

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: CS/SB 1142

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Fasano

SUBJECT: Public Records/Competitive Solicitations

DATE: March 23, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Eichin</u>	<u>Meyer</u>	<u>TR</u>	Favorable
2.	<u>Naf</u>	<u>Wilson</u>	<u>GO</u>	Fav/CS
3.	_____	_____	<u>WPSC</u>	_____
4.	_____	_____	<u>RC</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

Generally, this bill:

- Consolidates existing temporary public-records exemptions for replies to invitations to bid or requests for proposals and for replies to invitations to negotiate, respectively; and aligns the time frames after which the exemption expires for all three types of competitive solicitation (invitations to bid, requests for proposals, and invitations to negotiate).
- Expands an existing public-meetings exemption to also exempt meetings at which vendors make oral presentations or answer questions regarding replies to competitive solicitations; expands an existing temporary public-records exemption related to such meetings to also temporarily exempt documents and written materials presented at such meetings; clarifies that replies to all three types of competitive solicitations are included in these exemptions; and requires an agency to provide notice of its intent to reissue a competitive solicitation at the same time it rejects all replies in order for the public-records exemption to apply.

This bill expands existing public-records and public-meetings exemptions and therefore requires a two-thirds vote of the members of each house of the Legislature for passage.

This bill substantially amends the following sections of the Florida Statutes: 119.071 and 286.0113.

II. Present Situation:

Public Records – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.¹ In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.² Article I, s. 24 of the State Constitution, provides that:

(a) Every person³ has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . .

Unless specifically exempted, all agency⁴ records are available for public inspection. The term “public record” is broadly defined to mean:

All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁵

Only the Legislature is authorized to create exemptions to open government requirements.⁶ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption⁷ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.⁸ A bill creating an exemption must be passed by a two-thirds vote of both houses.⁹

¹ Sections 1390, 1391, F.S. (Rev. 1892).

² Article I, s. 24 of the State Constitution.

³ Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

⁴ The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

⁵ Section 119.011(11), F.S.

⁶ Article I, s. 24(c) of the State Constitution.

⁷ Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

⁸ Art. I, s. 24(c) of the State Constitution.

⁹ *Ibid.*

The Public Records Act¹⁰ specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.¹¹ The records custodian must state the basis for the exemption, in writing if requested.¹²

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.¹³ If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.¹⁴ If a record is simply made exempt from public inspection, the exemption does not prohibit the showing of such information at the discretion of the agency holding it.¹⁵

It should be noted the definition of “agency” provided in the Public Records Law includes the phrase “and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*” (emphasis added). Agencies are often authorized, and in some instances are required, to “outsource” certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

Agency Procurement – Agency procurements of commodities or contractual services exceeding \$25,000 are governed by statute and rule requiring one of the following three types of competitive solicitations to be used, unless otherwise authorized by law:¹⁶

1. Invitation to bid (ITB): An agency must use an ITB when it is capable of specifically defining the scope of work for which a contractual service is required or capable of establishing the precise specifications defining the commodities sought.¹⁷ The contract

¹⁰ Chapter 119, F.S.

¹¹ Section 119.07(1)(b), F.S.

¹² Section 119.07(1)(c) and (d), F.S.

¹³ *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5th DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

¹⁴ *Ibid* at 53; *see also*, Attorney General Opinion 85-62.

¹⁵ *Ibid* at 54.

¹⁶ Section 287.057, F.S.

¹⁷ Section 287.012(16), F.S.

- must be awarded to the responsible¹⁸ and responsive vendor¹⁹ that submits the lowest responsive bid.^{20 21}
2. Request for proposals (RFP): An agency may use a RFP when it determines in writing that it is not practicable for it to specifically define the scope of work for which the commodity or contractual service is required and when it is requesting that the vendor propose commodities or contractual services to meet the RFP's specifications.²² Unlike the ITB process, the contract need not be awarded to the lowest priced vendor; rather, the award shall be given to the responsible and responsive vendor whose proposal is determined in writing to be the most advantageous to the state after consideration of the price and other criteria set forth in the RFP.²³
 3. Invitation to negotiate (ITN): An agency may use an ITN when it determines in writing that negotiation is necessary for the state to achieve the best value.^{24 25} 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 contract must be awarded to the responsible and responsive vendor that the agency determines will provide the best value to the state.²⁶

Legislative intent expressed in Chapter 287, Florida Statutes, establishes several findings related to the competitive procurement process, including:²⁷

- Fair and open competition is a basic tenet of public procurement.
- Open competition reduces the appearance and opportunity for favoritism.
- It is essential that detailed justification of agency decisions in the procurement of commodities and contractual services be maintained.

