pursuant to s. 255.25(2)(a), F.S., no state agency may lease a building or any part thereof unless prior approval of the lease conditions and of the need therefor is first obtained from the DMS. Any approved lease may include an option to purchase, an option to renew the lease, or both, upon such terms and conditions as established by the DMS subject to final approval by the head of the DMS and s. 255.2502, F.S.

The approval of the DMS, except for technical sufficiency, need not be obtained for the lease of less than 5,000 square feet of space within a privately owned building, provided the agency head or the agency head's designated representative has certified that all criteria for leasing have been fully complied with,⁴ and has determined such lease to be in the best interest of the state.⁵ Such a lease, which is for a term extending beyond the end of a fiscal year, is subject to the provisions of ss. 216.311, 255.2502, and 255.2503, F.S.⁶

The DMS has the authority to approve leases of greater than 5,000 square feet that cover more than one fiscal year by operation of s. 255.25(3)(a), F.S., which provides that, except as provided in s. 255.25(10), F.S., for emergency space needs,⁷ no state agency shall enter into a lease as lessee for the use of 5,000 square feet or more of space in a privately owned building except upon advertisement for and receipt of competitive bids and award to the lowest and best bidder, subject to the provisions of ss. 216.311, 255.2501,⁸ 255.2502, and 255.2503, F.S., if such lease

¹ 2006 Annual Leasing Report and email of October 12, 2006.

² Section 255.25(3)(a), F.S., requires that leases for 5,000 square feet or more may be entered only upon "advertisement for and receipt of competitive bids and award to the lowest and best bidder."

³ The "master leases" in Tallahassee (Koger, Winewood, Northwood and Ft. Knox) constitute \$23.1 million annually in rent.

⁴ Pursuant to s. 255.249(4)(k), F.S.

⁵ Section 255.25(2)(b), F.S.

⁶ Relating, respectively, to statutory provisions concerning unauthorized contracts in excess of appropriations, contingency statements in contracts which require annual appropriations, and certain prohibited provisions in contracts for the leasing of buildings.

⁷ Section 255.25(10), F.S., provides that the DMS may approve emergency acquisition of space without competitive bids if existing state-owned or state-leased space is destroyed or rendered uninhabitable by an act of God, fire, malicious destruction, or structural failure, or by legal action, if the chief administrator of the state agency or designated representative certifies that no other agency-controlled space is available to meet this emergency need, but in no case shall the lease for such space exceed 11 months.

⁸ Relating to leases of space financed with local government obligations.

is, in the judgment of the department, in the best interests of the state.⁹ Section 255.25(3)(a), F.S., does not apply to buildings or facilities of any size leased for the purpose of providing care and living space for persons.

Section 255.449(4)(b), F.S., requires the DMS to promulgate rules providing procedures for: soliciting and accepting competitive proposals for leased space of 5,000 square feet or more in privately owned buildings; evaluating the proposals received; exemption from competitive bidding requirements of any lease the purpose of which is the provision of care and living space for persons or emergency space needs as provided in s. 255.25(10), F.S.; and the securing of at least three documented quotes for a lease that is not required to be competitively bid.

In sum, while the DMS is responsible for prior approval of lease terms for leases over 5,000 square feet, the lease is executed between the landlord and the agency. For leases less than 5,000 square feet, approval by the DMS is not necessary, except for technical sufficiency, so long as the agency head or their designee has certified compliance with applicable leasing criteria and has determined the lease is in the best interest of the state. Leases under 5,000 square feet need not be competitively bid. The terms “bids” and “proposals” are used throughout the leasing provisions of ch. 255, F.S.; the term “invitation to negotiate” does not appear in the chapter.

