

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1309 Procurement of Commodities and Contractual Services

**SPONSOR(S):** Appropriations Committee, Government Operations Subcommittee; Albritton

**TIED BILLS:** HB 1311 **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	11 Y, 0 N, As CS	Harrington	Williamson
2) Appropriations Committee	24 Y, 0 N, As CS	White	Leznoff

### SUMMARY ANALYSIS

State procurement of personal property and services is governed by chapter 287, F.S. The Department of Management Services (DMS) is responsible for maintaining uniform rules for and overseeing agency procurement, as well as negotiating statewide contracts to leverage the state's buying power. The Chief Financial Officer (CFO) is responsible for setting and approving accounts against the state and keeping all state funds and securities. The CFO's duties also include contract review, procurement training, and auditing.

Effective July 1, 2013, the bill makes the following revisions to provisions governing state agency procurement and contracting, including, but not limited to:

- Requiring that agencies upload contracts and related information into the Florida Accountability Contract Tracking System;
- Providing for additional provisions to be included in grant agreements;
- Requiring agencies to appoint grant managers;
- Requiring grant managers to receive contract manager certification;
- Renaming chapter 287, F.S., as "Procurement of Commodities and Contractual Services";
- Providing that both DMS and the CFO are jointly responsible for contract management training;
- Requiring that invitations to bid be awarded to the lowest responsive bidder;
- Permitting DMS to lead joint agreements with governmental entities; and
- Removing the requirement that an agency head certify emergency procurement documents.

The bill will likely have a minimal fiscal impact on state government. However, it is anticipated that the provisions of the bill will be handled within existing agency resources. See Fiscal Comments section for further information.

The bill provides an effective date of July 1, 2013, except as otherwise provided.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Department of Management Services

The Department of Management Services (DMS) provides administrative and support services to other state agencies and to state employees. DMS's areas of responsibility include, but are not limited to:<sup>1</sup>

- Employee benefits (retirement and insurance);
- Human resource management;
- Business operations (real estate development and management, state purchasing, and specialized services);
- Telecommunications; and
- Agency administration.

Section 20.22(2), F.S., establishes the following divisions and programs within DMS:

- Facilities Program;
- Technology Program;
- Workforce Program;
- Support Program;
- Federal Property Assistance Program;
- Administration Program;
- Division of Administrative Hearings;
- Division of Retirement; and
- Division of State Group Insurance.

##### State Procurement of Contracts for Personal Property and Services

Chapter 287, F.S., regulates state agency<sup>2</sup> procurement of personal property and services. DMS 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.<sup>3</sup> DMS establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.<sup>4</sup>

Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods, which include:<sup>5</sup>

- 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

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<sup>1</sup> See the Department of Management Services' website at: <http://www.dms.myflorida.com/> (last visited March 8, 2013).

<sup>2</sup> Section 287.012(1), F.S., defines agency as "any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. 'Agency' does not include the university and college boards of trustees or the state universities and colleges."

<sup>3</sup> See ss. 287.032 and 287.042, F.S.

<sup>4</sup> *Id.*

<sup>5</sup> See s. 287.057, F.S.

- Invitations to negotiate, which are used when negotiations are determined to be necessary to obtain the best value and involve a request for highly complex, customized, mission-critical services.

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.<sup>6</sup> Section 287.012(6), F.S., provides that competitive solicitation means “the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement.” Specified contractual services and commodities are not subject to competitive solicitation requirements.<sup>7</sup>

The chapter establishes a process by which a person may file an action protesting a decision or intended decision pertaining to contracts administered by DMS, a water management district, or certain other agencies.<sup>8</sup>

#### Agreements Funded with Federal and State Assistance

Current law requires an agency agreement that provides state financial assistance to a recipient or subrecipient,<sup>9</sup> or that provides federal financial assistance to a subrecipient,<sup>10</sup> to include a provision specifying scope of work that clearly establishes the tasks the recipient or subrecipient is required to perform, and a provision dividing the agreement into quantifiable units of deliverables that must be received and accepted in writing by the agency before payment. Each deliverable must be directly related to the scope of work and must specify the required minimum level of service to be performed and the criteria for evaluating the successful completion of each deliverable.<sup>11</sup>

#### Qualifications for Contract Managers and Contract Negotiators

For each contractual services contract the agency must designate an employee to function as contract manager who must be responsible for enforcing performance of the contract terms and conditions and serve as a liaison with the contractor. Current law requires certain contract managers to attend training conducted by the Chief Financial Officer (CFO).<sup>12</sup> It also requires certain contract negotiators to be certified based upon rules adopted by DMS.<sup>13</sup>

#### State Term Contracts

Using the various procurement methods, DMS negotiates state term contracts and purchasing agreements that are intended to leverage the state’s buying power.<sup>14</sup> Agencies must purchase commodities and contractual services from purchasing agreements and state term contracts procured by DMS; however, all governmental agencies, as defined in s. 163.3164, F.S., may utilize the contracts.<sup>15</sup>

#### MyFloridaMarketPlace

The State’s MyFloridaMarketPlace (MFMP) is a centralized e-procurement system. DMS maintains a list of vendors by classes of commodities within the MFMP system.

