

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #:	CS/CS/HB 1309	FINAL HOUSE FLOOR ACTION:	
SPONSOR(S):	Appropriations Committee; Government Operations Subcommittee; Albritton	116 Y's	0 N's
COMPANION BILLS:	(CS/CS/SB 1150)	GOVERNOR'S ACTION:	Approved

SUMMARY ANALYSIS

CS/CS/HB 1309 passed the House on April 4, 2013. The bill was amended by the Senate on April 29, 2013. CS/CS/HB 1309 as amended by the Senate was further amended by the House on May 3, 2013. The Senate concurred in the House amendment and subsequently passed the bill as amended on May 3, 2013. The bill makes several changes specific to grant agreements and the state agency procurement process.

The bill requires public agency contracts for services performed on behalf of the agency to contain contract provisions clarifying the public record responsibilities of the contractor. If a contractor does not comply with a public records request, the public agency must enforce the contract provisions in accordance with the contract.

The bill creates additional requirements for grant agreements and requires the Chief Financial Officer (CFO) to perform audits of executed grant agreements. It also requires agencies to designate a grant manager and provides training requirements for those managers.

The bill revises several provisions governing state agency procurement and contracting, including, but not limited to:

- Removing the requirement that the Department of Management Services (DMS) establish and maintain a vendor list;
- Permitting DMS to lead, rather than solely enter into, joint agreements with governmental entities;
- Requiring an invitation to bid be awarded to the vendor with the lowest responsive bid;
- Revising the training requirements for contract managers, including providing that both DMS and the CFO are jointly responsible for contract management training;
- Requiring the agency head to sign, rather than certify under oath, a written statement of emergency; and
- Requiring the CFO to audit executed contract documents and contract manager records.

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 was approved by the Governor on June 7, 2013, ch. 2013-154, L.O.F., and will become effective July 1, 2013, except as otherwise expressly provided in the act.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

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.

Public policy regarding access to agency¹ 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 public record² at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Current law requires certain procurements of contractual services in excess of \$35,000 to provide a written agreement that includes a provision allowing unilateral cancellation by the state agency for refusal by the contractor to allow public access to all documents, papers, letters, or other material made or received by the contractor in conjunction with the contract, unless the records are exempt from public record requirements.³ In addition, each contract for a proposed outsourcing that has an expected cost in excess of \$10 million within a single fiscal year must include a contractual provision that requires the contractor and its subcontractors to comply with public records laws, specifically to:⁴

- Keep and maintain the public records that ordinarily and necessarily would be required by the state agency in order to perform the service or activity;
- Provide the public with access to such public records on the same terms and conditions that the state agency would provide the records and at a cost that does not exceed that provided in chapter 119, F.S., or as otherwise provided by law;
- Ensure that records that are exempt or records that are confidential and exempt are not disclosed except as authorized by law; and
- Meet all requirements for retaining records and transfer to the state agency, at no cost, all public records in possession of the contractor upon termination of the contract and destroy any duplicate public records that are exempt or confidential and exempt. All records stored electronically must be provided to the state agency in a format that is compatible with the information technology systems of the state agency.

¹ Section 119.011(2), F.S., defines the term "agency" 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." The Public Records Act does not apply to legislative or judicial records. See *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992).

² Section 119.011(12), F.S., defines the term "public records" 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.

³ Section 287.058(1)(c), F.S.

⁴ Section 287.0571(5)(j), F.S.

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:⁵

- 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 agency⁶ 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.⁷ DMS establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.⁸

Depending on the cost and characteristics of the needed goods or services, agencies may utilize a variety of procurement methods, which include:⁹

- 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 highly complex, customized, mission-critical services.

For contracts for commodities or services in excess of \$35,000, agencies must utilize a competitive solicitation process.¹⁰ 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

⁵ See the Department of Management Services' website at: <http://www.dms.myflorida.com/> (last visited March 8, 2013).

⁶ 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."

⁷ See ss. 287.032 and 287.042, F.S.

⁸ *Id.*

⁹ See s. 287.057, F.S.

¹⁰ 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.

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.¹¹

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.¹²

Agreements Funded with Federal and State Assistance

Current law requires an agency agreement that provides state financial assistance to a recipient or subrecipient,¹³ or that provides federal financial assistance to a subrecipient,¹⁴ 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.¹⁵

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).¹⁶ It also requires certain contract negotiators to be certified based upon rules adopted by DMS.¹⁷

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

The CFO is an elected constitutional Cabinet member.¹⁸ 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.¹⁹ Such responsibilities include, but are not limited to, auditing and adjusting accounts of officers and those indebted to the state,²⁰ paying state employee salaries,²¹ and reporting all disbursements of funds administered by the CFO.²²

The CFO also serves as the head of the Department of Financial Services (DFS), which executes the duties of the CFO.²³ 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;

¹¹ See s. 287.057(3)(f), F.S.

