

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 Committee on Governmental Oversight and Accountability

BILL: SB 374

INTRODUCER: Senator Montford

SUBJECT: State-leased Space

DATE: November 16, 2015 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|------------------|
| 1. | Peacock | McVaney | GO | Favorable |
| 2. | | | AGG | |
| 3. | | | AP | |

I. Summary:

SB 374 eliminates the requirement that the Department of Management Services adopt a rule requiring that any lease agreement for private property must contain a clause allowing the lessee state agency to terminate the lease agreement if state-owned property becomes available to the lessee state agency and the state agency gives 6 months' advance written notice of termination. Under current law, this requirement may not be amended, supplemented, or waived by contract.

DMS retains the authority to promulgate or maintain the same or similar rule if DMS deems it to be an acceptable term and condition for lease agreements.

SB 374 provides that the bill does not impair or restrict the terms and conditions of lease agreements entered into by a state agency before July 1, 2016.

The bill provides an effective date of July 1, 2016.

II. Present Situation:

Leasing and Department of Management Services Authority

The Department of Management Services (DMS) Facilities Program, also called the Division of Real Estate Development and Management (REDM), is responsible for the overall management of the Florida Facilities Pool, as well as other facilities and structures DMS has been given responsibility to manage.¹ The State of Florida owns 20,199 facilities, including facilities owned by state agencies, the Florida College System, the State University System of Florida, and water

¹ See http://www.dms.myflorida.com/business_operations/real_estate_development_and_management (last visited on October 28, 2015).

management districts.² DMS manages 109 facilities in the Florida Facilities Pool, and five federal surplus property facilities.³ DMS also contracts for 7 private correctional facilities and 11 Division of Telecommunications equipment buildings.⁴ The Bureau of Leasing within the Division administers public and private leasing and ensures that leases are in the best interests of the state.⁵

As of June 30, 2015:

| Lease Type | Lease Count | Square Footage (SF) | Percent of Total Lease Space (SF) | Annual Rent |
|-------------|-------------|---------------------|-----------------------------------|------------------|
| Government | 324 | 961,828 | 7% | \$4,448,295.35 |
| Private | 794 | 6,466,501 | 48% | \$125,176,825.89 |
| Public | 302 | 6,070,907 | 45% | \$99,032,316.70 |
| Grand Total | 1,420 | 13,499,236 | 100% | \$228,657,437.94 |

According to the DMS 2015 Master Leasing Report,⁶ the state leases approximately 13.5 million square feet with an annual rent of \$228 million, of which 6.4 million square feet is in 794 private sector leases, with an annual rent of \$125 million.

Chapter 255, F.S., provides the statutory authority for DMS to manage and operate the Florida Facilities Pool and specifies the oversight role DMS has in the leasing of privately owned space. Except as provided in ss. 255.249⁷ and 255.2501,⁸ F.S., a state agency may not lease a building or any part thereof unless prior approval of the lease conditions and the need for the lease is first obtained from DMS.⁹

DMS has the authority to approve leases of greater than 5,000 square feet that cover more than 12 consecutive months, if such lease is, in the judgment of the DMS, in the best interests of the state.¹⁰ Except as provided for emergency space needs,¹¹ no state agency may enter into a lease

² DMS Master Leasing Report 2015, *available at* http://www.dms.myflorida.com/content/download/118552/650855/2015_Master_Leasing_reportpdf.pdf (last visited on October 28, 2015).

³ *Id.*

⁴ *Id.*

⁵ See http://www.dms.myflorida.com/business_operations/real_estate_development_and_management (last visited on October 28, 2015).

⁶ DMS Master Leasing Report 2015, *available at* http://www.dms.myflorida.com/content/download/118552/650855/2015_Master_Leasing_reportpdf.pdf (last visited on October 28, 2015).

⁷ Section 255.249(5), F.S. DMS may direct a state agency to occupy, or relocate to, space in any state-owned office building, including all state-owned space identified in the Florida State-Owned Lands and Record Information System managed by the Department of Environmental Protection.