#### Chief Financial Officer and Department of Financial Services

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<sup>6</sup> Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold contained in s. 287.017, F.S., to be competitively bid.

<sup>7</sup> See s. 287.057(3)(f), F.S.

<sup>8</sup> See s. 287.042(2)(c), F.S.

<sup>9</sup> As defined in s. 215.97, F.S.

<sup>10</sup> As defined by applicable United States Office of Management and Budget circulars.

<sup>11</sup> See s. 215.971, F.S.

<sup>12</sup> See s. 287.057(14), F.S.

<sup>13</sup> See s. 287.057(16)(b), F.S.

<sup>14</sup> See s. 287.012(27), F.S.

<sup>15</sup> See s. 287.056(1), F.S.

The CFO is an elected constitutional Cabinet member.<sup>16</sup> The CFO serves as the chief financial officer of the state and is responsible for setting and approving accounts against the state and keeping all state funds and securities.<sup>17</sup> Such responsibilities include, but are not limited to, auditing and adjusting accounts of officers and those indebted to the state,<sup>18</sup> paying state employee salaries,<sup>19</sup> and reporting all disbursements of funds administered by the CFO.<sup>20</sup>

The CFO also serves as the head of the Department of Financial Services (DFS), which executes the duties of the CFO.<sup>21</sup> DFS consists of the following divisions:

- The Division of Accounting and Auditing;
- The Division of State Fire Marshall;
- The Division of Risk Management;
- The Division of Treasury;
- The Division of Insurance Fraud;
- The Division of Rehabilitation and Liquidation;
- The Division of Insurance Agents and Agency Services;
- The Division of Consumer Services;
- The Division of Consumer Services;
- The Division of Workers' Compensation;
- The Division of Administration;
- The Division of Legal Services;
- The Division of Information Systems;
- The Office of Insurance Consumer Advocate;
- The Division of Funeral, Cemetery, and Consumer Services; and
- The Division of Public Assistance Fraud.<sup>22</sup>

The Financial Services Commission; Board of Funeral, Cemetery, and Consumer Services; and Strategic Markets Research and Assessment Unit also are established within DFS.<sup>23</sup>

#### Florida Accountability Contract Tracking System

Section 215.985(16), F.S., requires the CFO to provide public access to a state contract management system that provides information and documents related to contracts procured by governmental entities. The data collected in the system must include the contracting agency, the procurement method, and other pertinent contract information. Each time a major change to an existing contract is made, the agency must update the information in the contracting management system within 30 days. The website is known as the Florida Accountability Contract Tracking System (FACTS).<sup>24</sup>

Current law also requires each state agency to report to DFS, within three working days of executing a contract, the following information relating to certain contracted activities:<sup>25</sup>

- The nature of the commodities or services provided;
- The term of the contract;
- The final obligation made by the agency;
- A summary of any time constraints that apply to the procurement;
- The justification for not using the competitive solicitation, including any statutory exemption or exception; and

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<sup>16</sup> Art. 4, s. 4(a) and (c) of the State Constitution.

<sup>17</sup> Art. 4, s. 4(c) of the State Constitution, and s. 17.001, F.S.

<sup>18</sup> Section 17.04, F.S.

<sup>19</sup> See s. 17.09, F.S.

<sup>20</sup> Section 17.11, F.S.

<sup>21</sup> See s. 20.121, F.S.

<sup>22</sup> Section 20.121(2), F.S.

<sup>23</sup> Sections 20.121(3), (4), and (6), F.S.

<sup>24</sup> The FACTS website can be found online at: <http://www.myfloridacfo.com/aadir/statewidecontractreporting.htm> (last visited on March 14, 2013).

<sup>25</sup> Agencies must submit the information to DFS for contracts in excess of Category Two (\$35,000) if the goods and services were not purchased by competitive solicitation or from a state term contract. Section 216.0111(2), F.S.

