

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 Budget Committee

BILL: CS/CS/CS/SB 1626

INTRODUCER: Budget Committee, Governmental Oversight and Accountability Committee, Banking and Insurance Committee, and Senator Gaetz

SUBJECT: State Contracting

DATE: March 5, 2012 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rubio	Burgess	BI	Fav/CS
2.	McKay	Roberts	GO	Fav/CS
3.	Betta	Rhodes	BC	Fav/CS
4.	_____	_____	_____	_____
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:

This bill specifies the contract reporting requirements for state agencies using the contract management system in the Transparency Florida Act. The bill also specifies Auditor General's reporting requirements under the Transparency Florida Act.

The bill also requires that during the initial stage of a selection process for professional services, proposals must be evaluated on the basis of the compensation proposed by the competing firms.

This bill substantially amends sections 11.45 and 215.985, Florida Statutes.

The bill repeals section 216.0111, Florida Statutes.

The bill creates an unnumbered section of law.

II. Present Situation:

Department of Management Services and Chapter 287, F.S.

Under ch. 287, F.S., the Division of State Purchasing in the Department of Management Services (DMS) is responsible for developing and administering standardized procurement policies, procedures, and practices to be used by state agencies in acquiring commodities, contractual services, and information technology. A variety of procurement methods are available for use by the agencies depending on the cost and characteristics of the needed good or service, the complexity of the procurement, and the number of available vendors. To guide the procedures for the procurement method to be used, the type of review required, and the method for the award of any contract the following purchasing categories with threshold amounts have been established:

- Category one: \$20,000
- Category two: \$35,000
- Category three: \$65,000
- Category four: \$195,000
- Category five: \$325,000¹

The DMS prescribes methods of securing competitive sealed bids, proposals, and replies.² The competitive solicitation process must be used for procurement of commodities or contractual services in excess of the category two threshold amount, and include the following solicitation methods: invitations to bid, requests of proposals, and invitations to negotiate.³ Many services procured by state agencies are exempt from competitive solicitation requirements regardless of whether the purchase exceeds the applicable cost threshold, including artistic services, auditing services, and legal services.⁴ Agencies currently must seek approval from the DMS to use an alternate contract source to purchase commodities or services from term contracts or requirements contracts competitively established by other governmental entities. In approving the alternate contract source, the DMS determines that the contract source is cost-effective and in the best interest of the State.⁵

All agreements in excess of the category two threshold must be evidenced by a written agreement and include provisions for the required minimum level of service to be performed by the contractor, criteria for evaluating the successful completion of each deliverable, and financial consequences for nonperformance. There must also be a provision dividing the contract into quantifiable, measurable, and verifiable units of deliverables that must be received and accepted in writing by the contract manager before payment. Each deliverable must be directly related to the scope of work and specify the required minimum level of service to be performed and criteria for evaluating the successful completion of each deliverable.⁶

¹ Section 287.017, F.S.

² Rule 60A-1.041, F.A.C.

³ Section 287.057, F.S.

⁴ Section 287.057(3)(f), F.S.

⁵ Rule 60A-1.047, F.A.C.

⁶ Section 287.058(1), F.S.

Each agency is required to appoint at least one contract administrator responsible for maintaining a contract file and financial information on all contractual services contracts and who serves as a liaison with the contract managers and the DMS.⁷ The DMS designates certain minimum required documentation that must be in the contract file. Additionally, for each contractual services contract the agency must designate an employee to function as contract manager who shall be responsible for enforcing performance of the contract terms and conditions and serve as a liaison with the contractor, but there is no similar requirement for grants. Each contract manager who is responsible for contracts in excess of the threshold amount for category two (\$35,000) must attend training conducted by the CFO for accountability in contracts and grant management.⁸ Additional certifications were later required for contracts in excess of category four threshold⁹ and \$250,000 annual funding was appropriated to accomplish the certification, however no funding has been appropriated for this purpose for the past fiscal year.¹⁰ The DMS currently offers several training and certification programs including an optional Florida Certified Contract Manager designation.

Under s. 287.057(18), F.S., agencies must establish a review and approval process to be completed before contracts exceeding category three threshold (\$65,000) are executed. Under s. 216.3475, F.S., each agency shall maintain records to support a cost analysis, which includes a detailed budget submitted by the person or entity awarded funding and the agency's documented review of individual cost elements from the submitted budget for allowability, reasonableness, and necessity.