⁸ Section 255.2501, F.S. Lease of space financed with local government obligations under specified conditions.

⁹ Section 255.25(2), F.S.

¹⁰ Section 225.25(3)(b), F.S.

¹¹ Section 255.25(10), F.S., provides that the DMS may approve emergency acquisition of space without competitive bids if existing state-owned or state-leased space is destroyed or rendered uninhabitable by an act of God, fire, malicious destruction, structural failure, or by legal action, if the chief administrator of the state agency or designated representative certifies that no other agency-controlled space is available to meet this emergency need, but in no case shall the lease for such space exceed 11 months.

as lessee for the use of 5,000 square feet or more of space in a privately owned building except upon advertisement for and receipt of competitive solicitations.¹²

Section 255.249(9)(b), F.S., requires the DMS to promulgate rules to provide procedures for: soliciting and accepting competitive proposals for leased space of 5,000 square feet or more in privately owned buildings; evaluating the proposals received; exempting from competitive bidding requirements any lease the purpose of which is the provision of care and living space for persons or emergency space needs as provided in s. 255.25(10), F.S.; and the securing of at least three documented quotes for a lease that is not required to be competitively bid.

For the lease of less than 5,000 square feet of space, including space lease for nominal or no consideration, a state agency must notify DMS at least 90 days before the execution of the lease.¹³ DMS must review the lease and determine whether suitable space is available in a state-owned or state-leased building located in the same geographic region.¹⁴ If space is not available, DMS must determine whether the proposed lease is in the best interests of the state.¹⁵ If DMS determines that the lease is not in the best interests of the state, DMS must notify the agency proposing the lease, the Governor, the President of the Senate, and the Speaker of the House of Representatives of such finding in writing.¹⁶

Section 255.249(9)(j), F.S., requires DMS to promulgate rules for a leased of less than 5,000 square feet; a method for certification by the agency head or the agency head's designated representative that all criteria for leasing have been fully complied with and for filing a copy of such lease with all supporting documents with DMS for its review and approval as to technical sufficiency and whether such lease is in the best interest of the state.

Section 255.249(11), F.S., authorizes DMS to contract for a tenant broker or real estate consultant to assist with carrying out its responsibilities.¹⁷ DMS is required to annually publish a master leasing report that includes its required strategic leasing plan and to submit this report to the Governor and the Legislature by October 1st of each year.¹⁸ The report must contain analyses and other information on the status of state-owned facilities and private sector leased space.¹⁹ To assist the DMS in preparing the report, state agencies are required to provide their projected requirements for leased space based on active and planned full-time employee data, lease-expiration schedules for each geographic region of the state, and opportunities for consolidating operations, as well as costs relating to occupancy and relocation.²⁰

¹² Section 225.25(3)(a), F.S. The size at which a leased space must be competitively bid was raised in 1990 from 2,000 square feet to 3,000 square feet by ch. 90-224, s. 3, Laws of Fla., and raised in 1999 to 5,000 square feet by ch. 99-399, s. 22, Laws of Fla.

¹³ Section 255.25(2)(a), F.S.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Also, see s. 225.25(3)(h), F.S.

¹⁸ Section 255.249(7), F.S.

¹⁹ *Id.*

²⁰ Section 255.249(8), F.S.

According to the 2015 Lease Renegotiation Report released by DMS, renegotiations between fiscal years 2013-14 and 2014-15 have resulted in a decrease of 43,367 square feet, or -0.71 percent; however, lease costs increased by \$903,820.16, or 0.76 percent over the same time period.²¹

Section 39 of ch. 2015-222, Laws of Florida, requires DMS, with the cooperation of the agencies having existing private lease contracts for office or storage space in excess of 2,000 square feet, to use tenant broker services to renegotiate or reprocure all private lease agreements expiring between July, 1, 2016, and June 30, 2018, in order to reduce costs in future years.

