

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 1079 Agency Contracts for Commodities and Contractual Services
SPONSOR(S): State Affairs Committee, Government Operations Subcommittee, Mariano and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1616

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	16 Y, 0 N, As CS	Roth	Smith
2) State Administration & Technology Appropriations Subcommittee	12 Y, 0 N	Mullins	Topp
3) State Affairs Committee	21 Y, 0 N, As CS	Roth	Williamson

SUMMARY ANALYSIS

Florida law requires state agencies that wish to procure commodities or contractual services in excess of \$35,000 to use a competitive solicitation process. Depending on the type of contract and scope of work or goods sought, an agency may use one of three procurement methods: invitation to bid, request for proposals, or invitation to negotiate.

The bill includes several provisions for the evaluation, management, and oversight of competitively procured contracts for commodities and contractual services. Specifically, the bill:

- Provides that an agency may not initiate a competitive solicitation that would require a change in law or change to the agency's budget, unless specifically authorized.
- Requires each agency contract to include authorization for the agency to inspect certain financial and programmatic records of the contractor relevant to the performance of the contract.
- Provides that a contract may not contain a nondisclosure clause exempting certain information.
- For contract renewals or amendments that result in a longer contract term or increased payments, decreases from \$10 million to \$5 million the total contract threshold for when a report concerning contract performance must be submitted to the Governor and Legislature before executing the renewal or amendment.
- Requires the Secretary of Management Services to evaluate each alternate contract source and make a determination in writing that the contract will provide the best value to the state.
- Requires an agency issuing a request for quote from a state term contract vendor for contractual services to issue the request to a specified number of approved vendors for the service.
- For single-source contracts, increases the number of days an agency must post a commodity or service sought from seven business days to 15 business days.
- Requires each agency inspector general to complete a risk-based compliance audit of all contracts executed by the agency for the preceding three fiscal years and requires the audit to identify and evaluate any trend in vendor preference.
- Requires the creation of a "continuing oversight team" for each contractual services contract of \$5 million or greater and establishes meeting and reporting requirements for the teams.
- Expands training requirements and delineates the roles and responsibilities of contract managers, contract negotiators, and contract administrators.
- Requires supervisors of certain contract managers and contract administrators to annually complete training in public procurement.
- Provides that a vendor who is placed on the suspended vendor list is disqualified from bidding on or renewing a contract with the state.

The bill may have an indeterminate but likely insignificant negative fiscal impact on state government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Competitive Solicitation for Commodities or Contractual Services

Florida law requires state agencies that wish to procure commodities or contractual services in excess of \$35,000¹ to use a competitive solicitation process.² A competitive solicitation is 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 procurement method.³ Depending on the type of contract and scope of work or goods sought, an agency may use one of three procurement methods: invitation to bid,⁴ request for proposals,⁵ or invitation to negotiate.⁶

Invitation to Bid

When an agency is capable of defining the scope of work or specific commodity sought, then an agency must use an invitation to bid (ITB). An ITB must include a detailed description of the commodity or contractual service sought and whether the agency contemplates renewal of the contract. If the agency contemplates renewal of the contract, then each bid submitted in response to an ITB must include the price for each year for which the contract may be renewed. Bid evaluations must include consideration of the total cost for each year of the contract, including renewal years, and the contract must be awarded to the responsible and responsive vendor who submits the lowest responsive bid.⁷

Request for Proposals

An agency must use a request for proposals (RFP) when the purposes and uses for the contractual service or commodity sought can be specifically defined and the agency is capable of identifying necessary deliverables. A vendor may respond with various versions of services or commodities to meet the specification of the solicitation document. Before issuing an RFP, the agency must specify in writing the reasons an ITB is not practicable. An RFP must include a statement describing the commodities or contractual services sought, the relative importance of price and other evaluation criteria, and whether the agency contemplates renewal of the contract. The contract is awarded by written notice to the responsible⁸ and responsive vendor⁹ whose proposal is most advantageous to the state.¹⁰

Invitation to Negotiate

An invitation to negotiate (ITN) is a solicitation used by an agency that is intended to determine the best method for achieving a specific goal or solving a particular problem. It identifies one or more responsive vendors with which the agency may negotiate in order to receive the best value. Before issuing an ITN, the agency head must specify in writing the reasons an ITB or an RFP are not practicable. An ITN must include questions being explored, the facts being sought, and the specific goals of the solicitation. The agency may select one or more vendors to begin negotiations and then award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state.¹¹

¹ See s. 287.017, F.S., for a list of purchasing categories and their corresponding threshold amounts.