Rulemaking

Chapter 60H-1 of the Florida Administrative Code contains DMS-promulgated rules relating to leases for real property. Statutory authority for these rules is provided in ch. 255, F.S. In 2004, the DMS, through the rulemaking process of ch. 120, F.S., added a definition to Rule 60H 1.001(13), F.A.C., that a “competitive solicitation” means an invitation to bid (ITB), a request for proposal (RFP), or an invitation to negotiate (ITN). The Joint Administrative Procedures Committee (JAPC) sent the DMS an Objection Report on March 17, 2005, noting that the rule is an invalid exercise of delegated legislative authority, because it enlarges the specific provisions of s. 255.25(3)(a), F.S. The JAPC deferred consideration of the rule during the 2005 Legislative Session, when the DMS suggested it would seek legislative authority for conducting lease procurements using ITNs. Though legislation had been introduced during the 2004 Legislative Session that specifically authorized the DMS to use ITNs in the leasing of space, that legislation failed to pass. During the 2005 and 2006 Legislative Sessions, the Legislature did not pass legislation giving agencies or the DMS the authority to use ITNs in leasing. On February 19, 2007, the members of the JAPC voted to object to the rule. If the DMS does not modify, amend, withdraw, or repeal the rule, the JAPC must file with the Department of State a notice of its objection, and the Department of State must publish in the Florida Administrative Code a reference to the JAPC’s objection.¹⁰

2006-2007 Implementing Bill Requirements

Chapter 2006-26, L.O.F., requires additional duties of the DMS relating to agency leasing of privately-owned space. The following four provisions are set to expire on July 1, 2007:

⁹ The size at which a leased space must be competitively bid was raised in 1990 from 2,000 square feet to 3,000 square feet by s. 3, ch. 90-224, L.O.F., and raised in 1999 to 5,000 square feet by s. 22, ch. 99-399, L.O.F.

¹⁰ Section 120.545(9), F.S.

- A requirement that the DMS annually publish a report of expiring agency leases, to include a list of amendments and supplements to lease terms and conditions.
- A requirement that DMS rules provide that lease terms must include a clause that the state's performance under the lease is contingent upon appropriations and that the state may, with notice, terminate a lease in order to occupy a state-owned building.
- A requirement that the DMS may not approve lease terms that have been modified, unless the modification has been subject to comprehensive financial analysis showing that such modification is in the best interest of the state.
- A requirement that the DMS annually update its plan to implement the legislative policy to use state-owned buildings before leasing privately-owned buildings.

ITN as Procurement Method

Chapter 287, F.S., governs the procurement of personal property and services. The ITB and RFP have long been statutorily authorized options for executive agency procurement of commodities and contractual services. The ITN had been used by agencies since the 1990s, pursuant to DMS rule that lacked specific statutory authority,¹¹ but was only statutorily authorized during the 2001 Regular Session.¹²

In procuring commodities or contractual services, an agency may use an ITN when it determines in writing that negotiation¹³ is necessary for the state to achieve the best value.¹⁴ After ranking the responses to the ITN, the agency must select, based on the rankings, one or more vendors with whom to commence negotiations. The contract must be awarded to the responsible and responsive vendor that the agency determines will provide the best value to the state.¹⁵ Training materials from the DMS suggest that ITNs offer the greatest flexibility of the three procurement methods, but are also the most complex and most time consuming.¹⁶

According to the DMS, for leasing procurements, the main advantage in using an ITN over an ITB or RFP is flexibility and the maximization of competition, which are important when dealing with a unique and specialized item like real estate. Specifically, the DMS believes that using an ITB or RFP would not allow for enough flexibility to achieve best value to the state in transactions involving multiple vendors, and evaluations of tenant improvement dollars compared with rental rate.

III. Effect of Proposed Changes:

Section 1 amends s. 255.248, F.S. to define "competitive solicitation" to include an invitation to bid, a request for proposal, and an invitation to negotiate. The section replaces references to "bids" and "proposals" with "competitive solicitation" in ss. 255.249 and 255.25, F.S., thereby

¹¹ See Rule 60A-1.018, F.A.C., *repealed* January 2, 2000.

¹² Section 4, ch. 2001-278, L.O.F.

¹³ Sections 287.012(17) and 287.057(3), F.S.

¹⁴ "Best value" means, ". . . the highest overall value to the state based on objective factors that include, but are not limited to, price, quality, design, and workmanship." Section 287.012(4), F.S.

¹⁵ Section 287.057(3), F.S.

¹⁶ *Procurement Methods*, a PowerPoint presentation revised 9/6/05, located on 10/11/06 at http://dms.myflorida.com/business_operations/state_purchasing/florida_s_public_purchasing_training_and_certification/presentations_and_materials.

providing the authority to agencies to use invitations to negotiate in procuring leased space in privately-owned buildings. The bill also provides definitions for “best leasing value,” “responsible lessor,” “responsive bid,” “responsive proposal,” “responsive reply,” and “responsive lessor” to be used in evaluating responses to procurements for leased space.