Using these various procurement methods, the DMS also negotiates state term contracts and purchasing agreements that are intended to leverage the states' buying power. The DMS is also responsible for compiling statistical procurement data concerning the method of procurement, terms, usage, and disposition of commodities and contractual services by agencies.¹¹ This data is available in the Florida Accounting Information Resource Subsystem (FLAIR) and the State's My Florida Market Place (MFMP) centralized e-procurement system.¹²

The DMS facilitates the production and processing of these competitive solicitations through the MFMP system, which is the state's e-procurement system, and provides a standardized process for developing and processing solicitations. The MFMP system has four modules: the Buyer Module, Invoicing Module, Vendor Registration Module, and Sourcing Module. However, according to the DMS, the individual state agencies determine whether to use the MFMP e-procurement system.¹³ The DMS develops procedures to be used by agencies for advertising and issuing solicitations through the Vendor Bid System. Currently all solicitations and procurement related decisions/intended decisions are required to be posted on the Vendor Bid System.¹⁴ The

⁷ Section 287.057(15), F.S.

⁸ Section 287.057(14), F.S.

⁹ Section 287.057(16)(b), F.S.

¹⁰ Department of Management Services SB1626 Bill Analysis, January 23, 2012.

¹¹ Section 287.042(10), F.S.

¹² Department of Management Services Operational Audit, Report No. 2011-075, January 2011.

¹³ Department of Management Services SB 1626 Bill Analysis, January 23, 2012.

¹⁴ http://myflorida.com/apps/vbs/vbs_www.main_menu

DMS currently posts lists of firms not permitted to do business with the state online.¹⁵ The DMS also maintains a list of vendors by classes of commodities within the MFMP system.¹⁶

In August 2011, the DMS with the participation of eight agencies and nine local government representatives initiated the Procurement Process Improvement Project to examine the policy, procedure, practice, and technology for conducting procurements. The intent of the project is to improve the effectiveness and efficiency of state purchasing through establishing standardized processes and procedures, better leveraging the MFMP sourcing module, and developing a continuous improvement protocol to better monitor and actively manage sourcing activities.¹⁷

Chief Financial Officer

The CFO is the chief fiscal officer of the state and is responsible for examining, auditing, settling, and approving payment of all accounts against the state and keeping all state funds and securities.¹⁸ The CFO functions are carried out by the Department of Financial Services (DFS). The DFS's Division of Accounting and Auditing pays all the state's bills, including employees' salaries, payments for goods and services used by state agencies and benefit payments, promote financial accountability throughout state government by providing information about its fiscal soundness, and investigate allegations of waste, fraud, and abuse of taxpayers' money.¹⁹

Transparency Florida Act

The Transparency Florida Act²⁰ in s. 215.985, F.S., requires the Executive Office of the Governor, in consultation with appropriations committees from the Senate and House, to establish a public access website that provides information relating to each appropriation in the General Appropriations Act for each branch of state government and state agency.²¹ In 2011, a requirement was added that the CFO must provide access to a state contract management system that provides information and documentation relating to contracts procured by governmental entities. This contract management system is under development, and will become a part of the current DFS transparency website.^{22 23}

Office of the Auditor General

The Office of the Auditor General conducts financial audits of the accounts and records of State agencies, conducts operational and performance audits of public records and information technology systems, adopts rules for financial audits performed by independent certified public accountants of local governmental entities, and reviews all audit reports of local governmental

¹⁵http://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/convicted_suspended_discriminatory_complaints_vendor_lists

¹⁶ Department of Management Services SB1626 Bill Analysis, January 23, 2012.

¹⁷ Department of Management Services Bill Analysis, January 23, 2012.

¹⁸ Section 17.001, F.S.

¹⁹ Department of Financial Services website, <http://www.myfloridacfo.com/sitePages/agency/sections/AccountingAuditing.aspx>, (last viewed January 31, 2012).

²⁰ Enacted in 2009 by s. 2, ch. 2009-74, L.O.F.

²¹ This website is available at <http://www.transparencyflorida.gov/Home.aspx?FY=12>.

²² The DFS transparency website is located at <http://www.myfloridacfo.com/Transparency/>.

²³ According to information given to committee staff from DFS staff on 3 February, 2012.

entities.²⁴ The Auditor General must annually notify the President of the Senate, the Speaker of the House of Representatives, and the Department of Financial Services of all educational entities and water management districts that have failed to comply with transparency requirements as identified in audit reports.²⁵

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.²⁶ Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record.