¹² See s. 287.042(2)(c), F.S.

¹³ As defined in s. 215.97, F.S.

¹⁴ As defined by applicable United States Office of Management and Budget circulars.

¹⁵ See s. 215.971, F.S.

¹⁶ See s. 287.057(14), F.S.

¹⁷ See s. 287.057(16)(b), F.S.

¹⁸ Art. 4, s. 4(a) and (c) of the State Constitution.

¹⁹ Art. 4, s. 4(c) of the State Constitution, and s. 17.001, F.S.

²⁰ Section 17.04, F.S.

²¹ See s. 17.09, F.S.

²² Section 17.11, F.S.

²³ See s. 20.121, F.S.

- 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.²⁴

The Financial Services Commission; Board of Funeral, Cemetery, and Consumer Services; and Strategic Markets Research and Assessment Unit also are established within DFS.²⁵

Effect of the Bill

Public Records

The bill creates s. 119.0701, F.S., which requires specified public records provisions to be included in certain public agency²⁶ contracts. Specifically, the bill requires all public agency contracts for services in which the contractor is acting on behalf of the public agency to contain contract provisions clarifying the public record responsibilities of the contractor. The contract must include a provision that requires the contractor to comply with public records laws to:

- Keep and maintain public records that ordinarily and necessarily would be required by the public agency in order to perform the service;
- Provide the public with access to such public records on the same terms and conditions that the public agency would provide the records and at a cost that does not exceed that provided in chapter 119, F.S., or as otherwise provided by law;
- Ensure that public records that are exempt or that are confidential and exempt from public record requirements are not disclosed except as authorized by law; and
- Meet all requirements for retaining public records and transfer to the public agency, at no cost, all public records in possession of the contractor upon termination of the contract and destroy any duplicate public records that are exempt or confidential and exempt. All records stored electronically must be provided to the public agency in a format that is compatible with the information technology systems of the agency.

If the contractor does not comply with a public records request, the contracting governmental entity must enforce the contract provisions in accordance with the contract.

Agreements Funded with Federal or State Assistance

The bill requires that agreements funded with federal or 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;

²⁴ Section 20.121(2), F.S.

²⁵ Sections 20.121(3), (4), and (6), F.S.

²⁶ The bill defines the term "public agency" to mean a state, county, district, authority, or municipal officer, or department, division, board, bureau, commission, or other separate unit of government created or established by law.

- A provision specifying that any balance of unobligated funds that 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 which 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. Each grant manager that is responsible for agreements in excess of \$35,000 must complete training conducted by the CFO for accountability in contracts and grant management. Additionally, effective December 1, 2014, each grant manager that is responsible for agreements in excess of \$100,000 annually must complete the training and become a certified contract manager, as provided in s. 287.057(14), F.S. All grant managers must become certified contract managers within 24 months after establishment of the training and certification requirements by DMS and DFS.

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.

Chapter 287, F.S., 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, municipality, 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,” “commodity,” “electronic posting,” “extension,” and “request for a quote.”

Vendor List

The bill removes the requirement that DMS establish and maintain a vendor list from s. 287.042, F.S.

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.

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.²⁷

Exemption 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 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.

Exemption from Competitive Solicitation: Single Source Contracts

²⁷ See chapter 2010-151, L.O.F.

The bill deletes provisions that require agencies to submit forms to DMS for approval 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.²⁸

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.

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 has already been developed, the bill provides that DMS and the CFO must maintain, rather than develop, a program for online procurement of commodities and contractual services.

Training

Effective December 1, 2014, the bill requires each contract manager who is responsible for contracts in excess of \$100,000 annually 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. The training must be coordinated by DMS and conducted jointly by DMS and DFS. Training must promote best practices and procedures related to negotiating, managing, and ensuring accountability in agency contracts and grant agreements, which must include the use of case studies based on previous audits, contracts, and grant agreements.

All agency contract managers must become certified within 24 months after the establishment of the training and certification requirements by DMS and DFS.

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, except as otherwise expressly provided.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

²⁸ According to a representative from DMS on March 8, 2013.

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 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.