

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 7151 PCB GAP 10-24 Procurement

SPONSOR(S): Economic Development & Community Affairs Policy Council, Governmental Affairs Policy Committee and Schenck

TIED BILLS: **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Governmental Affairs Policy Committee	10 Y, 0 N	McDonald	Williamson
1)	Economic Development & Community Affairs Policy Council	15 Y, 0 N, As CS	McDonald	Tinker
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

The Department of Management Services (DMS) is responsible for overseeing state purchasing activity including professional and construction services as well as commodities needed to support agency activities. The Division of State Purchasing in DMS establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power. Agencies may use a variety of procurement methods, depending on the cost and characteristics of the needed good or service, the complexity of the procurement, and the number of available vendors. These include, but are not limited to, single source contracts, invitations to bid, requests for proposals, and invitations to negotiate. Purchasing categories with threshold amounts have been established in law to guide procedures for the procurement method to be used, type of review and evaluation required and method of contract award. Finally, many services that state agencies procure are exempted from competitive solicitation requirements.

The Council on Efficient Government is responsible for reviewing and issuing advisory reports on agency business cases to outsource and for developing standards for use by agencies in evaluating such business cases. Business case requirements for outsourcing and related contracts are provided in law. A business case may be submitted in the form prescribed in s. 216.023, F.S.

The bill addresses the state competitive solicitation and procurement system established under chapter 287, F.S., by doing the following:

- Clarifying procurement processes by rewording language to make it more reader friendly and by consolidating the following provisions into one section of law:
 - detailed substantive language included in definitions;
 - availability and content of a competitive solicitation; and
 - content and process requirements for each procurement method.
- Increasing the threshold limits for purchasing categories.
- Removing from competitive solicitation exemptions for services provided to persons with mental or physical disabilities provided by specified corporations meeting specific requirements and for specified prevention services related to mental health offered by not-for-profit corporations; amending an exemption related to specified health services and one related to Medicaid services; and adding a limited exemption for renewal of a contract for an agency providing child protective services, providing certain requirements are met.
- Revising definitions.
- Repealing the Council on Efficient Government.
- Retaining requirements for business cases for outsourcing for projects exceeding \$10 million and requiring submission through the s. 216.023, F.S., process and retaining contract requirements but strengthening those requirements for intellectual property.
- Repealing outdated provisions.
- Requiring coordination of contract management for health and human services by specified agencies.

The bill has an indeterminate fiscal impact. See "Fiscal Comments".

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Department of Management Services -- Procurement

The Department of Management Services is responsible for overseeing state purchasing activity including professional and construction services as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology. In addition to overseeing the state's electronic procurement system, MyFloridaMarketPlace, the Division of State Purchasing in the department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.¹

Agencies may use a variety of procurement methods, depending on the cost and characteristics of the needed good or service, the complexity of the procurement, and the number of available vendors. These include the following:

- "single source contracts," which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- "invitations to bid," which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- "requests for proposal," which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- "invitations to negotiate," which are used when negotiations are determined to be necessary to obtain the best value and involve a request for high complexity, customized, mission-critical services, by an agency dealing with a limited number of vendors.²

Prior to using one of these methods, an agency might use a "request for information." This is used when an agency wants to solicit information from vendors for information concerning commodities or contractual services.

¹ Chapter 287, F.S., provides requirements for the procurement of personal property and services. Part 1 of that chapter pertains to commodities, insurance, and contractual services and Part II pertains to motor vehicles.

² See ss. 287.012 and 287.057, F.S.

Also, by using the procurement methods described above, state term contracts and state purchasing agreements are created and used when multiple purchases of standard commodities and services are anticipated.³

Purchasing categories with threshold amounts have been established in law to guide the procedures for the procurement method to be used, the type of review and evaluation required, and the method for the award of any contract. The categories, which have not been changed since 1999, are as follows:

- Category One: \$15,000.
- Category Two: \$25,000.
- Category Three: \$50,000.
- Category Four: \$150,000.
- Category Five: \$250,000.

The department has authority to adopt rules to adjust the amounts "based upon the rate of change of a nationally recognized price index."⁴ No rules have ever been adopted to adjust the levels.