The Consultants' Competitive Negotiation Act

In 1972, Congress passed the Brooks Act (Public Law 92-582), which codified Qualifications-Based Selection (QBS) as the federal procurement method for design professional services. The QBS process entails first soliciting statements of qualifications from licensed architectural and engineering providers, selecting the most qualified respondent, and then negotiating a fair and reasonable price. The vast majority of states currently require a QBS process when selecting the services of design professionals.

Florida's Consultants' Competitive Negotiation Act (CCNA), was enacted by the Legislature in 1973,²⁷ to specify the procedures to be followed when procuring professional services²⁸ by an agency.²⁹ The CCNA did not prohibit discussion of compensation in the initial vendor selection phase until 1988, when the Legislature enacted a provision requiring that consideration of compensation occur only during the selection phase.³⁰

Currently, the CCNA, codified in s. 287.055, F.S., specifies the process to be followed when state and local government agencies procure the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper. The CCNA requires that state agencies publicly announce, in a consistent and uniform manner, each occasion when professional services must be purchased for one of the following:³¹

²⁴ Section 11.45(2), F.S.

²⁵ Section 11.45(7)(i), F.S.

²⁶ Article I, s. 24(c) of the Fla. Const.

²⁷ Chapter 73-19, L.O.F.

²⁸ Professional services are the services of architects, engineers, landscape architects, and surveyors and mappers.

²⁹ "Agency" is defined as the state, a state agency, a municipality, a political subdivision, a school district, or a school board. The term "agency" does not extend to a nongovernmental developer that contributes public facilities to a political subdivision under s. 380.06, F.S., or ss. 163.3220-163.3243, F.S.

³⁰ Chapter 88-108, L.O.F.

³¹ See, s. 287.055(3)(a)1., F.S.

- A project, when the basic construction cost is estimated by the agency to exceed \$325,000.
- A planning or study activity, when the fee for professional services exceeds \$35,000.

The public notice must provide a general description of the project and describe how the interested consultants may apply for consideration.

The CCNA provides a two-phase selection process.³² In the first phase, the “competitive selection,” the agency evaluates the qualifications and past performance of no fewer than three bidders. The agency selects the bidders, ranked in order of preference, it considers the most highly qualified to perform the required services. The CCNA requires consideration of several factors in determining the most highly qualified bidders, including willingness to meet time and budget requirements, past performance, location, recent, current, and projected firm workloads, volume of work previously awarded to the firm, and whether the firm is certified as a minority business.³³

The CCNA prohibits the agency from requesting, accepting, and considering, during the selection process, proposals for the compensation to be paid.³⁴ Section 287.055(2)(d), F.S., defines the term “compensation” to mean “the amount paid by the agency for professional services,” regardless of whether stated as compensation or as other types of rates.

In the second phase, the “competitive negotiation,” the agency then negotiates compensation with the most qualified of the three selected firms for professional services at compensation which the agency determines is “fair, competitive, and reasonable.”³⁵ If a satisfactory contract cannot be negotiated, the agency must formally terminate negotiations with that firm and must then negotiate with the second most qualified firm. The agency must negotiate with the third most qualified firm if the negotiation with the second most qualified firm fails to produce a satisfactory contract.³⁶ If a satisfactory contract cannot be negotiated with any of the three selected, the agency must select additional firms in order of their competence and qualifications and continue negotiations until a contract is reached.³⁷ Once negotiations with a firm are terminated, the agency cannot resume negotiations with that firm for the project.

In October 2011, Attorney General Bondi opined that local governments could not create a hybrid procurement process for awarding projects but instead is limited to utilizing the statutorily defined procedures.³⁸

³² Sections 287.055(4) and (5), F.S.

³³ The following is a full listing of the factors that s. 287.055(4)(b), F.S., requires agencies to consider: the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the firms; and, the volume of work previously awarded to each firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms.

³⁴ Section 287.055(4)(b), F.S.

³⁵ Section 287.055(5)(a), F.S.

³⁶ Section 287.055(5)(b), F.S.

³⁷ Section 287.055(5)(c), F.S.

³⁸ Fla. AGO 2011-21 (October 4, 2011).

III. Effect of Proposed Changes:

Section 1 amends s. 11.45, F.S., to require the Auditor General to provide notification of certain governmental entities' failure to comply with the reporting requirements of the Transparency Florida Act in s. 215.985, F.S., or annual financial audit reports specified in s. 218.39, F.S. The Auditor General must produce an annual report on which entities have not complied with the transparency requirement.

