

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

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

B. EFFECT OF PROPOSED CHANGES:

Current Situation:

According to the Department of Management Services (DMS),¹ the state leases a total of 8.4 million square feet in private sector leases with an annual rent of \$140 million. 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-type 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 therefore is first obtained from the DMS. Any approved lease may include an option to purchase or an option to renew the lease, or both, upon such terms and conditions as are established by the department subject to final approval by the head of the DMS and s. 255.2502, F.S.

The approval of 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

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.⁷ Section 255.449(4)(b), F.S., requires 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.

While 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 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.

¹ 2006 Annual Report

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. Know) constitute \$23.1 million annually in rent.

⁴ Pursuant to s. 255.249(4)(k), F.S.

⁵ Section 255.25(2)(b)

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 which provides that except as provided in s. 255.25(10), F.S., for emergency space needs, 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 an award to the lowest and best bidder, subject to the provisions of ss. 216.311, 255.2501, 255.2502, and 255.2503, F.S., if such lease is, in the judgment of the department, in the best interests of the state. 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.

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, DMS 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 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. JAPC deferred consideration of the rule during the 2005 legislative session when DMS suggested it would seek legislative authority for conducting lease procurements using ITNs. Though legislation was introduced during the 2004 legislative session specifically authorizing 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 enact legislation giving agencies or DMS the authority to utilize ITNs in leasing. Pursuant to JAPC Rule 7.2, the DMS rule amendment must be placed on a future JAPC meeting agenda for a committee vote on the proposed objection. If the committee objects to the amended rule and DMS does not modify, amend, withdraw, or repeal the rule change, 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 JAPC’s objection.⁸

Invitation to Negotiate as Procurement Method

Chapter 287, F.S., governs the procurement of personal property and services. The invitation to bid (ITB) and request for proposals (RFP) have long been statutorily authorized options for executive agency procurement of commodities and contractual services. The ITN had been utilized by agencies since the ‘90s, pursuant to DMS rule that lacked specific authority,⁹ but was only authorized during the 2001 legislative session.¹⁰

In procuring commodities or contractual services, an agency may utilize an ITN when it determines in writing that negotiation¹¹ is necessary for the state to achieve the best value.¹² After ranking the replies received in response to the ITN, the agency must select, based on the rankings, one or more vendors with which to commence negotiations. The potential vendors respond to the ITN with a competitive sealed reply. The contract must be awarded to the responsible and responsive vendor that the agency determines will provide the best value to the state.¹³ Training materials from DMS suggest that ITNs offer the greatest flexibility of the three procurement methods, but are also the most complex and the most time consuming.¹⁴

According to 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, DMS believes that using an ITB or RFP would not allow for adequate flexibility to achieve best value to the state in transactions involving multiple vendors, and evaluations of tenant improvement dollars compared with rental rate.

Effect of Proposed Change:

The bill provides the following definitions relevant to authorizing DMS to utilize ITNs:

- Best leasing value means the highest overall value to the state based on objective factors that include, but are not limited to, rental rate, renewal rate, operational and maintenance costs, tenant-

⁸ Section 120.545(9), F.S.

⁹ See Rule 60A-1.018, F.A.C., repealed January 2, 2000

¹⁰ Section 4, ch. 2001-278, L.O.F.

¹¹ Sections 287.012(17) and 287.057(3), F.S.

¹² “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.

¹³ Section 287.057(3), F.S.

¹⁴ *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.

improvement allowance, location, lease term, condition of facility, landlord responsibility, amenities and parking.

- Competitive solicitation means an invitation to bid, a request for proposals, or an invitation to negotiate.

The bill also requires DMS to develop and implement a strategic leasing plan to forecast space needs for all state agencies and identify cost reduction opportunities through consolidation, relocation, reconfiguration, capital investment, and the building or acquisition of state-owned space.

In addition to the information currently required to be published and submitted annually to the Executive Office of the Governor and the Legislature, the bill requires DMS to include the following in a Master Leasing Report and further requires it to include the annually updated 5-year-plan required under current statutory law:

- Financial impacts to the pool rental rate due to the sale, removal acquisition, or construction of pool facilities.
- Changes in occupancy rate, maintenance costs, and efficiency costs of leases in the state portfolio.
- Changes to occupancy costs in leased space by market and changes to space consumption by agency and market.
- An analysis of portfolio supply and demand.
- A cost-benefit analysis of acquisition, build, and consolidated opportunities, recommendations for strategic consolidation, and strategic recommendations for disposition, acquisition, and building.

The bill requires each agency to annually submit a report to DMS providing all the information regarding agency programs that affect the need for or use of space by that agency; the reviews of lease expiration schedules for each geographic area; the active and planned full-time equivalent data; the business case analyses related to consolidation plans by an agency; and the current occupancy and relocation costs.

The bill requires DMS to adopt rules for a standardized format for the submission of the annual state agency report to DMS, which must be submitted by each agency. The bill further requires the form to be certified by the agency head or the agency head's designated representative and submitted to DMS setting forth all conditions and requirements which must be met before executing the lease.

Under the bill, each agency must consult with DMS regarding opportunities for consolidation, use of state-owned space, build-to-suit space, and potential acquisitions. Additionally, the bill authorizes amendments to leases only with the approval of DMS.

The bill provides criteria for the utilization of invitations to bid, competitive sealed proposals, and competitive sealed replies as a means of competitive procurement for privately leased space. The bill provides the following requirements when utilizing these methods:

- The bid, invitation, or request must be made available simultaneously to all lessors and must include a detailed description of the space sought, the time and date for the receipt of bids or proposals and of the public opening; and all contractual terms and conditions applicable to the procurement.
- If the agency contemplates renewal of the contract, this must be included in the bid, request, or invitation.
- The reply must include the price for each year for which the contract may be renewed.