- Other information regarding the contract or the procurement that DFS requires.<sup>26</sup>

All of the information provided to DFS, however, is not included in FACTS. The contracting agency is not required to upload the contract into FACTS.

## **Effect of the Bill**

### Agreements Funded with Federal and State Assistance

The bill requires that agreements funded with federal and state assistance contain additional provisions, which include:

- A provision specifying the financial consequences that apply if the recipient or subrecipient fails to perform the minimum level of service required in the agreement. The provision can be excluded in specified situations;
- A provision specifying that a recipient or subrecipient of federal or state financial assistance may expend funds only for allowable costs resulting from obligations incurred during the specified agreement period;
- A provision specifying that any balance of unobligated funds which has been advanced or paid must be refunded to the state agency;
- A provision specifying that any funds paid in excess of the amount to that the recipient or subrecipient is entitled must be refunded to the state agency; and
- Any additional information required pursuant to s. 215.97, F.S., which is the Florida Single Audit Act.

The bill requires an agency to designate an employee to function as a grant manager for each agreement funded with federal or state financial assistance. The grant manager must complete the training and become a certified contract manager, as provided in s. 287.057(14), F.S.

The bill requires the CFO to establish uniform procedures for grant management to ensure that services have been rendered in accordance with agreement terms before the agency processes an invoice for payment. It requires the grant manager to reconcile and verify all funds received against all funds expended during the grant period and final reconciliation report. It also requires the CFO to perform audits after the grant agreement has been executed.

### Florida Accountability Contract Tracking System

The bill requires state agencies<sup>27</sup> to upload contracts that have been redacted to exclude confidential or exempt information to the contract management website within 30 days after execution. The agency must provide on the website information pertaining to the contract, including the names of the contracting entities, procurement method, contract dates, nature of the commodities and services purchased, applicable unit prices, total compensation to be paid, all payments made, and applicable contract measures. Agencies must update the information in the system within 30 days of an amendment to the existing contract. Agencies also must post to the system the information required for each existing contract that was executed more than 30 days prior to July 1, 2013.

The bill provides that contracts available on the contract tracking system must not reveal information made confidential or exempt by law. If a party to the contract discovers that an electronic copy of the contract has not been properly redacted, the bill provides a process for the agency to follow, upon being notified or discovering the error. The agency must immediately remove the contract, redact the confidential or exempt information, and republish the contract to the website within seven days. Agencies must notify the CFO upon becoming aware that an electronic copy of a contract posted on the website has not been properly redacted. The contract tracking system must display a notice of the right of an affected party to request redaction of confidential or exempt information.

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<sup>26</sup> Section 216.0111, F.S.

<sup>27</sup> The bill provides that “state agency” has the same meaning as defined in s. 216.011, F.S., excluding the judicial branch, the Department of Legal Affairs, the Department of Agriculture and Consumer Services, and the Department of Financial Services. The bill permits those entities to utilize the contract management website.

The bill provides that the CFO, DFS, and any officer, employee, or contractor thereof, is not liable for failure of a state agency to redact confidential or exempt information. It provides that posting the contract on the contract tracking system does not supersede the duty of an agency to respond to a public records request or to a subpoena. The bill provides that the CFO may adopt rules to administer the section. In addition, the bill requires the CFO to use appropriate Internet security measures to ensure that no person has the ability to alter or modify records available on the website.

#### Chapter Name

The bill renames chapter 287, F.S., as "Procurement of Commodities and Contractual Services." The chapter is currently named "Procurement of Personal Property and Services."

#### Definitions

The bill provides a definition for "governmental entity", which means a political subdivision or agency of this state or of any state of the United States, including, but not limited to, state government, county, city, school district, nonprofit public university or college, single-purpose or multipurpose special district, single-purpose or multipurpose public authority, metropolitan or consolidated government, separate legal entity or administrative entity, or any agency of the Federal Government.

The bill also amends the definitions for "best value," "commodities," "electronic posting," and "extension."

#### Term Contracts

The bill provides that when a vendor protests a notice of intent to award a contract to multiple vendors, the intended award may proceed unless the protesting vendor submits to DMS in writing particular facts and circumstances that demonstrate a reasonable basis for protesting the award to the other vendor or vendors. The Secretary of Management Services or his or her designee must determine in writing whether the vendor has demonstrated a sufficient basis for stay of the intended award. If the vendor prevails in the protest, the vendor is added to the contract with the same term and conditions as the other awarded contracts. This will allow DMS to proceed with the award of state term contracts during a vendor bid protest, rather than staying the award of the contract.