State Lease Agreements

Section 255.249(6), F.S., requires DMS to develop and implement a strategic leasing plan which must forecast space needs for all state agencies and identify opportunities for reducing costs through consolidation, relocation, reconfiguration, capital investment, and the renovation, building, or acquisition of state-owned space.

Section 255.2502, F.S., requires any contract on behalf of the state which binds the state or its executive agencies to the lease, rental, lease-purchase, purchase, or sale-leaseback of office space, real property or improvements to real property for a period in excess of 1 fiscal year, including any and all renewal periods and including all leases which constitute a series of leases, to contain a contingency statement that the state's obligation and performance under such contract is contingent upon an annual appropriation by the Legislature. Any contract not containing the required contingency statement is null and void.

Section 255.249(9)(e), F.S., requires DMS to adopt rules providing acceptable terms and conditions for inclusion in lease agreements. At a minimum, lease terms and conditions must include the following clauses, which may not be amended, supplemented, or waived:

1. As provided in s. 255.2502, "The State of Florida's performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature."
2. "The lessee has the right to terminate this lease, without penalty, if a state-owned building becomes available to the lessee for occupancy and the lessee has given 6 months' advance written notice to the lessor by certified mail, return receipt requested."

To comply with this requirement, DMS has adopted Rule 60H-1.003, F.A.C., which sets out the form of the lease agreement and includes the required termination clause.

Section 255.2503, F.S., prohibits an executive agency or department from entering into any lease on behalf of the state that requires the state agency to refrain from making legislative budget or fixed capital outlay requests for alternative space other than that in the lease agreement.²² Any

²¹ DMS 2015 Lease Renegotiation Report, *available at*

http://www.dms.myflorida.com/content/download/118819/652055/Complete_Report2.pdf (last visited November 3, 2015).

²² This section does not apply to any facility financed under the Florida Building and Facilities Act.

contract containing such a term is null and void.²³ Any person who willfully violates this section is guilty of a misdemeanor of the first degree.

Unless specifically authorized by law, no agency or branch of state government can contract to spend or enter into any agreement to spend, any moneys, in excess of the amount appropriated to such agency or branch.²⁴ Any such contract is null and void.²⁵

To best manage leasing costs, DMS must ensure that available and suitable state-owned space takes precedence over approving an agency's request to lease private-sector space, and whenever possible, backfill public office space, to ensure that debt service and operations and maintenance revenue projections are met.²⁶

Inventory of State-owned and State-leased Facilities

Pursuant to s. 216.0152(1), F.S., DMS must develop and maintain an automated inventory of all facilities²⁷ owned, leased, rented, or otherwise occupied or maintained by any agency of the state, the judicial branch, or the water management districts. DMS must use this data for determining maintenance needs and conducting strategic analyses.²⁸

Inventory of State-owned Real Property

DMS and the Department of Environmental Protection (DEP) must publish, by October 1st of each year, a complete report detailing the inventory of all state-owned facilities, including the inventories of the Board of Governors of the State University System, the Department of Education, and the Department of Transportation, excluding transportation facilities of the state transportation system.²⁹

In 2010, the Legislature mandated the creation of a database to identify surplus property and dispose of such property owned by the state that is unnecessary to achieving the state's responsibilities.³⁰ Pursuant to s. 216.0153, F.S., DEP must create, administer, and maintain a comprehensive system for all state lands and real property leased, owned, rented, and otherwise occupied or maintained by any state agency, by the judicial branch, and by any water management district. The comprehensive state-owned real property system must contain a database that includes an accurate inventory of all real property that is leased, owned, rented, occupied, or managed by the state, the judicial branch, or the water management districts.³¹ The

²³ Section 255.2503, F.S.

²⁴ Section 216.311(1), F.S.

²⁵ Section 216.311(2), F.S.

²⁶ DMS Legislative Bill Analysis dated October 20, 2015 (copy on file with the Governmental Oversight and Accountability Committee).

²⁷ The term "facility" means buildings, structures, and building systems, but does not include transportation facilities of the state transportation system.

²⁸ Section 216.0152(1), F.S.