² Section 287.057(1), F.S.

³ Section 287.012(6), F.S.

⁴ Section 287.057(1)(a), F.S.

⁵ Section 287.057(1)(b), F.S.

⁶ Section 287.057(1)(c), F.S.

⁷ Section 287.057(1)(a), F.S.

⁸ A “responsible vendor” is a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance. Section 287.012(25), F.S.

⁹ A “responsive vendor” is a vendor that has submitted a bid, proposal, or reply that conforms in all material aspects to the solicitation. Section 287.012(27), F.S.

¹⁰ Section 287.057(1)(b), F.S.

¹¹ Section 287.057(1)(c), F.S.

Contract Evaluations and Negotiations

For a contract in excess of \$195,000, the agency head must appoint at least three people to evaluate proposals and replies who collectively have experience and knowledge in the program areas and service requirements for which commodities or contractual services are sought.¹² In addition, the agency head must appoint three people¹³ to conduct negotiations during an ITN procurement who collectively have experience and knowledge in negotiating contracts, contract procurement, and the program areas and service requirements for which commodities or contractual services are sought.¹⁴

If the value of a contract is in excess of \$1 million in any fiscal year, at least one of the persons conducting negotiations must be certified as a Florida certified contract negotiator (FCCN)¹⁵ in order to ensure that certified contract negotiators are knowledgeable about effective negotiation strategies, capable of successfully implementing those strategies, and involved appropriately in the procurement process.¹⁶ If the value of a contract is in excess of \$10 million in any fiscal year, at least one of the persons conducting negotiations must be a Project Management Professional (PMP) certified by the Project Management Institute (PMI).^{17, 18}

Contracts

A competitive solicitation for contractual services in excess of \$35,000¹⁹ must be evidenced in writing by a written agreement embodying all provisions and conditions of the procurement of such services. The written agreement must include, but not be limited to, a provision:²⁰

- That bills for fees or other compensation for services or expenses be submitted in detail sufficient for a proper preaudit and postaudit thereof.
- That bills for any travel expenses be submitted in accordance with the law on per diem and travel expenses of public officers, employees, or authorized persons.²¹
- Allowing unilateral cancellation by the 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.
- Specifying a scope of work that clearly establishes all tasks the contractor is required to perform.

¹² Section 287.057(16)(a)1., F.S.

¹³ If the value of the contract is in excess of \$1 million in any fiscal year, then at least one person conducting negotiations must be certified as a contract negotiator. If the value of the contract is in excess of \$10 million in any fiscal year, then at least one person conducting negotiations must be a Project Management Professional certified by the Project Management Institute. Section 287.057(16)(b), F.S.

¹⁴ Section 287.057(16)(a)2., F.S.

¹⁵ A person must meet the following requirements for FCCN Certification, which is valid for five years or until the expiration date stated on the person's FCCN certificate, whichever is later:

- Successful completion of the FCCN certification course;
- At least 12 months' experience as a purchasing agent, contract manager, or contract administrator for an agency or local government entity, where the job description for the position required that at least half of the employee's designated duties included procuring commodities or contractual services, participating in contract negotiation, contract management, or contract administration, or working as an agency attorney whose duties included providing legal counsel to the agency's purchasing or contracting staff; and
- Experience during the preceding five years in leading at least one federal, state, or local government negotiation team through a negotiated procurement, or participation in at least two federal, state, or local government negotiated procurements. Negotiated procurements include those from a single source; those negotiated when fewer than two responsive bids, proposals, or replies are received; and contract renewals. Employees must provide documentation to show compliance with the experience and participation requirements when submitting the application.

Rule 60A-1.041(3), F.A.C.