Many services procured by state agencies are exempt from competitive solicitation requirements. Thirteen types of non-construction services are exempt from such requirements, regardless of whether the purchase exceeds the applicable cost threshold, including health, auditing, and legal services.⁵ Also, agencies are not required to use the competitive solicitation requirements when commodities or contractual services are available only from a single source⁶ or when emergency situations exist that preclude the use of such required solicitation processes.⁷

Florida Efficient Government Act⁸

Council on Efficient Government⁹

The Council on Efficient Government (CEG or council) was created in 2006 to employ a standard process for reviewing agency business cases to outsource, review and issue advisory reports on such business cases, and develop standards for use by agencies in evaluating business cases to outsource in compliance with the "Florida Efficient Government Act." The council was created in reaction to various audits and reports that raised legislative concerns about agency attempts to outsource or privatize state functions.¹⁰ The council consists of seven members appointed by the Governor; the DMS secretary, who serves as chair; one cabinet member other than the Governor, or designee; two heads of executive branch agencies; and three members from the private sector subject to confirmation by the Senate and who, collectively, have experience with purchasing, increasing operational efficiency, and implementing complex projects in the private-sector business environment. In FY 2006-07, the council developed business case standards for agencies as defined in statute; evaluated 27 agency business cases totaling \$62 million; drafted the 2007 CEG Annual Report; and established Project Management Professional training for state agency purchasing staff.¹¹ In FY 2008-09, council staff reviewed 23 business cases with a total value of approximately \$225 million and provided training on the development and submission of business cases.¹²

³ These purchases could include such things as office supplies, uniforms, vehicles, and consulting services.

⁴ The categories and thresholds as well as the authorization for rulemaking are found in s. 287.017, F.S.

⁵ See s. 287.057(5)(f), F.S.

⁶ See s. 287.057(3)(c), F.S.

⁷ See s. 287.057(5)(a), F.S.

⁸ See ss. 287.0571 - 287.0574, F.S.

⁹ See s. 287.0573, F.S.

¹⁰ For background on audit reports on agency outsourcing efforts through 2005, see Senate Staff Analysis by the General Government Appropriations Committee on CS/CS/SB 1146 from the 2005 Regular Session.

¹¹ Department of Management Services' Sunset Review Report, p. 14.

¹² Council on Efficient Government, 2009 Annual Report, p. 5.

The Florida Efficient Government Act requires a business case to outsource a service or activity that has a projected cost of more than \$10 million in any fiscal year. The business case must provide certain information and specified information must be submitted to the Governor, the President of the Senate, and the Speaker of the House of Representatives prior to the solicitation and prior to the execution of a contract. Requirements for business plans for other levels of outsourcing are delineated.¹⁴ Business cases for outsourcing at other levels of funding are delineated. The outsource business case for a state agency may be submitted in the form required by the budget instructions issued under s. 216.023(4)(a)7., F.S., augmented with additional information, if needed.

Procurement of Products with Recycled Content¹⁵

In 1988, requirements were placed in law for the Department of Management Services, in cooperation with the Department of Environmental Protection, to review and revise existing procurement procedures and specifications for the purchase of products and materials to eliminate procedures and specifications that explicitly discriminated against products and materials with recycled content unless they were needed to protect public health, safety, and welfare. The law created a price preference for a vendor who used recycled materials. When enacted, five positions were provided and annual funding of approximately \$600,000 was provided to conduct necessary research and bid specification review. The funding for the program was stopped approximately eight years ago and as a result the Department of Management Services stopped most activities associated with the provision in law. The testing lab that was established to handle the required testing is no longer in place at the Department of Agriculture and Consumer Services. The State Negotiated Agreement Price Schedule (SNAPS) program was implemented to achieve greater efficiencies in the recycled content program and to help meet the need for review. The SNAPS program assisted in the approval of approximately 600 agreements. According to the Department of Management Services, the majority of the agreements were never used. The SNAPS program was phased out in 2004.¹⁶

Effect of Proposed Changes

Department of Management Services -- Procurement

The bill amends definitions of the methods of procurement to relocate substantive, detailed provisions to a section pertaining to procurement processes. By doing this, clarity is added to the law regarding these provisions. The definition of "commodity" is amended to remove an outdated exception to certain prescribed drugs, medical supplies, or devices. The definition of "artist" is replaced with a definition of "artistic services" which is the term used in provisions relating procurement. Other definitions are clarified as to the meaning and to conform to other requirements in the provisions relating to procurement and to Administrative Procedure Act¹⁷ requirements. Also, the bill relocates the definition for "outsource" from the Florida Efficient Government Act.