²⁹ Section 216.0152(2), F.S. Also, the annual report of state-owned real property recommended for disposition required under s. 216.0153 must be included in the report.

³⁰ Chapter 2010-280, s. 5, Laws of Fla.

³¹ Section 216.0153(1)(a), F.S.

Division of State Lands in DEP is the statewide custodian of the real property information and is accountable for its accuracy.³²

The Division of State Lands in DEP must annually submit a report by October 1st, to the Governor, the President of the Senate, and the Speaker of the House of Representatives that lists the state-owned real property recommended for disposition, including a report by DMS of surplus buildings recommended for disposition.³³ The report must include specific information that documents the valuation and analysis process used to identify the specific state-owned real property recommended for disposition.

The DEP and DMS are now implementing the Florida State Owned Lands and Records Information System (FL-SOLARIS), designed with two main components:³⁴

- Facility Information Tracking System (FITS) – available since April 2012; and
- Lands Information Tracking System (LITS) – available since February 2013.

Both components are designed to give agencies an online interface to record data on their state-owned facilities, as well as provide the mechanism for agencies' annual identification and reporting of properties that are candidates for disposition.³⁵ Facility leases are not entered via FITS.³⁶

Energy Performance and Reporting

The “Florida Energy Conservation and Sustainable Buildings Act” in ss. 255.251 - 255.2575, F.S., creates duties for agencies and the DMS concerning energy efficiency in buildings leased and owned by the state.

Section 255.254, F.S., requires agencies to seek from the DMS an evaluation of life-cycle costs based on sustainable building ratings for all leased or newly constructed facilities.

Section 255.257, F.S., requires all agencies to collect energy consumption and cost data for all state-owned and metered state-leased facilities, and report the data annually to DMS.

III. Effect of Proposed Changes:

Section 1 amends s. 255.249(9), F.S., to eliminate a requirement on DMS to adopt a rule that each lease agreement include a clause to allow a lessee state agency to terminate a lease, without penalty, when a state-owned building becomes available for occupancy and the lessee has provided a 6 month advanced written notice to the lessor by certified mail, return receipt requested. DMS retains the authority to promulgate or retain the same or similar rule if DMS deems the provision to be an acceptable term and condition of a lease agreement.

³² Section 216.0153(1)(b), F.S.

³³ Section 216.0153(3), F.S.

³⁴ See DEP website located at

http://www.dms.myflorida.com/business_operations/real_estate_development_and_management/facilities_management/florida_state_owned_land_and_records_information_system_fl_solaris (last visited on October 29, 2015).

³⁵ *Id.*

³⁶ *Id.*

Currently, some agencies are in private leases that are not fully utilized. The clause in s. 255.249, F.S., allows agencies to move/realign to under-utilized state-owned space to reduce costs. By eliminating this required clause, the state's ability to negotiate reductions in square footage and continue to backfill vacant public space may be limited.

Section 2 provides that the bill does not impair or restrict the terms and conditions of a lease agreement entered into by a state agency pursuant to s. 255.249, F.S., before July 1, 2016.

Section 3 provides an effective date of July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shares with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate. The owners of private property leased to the state argue that they bear additional financing costs when the lessee (the state) has the option to terminate the lease based on the availability of other state-owned property. If the lease agreement did not contain the current requirement allowing for termination, the owners of the private property may "save" money when refinancing their properties to the extent the institutional lenders deem the lease agreements to be of a higher value or quality without the termination clause.

C. Government Sector Impact:

Indeterminate. The state may lose a portion of its flexibility to terminate private property lease agreements when state-owned property becomes available. However, the Legislature retains its authority to underfund the lease agreement and potentially terminate the lease agreement or a portion thereof.

The costs of financing the private property may be reduced if institutional lenders deem the lease agreements to be of a higher value or quality without the termination clause. The state may realize some cost savings if the landlord passes such financing savings on to the state. On the other hand, the lease agreements are competitively procured, and the state should be entering into lease agreements based on the best value to the state.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 255.249 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

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

None.

B. Amendments:

None.