

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 Transportation Committee

BILL: SB 1142

INTRODUCER: Senator Fasano

SUBJECT: Public Records/Competitive Solicitations

DATE: February 24, 2010

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Eichin	Meyer	TR	Favorable
2.			GO	
3.			WPSC	
4.			RC	
5.				
6.				

I. Summary:

Generally, this bill:

- clarifies that sealed bids or proposals received by an agency in response to
 - invitations to bid,
 - requests for proposals, and
 - invitations to negotiaterelated to certain public-private partnerships under s. 334.30, F.S., are included in the records temporarily exempted from public inspection requirements;
- exempts meetings at which vendors make oral presentations in response to competitive solicitations from public meeting requirements and temporarily exempts recordings of such meetings from public records inspection requirements; and
- presents legislative findings related to such exemptions.

This bill requires a two-thirds vote of the members of both houses of the Legislature.

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

This bill creates an unnumbered section of the Florida Statutes.

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

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.

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.*

¹⁰ Chapter 119, F.S.

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 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

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.

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.

- 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 (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.

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.

²⁹ Section 119.071(1)(b)2., F.S.

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.

Public Private Partnerships

Section 334.30, F.S., establishes the process and criteria by which the Florida Department of Transportation (FDOT) may enter public-private partnerships (PPPs) for transportation projects. In accomplishing this, FDOT may use state resources to participate in funding and financing the project for projects on the State Highway System. The section requires FDOT to ensure all reasonable costs to the state, related to transportation facilities not part of the State Highway System, are to be borne by the private entity, and all reasonable costs to the state, local governments, and utilities are to be borne by the public-private entity for transportation facilities owned by private entities. In 2007, HB 985 made several significant changes to s. 334.30, F.S., including:

- Allowing FDOT to advance a project not included in the 5-year work program if the project adds transportation capacity, costs more than \$500 million, and is included in the 10-year Strategic Intermodal System Plan.
- With the exception of the Florida Turnpike System, FDOT may lease its existing toll facilities to private partners for up to 75 years.
- FDOT may develop new toll facilities or increase capacity on existing toll facilities through PPPs.
- Up to 15 percent of the total federal and state funds from the State Transportation Trust Fund may be obligated to PPPs.

III. Effect of Proposed Changes:

Section 1 of the bill revises s. 119.071(1)(b), F.S., regarding public records exemptions to clarify that sealed bids or proposals received by an agency in response to invitations to bid (ITB), requests for proposals (RFP), and invitations to negotiate (ITN) issued for public-private partnerships (PPP) under s. 334.30, F.S., are included in the records temporarily exempted from public inspection requirements of the section. The 10-day period in which the bid or proposal

received in response to ITBs and RFPs must be made public, *i.e.*, the agency's notice of decision or intended decision, or within 10 days of the opening of the bid or proposal, whichever occurs first, is expanded to 20 days, providing uniformity with the period used in the ITN process.

The term "notice of decision or intended decision" is defined to mean the decision to award one or more contracts resulting from an ITB, RFP, or ITN and to specifically *not* mean an intermediate decision to short-list vendors or exclude vendors from further consideration.

Section 2 adds a paragraph (3) to s. 286.0113, F.S., regarding public meeting exemptions to include meetings at which vendors make oral presentations or answer questions regarding their sealed bids, proposals, or replies to competitive solicitations. Meetings at which vendors make oral technical concept presentations are likewise exempted. 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 competitive solicitation, the recording remains exempt from public inspection until the agency issues a decision or withdraws the competitive solicitation. A recording may not be exempt for more than 12 months from the initial agency rejection of all replies.

The term "notice of decision or intended decision" is defined to mean the decision to award one or more contracts resulting from a competitive solicitation and to specifically *not* mean an intermediate decision to short-list vendors or exclude vendors from further consideration.

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

- Temporary exemptions from public records inspection and public meetings are public necessities.
- Temporarily protecting sealed bids, proposals, negotiations, and presentations 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.

Included in the findings is the following statement which introduces a possible exemption not included in the statutory changes in Sections 1 and 2 and could amount to the permanent exemption from public disclosure of the assessment and rationale used in selecting the winning vendor:

"The Legislature also finds that it is unfair and inequitable to publicly discuss any assessment by the agency or governmental entity of the vendors' proposals which might arise during such a meeting."

The effective date of the bill is July 1, 2010.

Other Potential Implications:

By specifically identifying the ITBs, RFPs, and ITNs issued under s. 334.30, F.S., for public records and meetings exclusion, the bill may by exclusion, jeopardize the public records exemptions of bids, proposals, and negotiations responding to ITBs, RFPs, and ITNs issued under other sections of Florida Statute.

Also, according to a Department of Children and Families Staff Analysis and Economic Impact dated January 22, 2010:

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, 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:

This bill creates exemptions from the records and meetings requirements of Art. I, s. 24 of the State Constitution and requires a two-thirds vote of the members of both houses of the Legislature.

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:

None.

VII. Related Issues:

The bill does not address the disclosure of public records or meetings associated with the submittal 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.)

None.

B. Amendments:

None.