The bill specifically provides that when utilizing an invitation to bid, an agency must make its determination based upon criteria set forth in the invitation. Furthermore, the bill provides that contract must promptly provide written notice to the responsive lessor that submits the lowest responsive bid and the bid must be determined, in writing, to meet the requirements and criteria set forth in the invitation to bid.

When utilizing a competitive sealed proposal, the agency must determine in writing that the use of an invitation is not in the best interest of the state and that the leased space shall be procured by competitive

sealed proposals, under the bill. The relative importance of price and other evaluation criteria must also be indicated in the request for proposal. In evaluating the proposals, the total cost for each year as submitted by the lessor must be considered by the agency. The agency must keep in its records the documentation supporting the basis on which the award is made.

When utilizing competitive sealed replies¹⁵ the bill requires the agency to determine in writing that the use of an invitation to bid or a request for proposals will not result in the best value to the state. The reasons why negotiation may be necessary in order for the state to achieve the best leasing value must also be set forth in writing by the agency head or his designee prior to the advertisement of an invitation to negotiate. The bill further provides that cost savings related to the agency procurement process alone are not sufficient to justify the use of an invitation to negotiate. The replies must be evaluated ranked as they relate to the criteria set forth in the invitation to negotiate and must make their selection of one or more of the lessors with which to commence negotiations based on the ranking. After negotiations have commenced, the agency must award the contract to the responsible and responsive lessor that the agency determines will provide the best leasing value to the state. The bill requires a short, plain statement that explains the basis for the selection to be included in the contract file. In determining best interests of the state, the bill requires DMS to consider availability of state-owned space and analyses of build-to-suit and acquisition opportunities.

The bill authorizes DMS to procure a term contract for real estate consulting and brokerage services with up to three tenant brokers to serve the north, central, and south areas of the state. The awarded brokers must maintain an office or presence in the market served. Preferences must be given to brokers that are licensed in Florida and that have 3 or more years experienced in the market served. DMS must provide training for the tenant brokers concerning the rules governing the procurement of leases. The bill further provides that the tenant brokers should participate in developing the strategic leasing plan.

A state agency may use the services of a tenant broker to assist with a competitive solicitation at the sole discretion of the agency head or his or her designee, under the bill, provided that the agency consults with DMS and the broker is under a term contract with the state to offer such services. Specifically, DMS must properly procure the contract pursuant to the additional requirements set forth above and the state agency must submit the following information to DMS: the number of leases that adhere to the goal of the workspace – management initiative of 180 square feet per FTE; the quality of space leased and the adequacy of tenant-improvement funds; the timeliness of lease procurement, measured from the date of the agency's request to the finalization of the lease; whether cost-benefit analyses were performed before execution of the lease in order to ensure that the lease is in the best interest of the state; and the lease costs compared to market rates for similar types and classifications of space according to the official classifications of the Building Owners and Managers Association.

The bill prohibits an agency from entering into a lease with any landlord to which the tenant broker is providing brokerage services for that transaction. The bill further provides that the new requirements proposed by this legislation relating to the procurement of state term contracts will become effective after October 1, 2007.

The bill also provides that real estate consultants and tenant brokers shall be compensated by the state agency and the payment is subject to appropriation by the Legislature. The real estate consultant or tenant broker is prohibited, under the bill from receiving compensation from a lessor for services that are rendered under the term contract. The terms for compensation of the real estate consultant or tenant broker shall be specified in the term contract and may not be modified by the agency. The bill also requires DMS to conduct periodic customer-satisfaction surveys.

The bill amends and makes permanent the following four provisions relating to the leasing of space by state agencies that are set to expire July 1, 2007:

- The requirement that DMS annually publish a master leasing report concerning agency leases.
- The requirement that lease terms include certain specified clauses.

¹⁵ A competitive sealed reply is a response to an ITN.

- The requirement that 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.
- The requirement that DMS annually update its plan for implementing stated legislative policy of using state-owned buildings before leasing privately owned buildings.

C. SECTION DIRECTORY:

Section 1. Amends s. 255.248, F.S., relating to definitions to be utilized in ss. 255.249, F.S., and 255.25, F.S.

Section 2. Amends s. 255.249, F.S., relating to the responsibilities of the Department of Management Services.

Section 3. Amends s. 255.25, F.S., relating to the approval required prior to construction or lease of buildings.

Section 4. Creates an appropriation in the amount of \$330,620 in recurring funds and the sum of \$23,630 in nonrecurring funds from the Supervision Trust Fund of the Department of Management Services.

Section 5. Provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

See fiscal comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

An appropriation in the amount of \$330,620 in recurring funds and \$23,630 in nonrecurring funds are appropriated from the Supervision Trust Fund in the Department of Management Services to fund five full-time equivalent positions.

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

Increased expenditures may result from utilizing a tenant broker on the front end, however, it is expected that the utilization of brokers should result in cost savings.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. It does not reduce the percentage of a state tax shared with counties or municipalities. The bill also does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires DMS to adopt rules for a standardized format for the submission of the annual state agency report to DMS that is required by the bill to be submitted by each state agency.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

On March 28, 2007, the Government Efficiency & Accountability Council adopted three amendments which did the following:

- Corrected an error in the title.
- Provided that an agency may use the services of a tenant broker to assist with a competitive solicitation at the sole discretion of an agency head.
- Provided that the new requirements relating to the procurement of state term contracts for real estate consulting and brokerage services will become effective after October 1, 2007.
- Clarified that when procurement is sought by the use of an invitation to bid, a contract must be awarded by written notice to the responsive lessor that submits the lowest responsive bid.