This provision would require the Auditor General to report on the failure of specified entities to supply data, even though the Auditor General does not have any audit authority over some of those entities.

Section 2 amends s. 215.985(16), F.S., to modify requirements related to the state contract management system, which must be used by state agencies. Within 30 calendar days after executing a contract, state agencies must post on the contract tracking system specified contract information and documentation, to include:

- The name of the contracting entities;
- The procurement method;
- The beginning and ending dates of the contract;
- The nature of the commodities or services purchased;
- Contract unit prices and deliverables;
- Total compensation to be paid or received;
- All payments made to the vendor to date;
- All commodities or services received from vendor to date;
- Applicable contract performance measures;
- Contract extensions or renewals, if any;
- Justification for not using competitive solicitation, if applicable; and
- Electronic copies of contract and procurement documents.

Each state agency must redact exempt or confidential information from the procurement or contract documents before posting. If a party to a contract discovers that a document has not been properly redacted, the party may request that the posting entity redact the information; upon receipt of such a request, the posting entity must redact the confidential or exempt information. The bill provides a disclaimer from liability to the CFO and DFS for the failure of a posting entity to properly redact information. Requests for copies of documents in the system, or subpoenas for documents, must be made to or served on the entity that maintains the original documents, not the CFO or DFS.

The bill allows the CFO to make information posted on the system available for viewing and downloading by the public. The CFO may prohibit the posting of records on the public website that could jeopardize the health, safety, or welfare of the public. Requests for copies of documents on the system must be made to the entity that is a party to the contract, as must subpoenas for copies.

The bill provides DFS authority to adopt rules to administer the subsection.

Section 3 repeals s. 216.0111, F.S., which specifies the agency contract information required to be submitted to DFS. That information is now included in s. 215.985, F.S.

Section 4 creates an unnumbered section as follows:

Notwithstanding any law to the contrary, a state agency, a special district, or a local government may seek competitive bids for professional services. During the initial stage of this selection process, proposals shall be evaluated on the basis of the compensation proposed by the competing firms or vendors to provide professional services. A proposal shall then be evaluated on the basis of any other qualifications the agency, special district, or local government deems applicable to the selection of a qualified firm or vendor. Each agency that is subject to chapter 120, Florida Statutes, shall adopt rules for the competitive bidding of professional services.

This section appears to modify the existing provisions of the CCNA in s. 287.055, F.S. The section is unnumbered, however, which could make implementation problematic, if the provision is placed in a section without definitions inconsistent with the terms used in the provision.

Section 4 provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill does not appear to create a new public records exemption; it requires compliance with existing public records exemptions.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 4 of the bill is unnumbered, though it appears designed to modify the CCNA in s. 287.055, F.S. To avoid difficulty in implementing this provision, the Legislature should specify where it is to be placed.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS/CS/CS by Budget on March 1, 2012:

The CS removes all provisions from the bill except those relating to Auditor General reporting requirements, and CFO and state agency duties related to the contract management system, which must be used by state agencies, but not other entities. The CS also adds a requirement that during the initial stage of a selection process for professional services, proposals must be evaluated on the basis of the compensation proposed by the competing firms.

CS/CS by Governmental Oversight and Accountability on February 7, 2012:

The CS added a requirement that the Auditor General must send, to the Joint Legislative Auditing Committee, an annual report on which entities have not complied with the transparency requirement. The CS also specified the appropriation for the CFO's expanded contract auditing responsibilities as \$4,067,000 and 36 full-time equivalent positions.

CS by Banking and Insurance on February 2, 2012:

The bill retains many of the same provisions of the bill as filed and makes the following major changes:

Provides for the establishment, by the CFO, of dollar thresholds and criteria for determining agreements funded with state or federal assistance that are to be reviewed prior to execution.

- Provides that the CFO may review and approve contracts prior to execution in accordance with rules adopted by the DFS.
- Allots 30 days for the DFS to make a final determination regarding approval of the agreement; which may be extended to ensure a thorough review.
- Provides a list of records the DFS may search for when reviewing contracts.
- Requires the DFS to establish a training certification program for negotiators of contracts and grants.
- Inserts and revises effective dates for certain provisions.

- Makes drafting changes to the bill by inserting and revising sections and deleting certain language.

B. Amendments:

None.

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