General Public-Records Exemptions

Section 119.071, F.S., contains several general exemptions grouped under subheadings applying to agencies generally. Included in subsection (1) "Agency Administration," is a general exemption for sealed bids or proposals received in response to ITBs or RFPs.²⁸ Such sealed bids or proposals are temporarily exempt from the public inspection provisions of s. 119.07(1), F.S., until the agency provides a notice of decision or intended decision, or within 10 days of the bid

¹⁸ The term "responsible vendor" means, ". . . a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance." Section 287.012(24), F.S.

¹⁹ "Responsive vendor" means, ". . . a vendor that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation." Section 287.012(26), F.S.

²⁰ Section 287.057(1), F.S.

²¹ "Responsive bid," "responsive proposal," or "responsive reply" means, ". . . a bid, proposal, or reply submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation." Section 287.012(25), F.S.

²² Sections 287.012(22) and 287.057(2), F.S.

²³ Section 287.057(2), F.S.

²⁴ Sections 287.012(17) and 287.057(3), F.S.

²⁵ "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.

²⁶ Section 287.057(3), F.S.

²⁷ Section 287.001, F.S.

²⁸ Section 119.071(1)(b)1., F.S.

(or proposal) opening, whichever occurs first. If the agency rejects all bids or proposals and provides notice of intent to reissue the ITB or RFP, the rejected bids or proposals remain exempt until the agency issues a decision on the reissued ITB or RFP or withdraws the reissued invitation or request.

Similarly, a competitive sealed reply to an agency's ITN is temporarily exempt from public inspection, until the agency issues a decision or its intended decision, or all of the replies are opened.²⁹ However, in this case, the reply remains exempt for 20 (rather than 10) days after the final sealed reply is opened. Again, if the agency rejects all replies and provides notice of its intent to reissue the ITN (and such reissuance occurs within 90 days), a reply to the original ITN remains exempt from public inspection until the agency issues a decision or withdraws the ITN. A sealed reply may not be exempt for more than 12 months from the initial agency rejection of all replies.

General Public-Meetings Exemptions

Section 286.011, F.S., requires all meetings of any state agency or authority at which official acts are to be taken to be open to the public at all times. Two general exemptions to this requirement are provided in s. 286.0113, F.S., exempting meetings:

- which would reveal security system plan components made confidential by s. 119.071(3)(a), F.S.; and
- at which a negotiation with a vendor is conducted under s. 287.057(3), F.S.

Regarding meetings held for negotiation with a vendor, such meetings shall be recorded and the recording is temporarily exempt from public inspection until the agency issues a decision or until 20 days after the final sealed competitive reply is opened, whichever occurs first. If the agency rejects all replies and provides notice of its intent to reissue the ITN, the recording remains exempt from public inspection until the agency issues a decision or withdraws the ITN. A recording may not be exempt for more than 12 months from the initial agency rejection of all replies.

III. Effect of Proposed Changes:

Section 1 of the bill revises s. 119.071(1)(b), F.S., regarding public-records exemptions, to consolidate the prior two paragraphs (exemptions relating to replies to invitations to bid or requests for proposals, and relating to replies to invitations to negotiate, respectively) into one paragraph relating to all competitive solicitations. The exemption for replies to all three types of competitive solicitation expires when the agency provides notice of a decision or intended decision *or* 20 days after opening the bids, proposals, or replies, whichever is earlier. If an agency rejects all bids, proposals, or replies, those responses are not exempt for longer than 12 months after the initial agency notice rejecting all such responses.

The bill extends the Open Government Sunset Review date for the exemption to October 2, 2015.

²⁹ Section 119.071(1)(b)2., F.S.

Section 2 of the bill expands an existing public-meetings exemption³⁰ for a meeting at which a negotiation with a vendor is conducted to also exempt meetings at which a vendor makes an oral presentation, or at which a vendor answers questions as part of a competitive procurement solicitation.

The bill also expands an existing public-records exemption for recordings of such meetings³¹ to additionally exempt all documents or written materials presented at such meetings. An agency must concurrently reject all bids, proposals, or replies and provide notice of its intent to reissue a competitive solicitation in order for the recordings, documents, and written materials to remain exempt until the agency provides notice of a decision or intended decision, or until the agency withdraws the reissued solicitation. The bill subjects the documents and written materials to the provision that they are not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.