The purchasing category threshold amounts are updated.¹⁸ The amounts are increased based upon changes in the Consumer Price Index from 1999 to present and then rounding the amounts to the nearest \$5,000. The bill also removes rulemaking authority for the department for updating the threshold amounts. It has never been used by the department.

The procurement processes are clarified by adding substantive provisions that had previously been included in definitions with provisions relating to the availability and content of a competitive solicitation. The content and process requirements for each procurement method are combined with these other

¹³ See s. 287.0574, F.S.

¹⁴ See s. 287.0574, F.S.

¹⁵ See s. 287.045, F.S.

¹⁶ Information obtained from a Department of Management Analysis of HB 59 in 2009, dated February 27, 2009.

¹⁷ Ch. 120, F.S.

¹⁸ According to the Department of Management Services, the thresholds were last updated in 1999 or 2000. Information received from staff of the Department of Management Services in a telephone call on March 12, 2010.

provisions to place all of the language in one comprehensive subsection of law. The provisions relating to how agencies evaluate, rank, and select vendors through the invitation to negotiate process are clarified. Conflict of interest provisions and actions by agencies regarding conflict of interest are clearly specified. Included in the conflict of interest provision is specification as to what constitutes an unfair competitive advantage for a vendor. Finally, the provisions regarding the procurement process are made more reader friendly.

The bill removes two exemptions from competitive solicitation, amends two, and adds one. The exemption from competitive solicitation for services provided to persons with mental or physical disabilities provided by specified corporations meeting specific requirements and for specified prevention services related to mental health offered by not-for-profit corporations are removed. The exemption relating to health services is amended to specify that the services must be offered to eligible individuals participating in a program that qualifies multiple providers and utilizes standard payment methodology. Administration is removed from inclusion as a health service. The health services exemption as reworded would include some contractual services currently exempted under other exemptions that are removed. The exemption for Medicaid services delivered to Medicaid recipients is amended to provide that it applies unless the agency is directed otherwise in law. The bill provides for the renewal of a contract once for a term of 5 years for a community-based lead agency with which the Department of Children and Family Services contracts to provide child protective services. The renewal is contingent upon compliance with specified requirements and requires the department to make a determination that renewal without a competitive solicitation is in the best interest of persons served.

Florida Efficient Government Act

Council on Efficient Government

The Council on Efficient Government is repealed.

Business Case to Outsource

Provisions relating specifically to the requirements for business cases for outsourcing and for contracts are retained and moved to a revised s. 278.0571, F.S. The business case to outsource must be submitted when an outsourcing project is expected to cost in excess of \$10 million within a single fiscal year. It must be submitted as required in s. 216.023, F.S., the legislative budget review process.

The required provisions of the business case are the same as current law. The required additional contract provisions are identical with one exception. Provisions relating to protection of the state's interest regarding intellectual property are clarified and strengthened.

Coordination of Contracted Services¹⁹

The Department of Children and Family Services, the Agency for Persons with Disabilities, the Department of Health, the Department of Elderly Affairs, the Florida Department of Veteran Affairs, and service providers under contract with those agencies are required to follow certain actions to coordinate contract management by specified times.

Contractors with health and human services contracts with multiple agencies are required to notify the state agencies with information regarding all of the contracts. State agency contract managers of the same provider of services are to choose a lead administrative coordinator. The lead administrative coordinator must establish coordinated administrative and fiscal monitoring, a unified schedule for updates of information, and maintain certain accessible information electronically.

¹⁹ This section of the bill is a new approach to coordination of administrative and fiscal monitoring of contracted health and human services providers

This does not preclude an agency from conducting program performance monitoring or from responding to concerns regarding client health or safety.

Reports must be provided annually to the Governor, the President of the Senate, and the Speaker of the House of Representatives to determine the effectiveness of the coordination in improving efficiency and reducing redundant monitoring activities of state agencies and their providers.

Procurement of Products with Recycled Content

The provisions of s. 287.045, F.S., are repealed.

B. SECTION DIRECTORY:

Section 1. Amends s. 287.012, F.S., clarifying and updating certain definitions, deleting unnecessary definitions, and adding definitions for the terms "artistic services" and "outsource."

Section 2. Amends s. 287.017, F.S., increasing purchasing category thresholds and removing certain rulemaking authority.