¹⁶ Section 287.057(16)(b), F.S.

¹⁷ See Project Management Institute, available at <https://www.pmi.org/> (last visited April 1, 2021).

¹⁸ Section 287.057(16)(b), F.S.

¹⁹ Section 287.058(1), F.S., provides an exception for the written agreement for contractual services that provide health and mental health services or drugs in the examination, diagnosis, or treatment of sick or injured state employees or provide other benefits as required by ch. 440, F.S.

²⁰ Section 287.058(1), F.S.

²¹ See s. 112.061, F.S.

- 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.
- Specifying the criteria and the final date by which such criteria must be met for completion of the contract.
- Specifying that the contract may be renewed for a period that may not exceed three years or the term of the original contract, whichever is longer.
- Specifying the renewal price for the contractual service as set forth in the bid, proposal, or reply.
- Specifying that costs for the renewal may not be charged.
- Specifying that renewals are contingent upon satisfactory performance evaluations by the agency and subject to the availability of funds.
- Specifying the financial consequences that the agency must apply if the contractor fails to perform in accordance with the contract.
- Addressing the property rights of any intellectual property related to the contract and the specific rights of the state regarding the intellectual property if the contractor fails to provide the services or is no longer providing services.

The written agreement must be signed by the agency head or designee and the contractor before the rendering of any contractual service in excess of \$35,000.^{22, 23} Unless otherwise provided in the General Appropriations Act (GAA) or the substantive bill implementing the GAA, the Chief Financial Officer (CFO) may waive these requirements for services, which are included in law for procurement of commodities or contractual services.²⁴ A contract may not prohibit a contractor from lobbying the executive or legislative branch concerning the scope of services, performance, term, or compensation regarding any contract to which the contractor and a state agency are parties, after contract execution and during the contract term.²⁵

Each public agency contract for services must authorize the public agency to inspect the:²⁶

- Financial records, papers, and documents of the contractor that are directly related to the performance of the contract or the expenditure of state funds.
- Programmatic records, papers, and documents of the contractor that the public agency determines are necessary to monitor the performance of the contract or to ensure that the terms of the contract are being met.

The contract must require the contractor to provide the records, papers, and documents requested by the public agency within 10 business days after the request is made.²⁷

These contract terms terminate on July 1, 2021.²⁸

Contract Renewals

Current law allows contracts for commodities or contractual services to be renewed for a period that does not exceed three years or the term of the original contract, whichever is longer. Renewal of a contract for commodities or contractual services must be in writing and is subject to the same terms and conditions set forth in the initial contract and any written amendments signed by the parties. A renewal contract may not include any compensation for costs associated with the renewal, is contingent upon satisfactory performance evaluations by the agency, and is subject to the availability of funds.²⁹

If a contract amendment results in a longer contract term or increased payments, an agency may not renew or amend a contract for the outsourcing of a service or activity that has an original term value

²² There is an exception in the case of a valid emergency as certified by the agency head.

²³ Section 287.058(2), F.S.

²⁴ Section 287.058(5), F.S.

²⁵ Section 287.058(6), F.S.

²⁶ Section 216.1366(1), F.S.

²⁷ Section 216.1366(2), F.S.

²⁸ Section 216.1366(3), F.S.

²⁹ Section 287.057(13), F.S.

exceeding \$10 million before submitting a written report concerning contract performance to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The written report must be submitted at least 90 days before execution of the renewal or amendment.³⁰

Alternate Contract Sources

The Department of Management Services (DMS) must evaluate contracts let by the Federal Government, another state, or a political subdivision for commodities or contractual services, often referred to as alternate contract sources to determine if the contracts are cost-effective and in the best interest of the state. If DMS makes such determination in writing, then an agency may make purchases under the contract.³¹

State Term Contracts

A state term contract is a contract for commodities or contractual services that is competitively procured by DMS and that is used by agencies and other eligible users.³² Agencies must purchase commodities or contractual services from a state term contract if one has been competitively procured by DMS.³³ Agencies may use a request for quote (RFQ)³⁴ to obtain written pricing or services information from a state term contract vendor. The purpose of an RFQ is to determine whether a price, term, or condition is more favorable to the agency or eligible user than that provided in the state term contract is available.³⁵