#### Joint Agreements

The bill authorizes DMS to lead, rather than solely enter into, joint agreements with governmental entities for the purchase of commodities or contractual services that can be used by multiple agencies.

#### Required Agency Agreement Terminology

The bill deletes repetitive language found in s. 287.056, F.S., that also is found in s. 287.058(d) and (e), F.S. The language requires agencies to include in contracts a provision specifying a scope of work that clearly establishes all tasks that the contractor is required to perform, and 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 the criteria for evaluating the successful completion of each deliverable.

#### Invitations to Bid

The bill provides that a contract awarded in a procurement initiated with an invitation to bid must be awarded to the responsible and responsive vendor that submits the lowest responsive bid. This provision was in chapter 287, F.S., until 2010, when it was inadvertently removed.<sup>28</sup>

#### Exemptions from Competitive Solicitation

##### *Emergency Action Exception*

The bill provides that the agency head must sign a written determination that immediate danger to the public health, safety, or welfare or other substantial loss to the state requires emergency action. The

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<sup>28</sup> See chapter 2010-151, L.O.F.

bill provides that the agency must furnish copies of all written determinations relating to the emergency to DMS and the CFO. The bill removes the requirement that the determination be certified under oath.

#### Single Source Contracts

The bill deletes provisions that require agencies to submit forms for approval from DMS for specified single source contracts prior to entering into contracts with vendors. According to DMS, these requirements were established to verify that agencies were noticing intent to enter into single source contracts and DMS has never utilized this provision to deny an agency's request to enter into such an agreement.<sup>29</sup>

#### Contract Renewals and Extensions

The bill permits a contract extension and renewal to include written amendments signed by the parties. The bill also provides that an agency may negotiate a lower price in solicitations for contract renewals.

#### Training

The bill requires each contract manager who is responsible for contracts in excess of the threshold amount for Category Two (\$35,000) to be a certified contract manager. DMS is responsible for establishing and disseminating the requirements for certification, which includes completing the training conducted by the CFO for accountability in contracts and grant management.

#### MyFloridaMarketPlace

Current law requires DMS, in consultation with the Agency for Enterprise Information Technology and the Comptroller, to develop a program for online procurement of commodities and contractual services. The bill inserts a reference to the CFO in place of the Comptroller as the CFO is the state's chief financial officer, and removes a reference to the Agency for Enterprise Information Technology, as the Agency for Enterprise Information Technology has been decommissioned. Because MyFloridaMarketPlace is developed already, the bill provides that DMS and the CFO must maintain, rather than develop, a program for online procurement of commodities and contractual services.

#### Audits of Executed Contracts

The bill creates s. 287.136, F.S., which requires the CFO to perform audits of executed contract documents and a contract manager's records to ensure that adequate internal controls are in place for complying with the terms and conditions of the contract and for the validation and receipt of goods and services. It provides that the CFO must discuss the audit and potential findings with the official whose office is subject to the audit and that the final audit must be submitted to the agency head. The agency head must submit a written response to the final audit within 30 days.

#### Effective Date

The bill provides an effective date of July 1, 2013.

### B. SECTION DIRECTORY:

Section 1. amends s. 215.971, F.S., providing additional information that must be included in an agency agreement that provides state financial assistance to a recipient or subrecipient; requiring each state agency to designate an employee to function as a grant manager for purposes of the agreements; requiring training for certain grant managers; requiring the CFO to establish and disseminate uniform procedures for grant managers; requiring the grant manager to report certain information; requiring the CFO to perform audits of executed grant agreements.

Section 2. amends s. 215.985, F.S., requiring the CFO to establish and maintain a secure contract tracking system; providing requirements for the system; requiring state agencies to post certain information on the contract tracking system within a specified timeframe; specifying information that must be posted on the contract tracking system; providing that records posted on the system may not contain confidential or exempt information; requiring state agencies to redact confidential or exempt information prior to posting records on the system; providing a process for a party to the contract to request redaction of confidential or exempt information; providing notice requirements; providing that

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<sup>29</sup> According to a representative from DMS on March 8, 2013.

posting of information on the contract tracking system does not supersede the duty of a state agency to respond to a public record request; providing that a subpoena for certain contract information must be served on the state agency that is party to the contract; authorizing the CFO to adopt rules; defining the term "state agency"; authorizing the judicial branch, Department of Legal Affairs, Department of Agriculture and Consumer Services, and Department of Financial Services to elect to comply with the posting requirements.

Section 3. renames chapter 287, F.S., as "Procurement of Commodities and Contractual Services."