The bill extends the Open Government Sunset Review date for the exemptions to October 2, 2015.

Section 3 provides a number of legislative findings, several of which address the temporary exemptions from public-records or public-meetings requirements in Sections 1 and 2 of the bill. These findings are summarized as:

- Temporary exemptions from public-records and public-meetings requirements are public necessities.
- Temporarily protecting sealed bids, proposals, replies, negotiations, presentations, and written materials presented at specified meetings ensures the process remains “fair and economical for vendors, while still preserving oversight after a procurement decision is made.”
- Compelling vendors to disclose the nature and details of their proposals to competitors is “unfair and inequitable” and would impede the “full and frank discussion of the strengths, weaknesses, and value of a proposal” which would limit the ability of the agency to “obtain the best value for the public.” The harm from these practices “outweighs the temporary delay” in making such meetings and records open to the public.

Section 4 specifies an effective date of July 1, 2010.

Other Potential Implications:

The following statements from the Department of Children and Families Staff Analysis and Economic Impact dated January 22, 2010 are relevant to this committee substitute:

Subsection 119.71(1)(a), F.S., currently exempts the release of bids or proposals for 10 days after the opening of bids or proposals and s. 119.71(2)(a), F.S., exempts the release of replies for 20 days after the opening of replies. This bill would align the exemption for release of bids,

³⁰ Section 286.0113(2)(a), F.S.

³¹ Section 286.0113(2)(a)1., F.S.

proposals and replies at 20 days after opening. However, since the exemption ends at the earlier of the notice of decision or 20 days after bid opening, the exemption would likely always end prior to the meetings and analyses that are supposed to be exempted. This means that any person can have access to these materials almost immediately after they are created. The exemption should remain in place until the posting of the intended decision. In addition, the legislation does not make clear that the "meetings" that are exempted are those that occur pre-award and should be revised to describe those meetings as "prior to a notice of a decision or intended decision."

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Section 24(c), art. I of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly created or expanded public-records or public-meetings exemption. Because this bill expands existing public-records and public-meetings exemptions, it requires a two-thirds vote for passage.

Subject Requirement

Section 24(c), art. I of the State Constitution requires the Legislature to create or expand public-records or public-meetings exemptions in legislation separate from substantive law changes. This bill complies with that requirement.

Public Necessity Statement

Section 24(c), art. I of the State Constitution requires a public necessity statement for a newly created or expanded public-records or public-meetings exemption. Because this bill expands existing public-records and public-meetings exemptions, it includes a public necessity statement.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill refers to “competitive procurement solicitation(s),” but does not link the term to a statutory definition. Section 287.012(7), F.S., defines “competitive solicitation” or “solicitation” to mean an invitation to bid, a request for proposals, or an invitation to negotiate. Therefore, it may be clarifying to replace the term “competitive procurement solicitation” with “competitive solicitation” or “solicitation” and to link the term to the statutory definition throughout the bill.

The bill refers to “bids, proposals, and replies” but does not link the term to a statutory definition. Section 287.012(6), F.S., defines “competitive sealed bids,” “competitive sealed proposals,” or “competitive sealed replies” to mean the process of receiving two or more sealed bids, proposals, or replies submitted by responsive vendors and to include bids, proposals, or replies transmitted by electronic means in lieu of or in addition to written bids, proposals, or replies. Therefore, it may be clarifying to replace “bids, proposals, and replies” with “competitive sealed bids, competitive sealed proposals, or competitive sealed replies” and to link the term to the statutory definition throughout the bill.

VII. Related Issues:

The bill does not address the disclosure of public records or meetings associated with the submission of unsolicited proposals.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on March 23, 2010:

The committee substitute:

- Removes clarifications that competitive solicitations issued pursuant to s. 334.30, F.S., are covered by the exemptions in s. 119.071(1)(b), F.S.;
- Consolidates existing public-records exemptions relating to replies to invitations to bid and requests for proposals and relating to replies to invitations to negotiate, respectively, into one exemption relating to replies to competitive solicitations;
- Removes a definition for “notice of a decision or intended decision” in the context of competitive solicitations;
- Reorganizes the expansion of the public-meetings and public-records exemptions relating to competitive solicitations in s. 286.0113, F.S., and
- Amends the public necessity statement to reflect the above-listed changes.

B. Amendments:

None.

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