Section 2 amends s. 255.249, F.S., to require the DMS to develop and implement a strategic leasing plan that forecasts space needs for all state agencies and identifies opportunities for reducing costs. The section permits the DMS to contract for real estate consulting or tenant broker services to carry out the strategic leasing plan. A contract for these services must be competitively procured pursuant to s. 287.057, F.S., and must provide that:

- The vendor will be paid directly by the DMS, subject to appropriation by the Legislature.
- The vendor will not receive compensation directly from a lessor.
- Moneys paid to the vendor are exempt from the MyFloridaMarketPlace transaction fee of s. 287.1345, F.S.
- Moneys paid by a lessor to the DMS are not subject to the seven percent service charge of s. 215.20, F.S.

This section requires the DMS to annually publish a master leasing report, which must include leases expiring within two years, amendments to lease terms and conditions, and cost-benefit analyses. This report contains more information than the reporting requirement that was set to expire on July 1, 2007. The section also requires state agencies to supply to the DMS information concerning agency space needs, and requires the DMS to promulgate a rule providing a format for the information.

Section 3 amends s. 255.25, F.S., to require agencies to consult with the DMS during the term of existing leases concerning opportunities for consolidation or use of other space. The section provides that an agency may only procure leased space by invitation to negotiate if the agency determines in writing that use of an invitation to bid or request for proposal will not result in the best value to the state. The section provides basic award criteria and methodology for use with the three solicitation methods: invitations to bid, requests for proposals, and invitations to negotiate.

The section allows agency heads to determine, after consulting with the DMS, whether to use the services of a tenant broker in conjunction with a competitive solicitation for leased space. An agency may use a tenant broker only if the broker is an awarded vendor on a state term contract that contains the following provisions:

- Awarded brokers must maintain a presence in the market served.
- Brokers must work under the direction of the state agency.
- The DMS will provide lease procurement training to brokers.
- Brokers must comply with requirements regulating real estate brokers in s. 475.278, F.S.
- Brokers will be paid by the agency, not the lessor, subject to funds appropriated by the Legislature; and such moneys will not be subject to the MyFloridaMarketPlace transaction fee of s. 287.1345, F.S., or the seven percent service charge of s. 215.20, F.S.
- The DMS must conduct periodic customer satisfaction surveys.

- Agencies must report information concerning lease procurements and contracts to the DMS.

This section makes permanent three provisions that would otherwise have expired on July 1, 2007:

- A requirement that DMS rules provide that lease terms must include a clause that the state's performance under the lease is contingent upon appropriations and that the state may, with notice, terminate a lease in order to occupy a state-owned building.
- A requirement that the DMS may not approve lease terms that have been modified, unless the modification has been subject to comprehensive financial analysis showing that such modification is in the best interest of the state.
- A requirement that the DMS annually update its plan to implement the legislative policy to use state-owned buildings before leasing privately-owned buildings. This plan must be submitted as part of the master leasing report.

Section 4 provides that the bill takes effect July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

It does not appear that a reply submitted in response to an invitation to negotiate for leased space would be subject to the provisions of s. 119.071(1)(b)2., F.S., which exempts replies to ch. 287, F.S., ITNs from public inspection during certain specified time periods. The exemption in ch. 119, F.S., references the definition of "invitation to negotiate" in s. 287.012(17), F.S., which refers to the procurement of "commodities or contractual services."

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The required lease clause allowing an agency to terminate a lease in order to occupy a state-owned building could affect the rental rates offered by landlords. A landlord concerned that the state could break a lease may require higher rental rates to compensate for the uncertainty. The potential difference is difficult to prospectively determine.

C. Government Sector Impact:

The Senate budget (SB 2800) provides an appropriation in the 2007-2008 fiscal year of \$330,620 in recurring funds and \$23,630 in non-recurring funds from the Supervision Trust Fund and authorizes five positions to the DMS.

The Senate budget (SB 2800) also provides an appropriation in the 2007-2008 fiscal year of \$1 million in non-recurring trust funds to the Administered Funds program, to provide budget authority to state agencies for the payment of professional real estate and tenant broker transaction fees.

Agencies could potentially incur higher lease rates relating to the clause allowing agency termination of leases in order to occupy state-owned buildings. Those costs are indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