Section 4. amends s. 287.012, F.S., providing and revising definitions.

Section 5. amends s. 287.042, F.S., revising powers, duties, and functions of DMS; removing the requirement that DMS establish and maintain a vendor list; providing an additional circumstance under which the department may proceed with a competitive solicitation or contract award process of a term contract as an alternative to the stay of such process pursuant to a formal written protest under the Administrative Procedure Act; authorizing DMS to lead or enter into joint agreements with governmental entities for the purchase of commodities or contractual services that can be used by multiple agencies.

Section 6. amends s. 287.056, F.S., eliminating provisions requiring certain inclusions in agency agreements.

Section 7. amends s. 287.057, F.S., providing that contracts awarded pursuant to an invitation to bid must be awarded to the responsible and responsive vendor that submits the lowest responsive bid; revising exceptions to the requirement that the purchase of specified commodities or contractual services be made only as a result of receiving competitive sealed bids, competitive sealed proposals, or competitive sealed replies; revising contractual services and commodities that are not subject to competitive solicitation requirements by virtue of being available only from a single source; providing that a contract for commodities or contractual services may be awarded without competition if the recipient of funds is established during the appropriations process; revising provisions relating to extension of a contract for commodities or contractual services; authorizing an agency to negotiate better pricing upon renewal of a contract; providing training requirements for contract managers responsible for contracts in excess of a specified threshold amount; providing that DMS is responsible for establishing and disseminating the requirements for certification of a contract manager; requiring DMS and the CFO to maintain a program for online procurement of commodities and contractual services.

Section 8. amends s. 287.0571, F.S., revising nonapplicability of a business case to outsource.

Section 9. amends s. 287.058, F.S., defining the term "performance measure"; revising references within provisions relating to purchase orders used in lieu of written agreements for classes of contractual services; revising terminology.

Section 10. amends s. 287.076, F.S., providing that Project Management Professionals training for personnel involved in managing outsourcings and negotiations is subject to annual appropriations.

Section 11. creates s. 287.136, F.S., requiring the CFO to perform audits of executed contracts; creating reporting requirements.

Sections 12. through 22. amend ss. 16.0155, 283.33, 394.457, 402.7305, 409.9132, 427.0135, 445.024, 627.311, 627.351, 765.5155, and 893.055, F.S., conforming cross references.

Section 23. provides an effective date of July 1, 2013.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**



1. Revenues:

None.

2. Expenditures:

See below Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill requires certain agencies to upload contracts and contract related information on a secure contract management website. The bill likely could create a minimal fiscal impact on agencies, because staff responsible for complying with the uploading requirements could require training on the system and on public record exemptions. Agencies also could incur costs associated with redacting the confidential or exempt information prior to uploading the documents.

In addition, the bill requires specified employees to receive training and contract manager certification. Providing the certification could create a minimal fiscal impact on DMS and the CFO. The bill could create a minimal fiscal impact on agencies as well because certain agency personnel will be required to attend and obtain certification. However, despite the potential for a minimal fiscal impact, the provisions of the bill are anticipated to be accomplished within existing agency resources.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill authorizes the CFO to create rules pertaining to the contract management website and provides a grant of rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 13, 2013, the Government Operations Subcommittee adopted a strike-all amendment and reported HB 1309 favorable with committee substitute. The committee substitute:

- Creates additional contract provisions for grant agreements;
- Requires that agencies appoint grant managers who have obtained contract manager certification;
- Requires agencies to upload redacted contracts and related information into a secure contract management website;
- Requires the CFO to conduct audits on executed contracts and grant agreements;
- Maintains the requirement in current law that DMS utilize a negotiation team with a chief negotiator when negotiating certain information technology contracts; and
- Removes provisions that raised concerns in the bill, including provisions that authorized DMS to delegate the purchase of insurance, provisions that permitted agencies to suspend vendors from the vendor list, provisions that permitted agencies to combine funds for purchases, and provisions that created a direct-support organization.

On March 20, 2013, the Appropriations Committee adopted two amendments and reported CS/HB 1309 favorable with committee substitute. The committee substitute:

- Removes the requirement that DMS establish and maintain a vendor list;
- Maintains the current requirement that contract managers responsible for contracts greater than \$35,000 must complete training conducted by the CFO; and
- Provides that effective December 1, 2014, contract managers responsible for contracts in excess on \$100,000 annually must complete training in contract management and become a certified contract manager. The training is jointly conducted by the DMS and the DFS.

The analysis reflects the bill as amended.