Section 3. Repeals s. 287.045, F.S., relating to procurement of products and materials with recycled content.

Section 4. Amends s. 287.057, F.S., creating a new provision on procurement processes which combines other provisions of law relating to such processes; clarifying how agencies evaluate, rank, and select vendors through the Invitation to Negotiate process; removing language in conflict with case law; revising qualifications for certain services that are exempt from competitive-solicitation requirements; removing certain exempt status from certain services; and permitting renewal of contracts for community-based lead agency services without competitive-solicitation provided certain requirements are met; clarifying conflict of interest provisions and actions by agencies; providing specificity regarding what constitutes an unfair competitive advantage.

Section 5. Amends s. 287.0571, F.S., changing the section to pertain to business case to outsource; retaining intent language; requiring a business case for projects in excess of \$10 million; requiring agency submission of a business case through the legislative budget request process; providing requirements for the business case; and delineating contract requirements for a proposed outsourcing.

Section 6. Repeals s. 287.05721, F.S., eliminating definitions.

Section 7. Creates s. 287.0575, F.S., relating to coordination of contracted services.

Section 8. Repeals s. 287.0573, F.S., relating to the creation, membership and duties of the Council on Efficient Government.

Section 9. Repeals s. 287.0574, F.S., relating to business cases to outsource.

Section 10. Amends s. 283.32, F.S., conforming language to the repeal of s. 287.045, F.S.

Section 11. Amends s. 403.7065, F.S., conforming language to the repeal of s. 287.045, F.S.

Sections 12 through 37. Corrects cross-references.

Section 38. Provides a January 1, 2011 effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate.

D. FISCAL COMMENTS:

The repeal of the Council on Efficient Government will result in a decrease in expenditures related to staff of the council, expenses related to the operation of the council, and any expenses related to Members of the Council. The amount is not known at this time.

The coordination of contracted services fiscal and administrative monitoring as required in section 7 of the bill could have a positive impact on the state agencies listed by having one person designated as the lead administrative coordinator for all agencies when they have contracts with the same contract provider. There also could be some costs associated with the requirement to develop and maintain an accessible electronic file of up-to-date administrative and fiscal documents. There could be a positive impact on service providers through the reduction in redundant monitoring by state agencies and provision of duplicative information to multiple agencies.

According to the Department of Children and Family Services, the Department of Corrections, and the Agency for Persons with Disabilities, there is a potential impact on contracts that are now exempt from competitive-solicitation that could require going through the competitive process.^{20, 21, 22}

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require a county or municipality to spend funds or take an action requiring expenditures; reduce the authority that counties and municipalities had as of February 1, 1989, to raise revenues in the aggregate; or reduce the percentage of a state tax shared in the aggregate with counties and municipalities as of February 1, 1989.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

²⁰ Staff Analysis and Economic Impact (Draft), Department of Children and Families, March 24, 2010, p. 4.

²¹ HB 7151 - Procurement, Department of Corrections, pp. 1-2.

²² HB 7151 2010 Bill Analysis, Agency for Persons with Disabilities, March 24, 2010, pp. 1-4.

Section 2 of the bill removes the authority of the Department of Management Services to adopt rules related to purchasing category thresholds.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

On March 25, 2010, the Economic Development and Community Affairs Council adopted five amendments to HB 7151 and passed the bill as a committee substitute. The committee substitute differs from the original bill as follows:

- Adds a definition for "artistic services" which is needed because the term is used, but not defined, in competitive-solicitation requirements, and clarifies that the term does not include typesetting.
- Clarifies how agencies evaluate, rank, and select vendors through the Invitation to Negotiate process and removes terminology that is in conflict with current case law in the procurement area.
- Clarifies conflict of interest provisions by requiring that an agency must avoid, neutralize, or mitigate significant potential organizational conflicts of interest before a contract is awarded; providing procedures and requirements with respect to mitigation of such conflicts of interest; authorizing an agency to proceed with a contract award when a conflict cannot be avoided or mitigated if the agency head certifies that the award is in the best interests of the state and specifies in writing the basis for the certification; and prohibits a contract award when conflict of interest is based upon the vendor gaining an unfair competitive advantage; and, specifying the conditions that constitute an unfair competitive advantage.
- Changes the effective date to January 1, 2011, to give the Department of Management Services and other agencies time to prepare for implementation of the provisions of the act.