Single-source Contracts

A commodity or contractual service that is available from a single source may be exempt from the competitive solicitation requirements.³⁶ If an agency believes the commodity or contractual service is only available from one source, then the agency must electronically post a description of the commodity or service sought to the vendor bid system, including a request that prospective vendors provide information regarding their ability to supply the commodity or service, for at least seven business days.³⁷ If, after reviewing information received from prospective vendors, the agency determines in writing that the commodities or contractual services are available only from a single source, the agency must provide notice of its intended decision to enter into a single-source purchase contract.³⁸

Florida Accountability Contract Tracking System

The CFO maintains a secure contract tracking system available to the public known as the Florida Accountability Contract Tracking System (FACTS).³⁹ Within 30 days after executing a contract or an amendment to an existing contract, each state agency must post certain information relating to the contract in FACTS.⁴⁰

Contract Audits

After the execution of a contract, the CFO must perform audits of the executed contract document and 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.⁴¹ At the conclusion of the audit, the CFO's designee must discuss the audit and potential findings with the official whose office is subject to audit. The final audit report must be submitted to the agency head.⁴²

³⁰ *Id.*

³¹ Section 287.042(16), F.S.; *see also Agency Alternate Contract Source (ACS) Requests*, available at https://www.dms.myflorida.com/business_operations/state_purchasing/state_agency_resources/agency_alternate_contract_source_acs_requests (last visited April 1, 2021).

³² Section 287.012(28), F.S.; *see also s. 287.042(2)(a)*, F.S.

³³ Section 287.056(1), F.S.

³⁴ A "request for quote" is an oral, electronic, or written request for written pricing or services information from a state term contract vendor for commodities or contractual services available on a state term contract from that vendor. Section 287.012(24), F.S.

³⁵ Section 287.056(2), F.S.

³⁶ Section 287.057(3)(c), F.S.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See* FACTS website, available at <https://facts.fldfs.com/Search/ContractSearch.aspx> (last visited April 1, 2021).

⁴⁰ Section 215.985(14)(a), F.S.

⁴¹ Section 287.136, F.S.

⁴² Section 287.136(1), F.S.

Within 30 days after receipt of the final audit report, the agency head must submit to the CFO, or his or her designee, a written statement of explanation or rebuttal concerning findings requiring corrective action, including corrective action to be taken to preclude a recurrence.⁴³

Contract Management Professionals

A state agency must designate an employee to function as a contract manager for each contractual services contract.⁴⁴ The contract manager is responsible for enforcing performance of the contract terms and conditions and serves as a liaison with the contractor.⁴⁵ In addition, each agency must designate at least one employee to serve as a contract administrator who is responsible for maintaining a contract file and financial information on all contractual services contracts and who serves as a liaison with the contract manager and DMS.⁴⁶

Contract managers who are responsible for contracts in excess of \$35,000 must complete training conducted by the CFO for accountability in contracts and grant management. The CFO must establish and disseminate uniform procedures⁴⁷ to ensure that contractual services have been rendered in accordance with the contract terms before the agency processes the invoice for payment.⁴⁸

Contract managers who are responsible for contracts in excess of \$100,000 annually must complete training⁴⁹ in contract management and become a Florida certified contract manager (FCCM).⁵⁰ FCCM certification⁵¹ is coordinated by DMS, and DMS and the Department of Financial Services (DFS) conduct the training jointly. The training must promote best practices and procedures related to negotiating, managing, and ensuring accountability in agency contracts and grant agreements.⁵²

Vendors

Any vendor that wishes to provide goods or services to the state must register in the Vendor Registration System. In order to register, a vendor must provide its company name, federal tax identification number, tax filing name, business location, commodities and services offered, and certified business and enterprise status.⁵³

Once registered, vendors are able to do business with the State of Florida executive branch agencies through the Vendor Information Portal (VIP).⁵⁴ The VIP is designed to streamline interactions with vendors and state government entities that purchase goods and services. The system provides a portal where vendors can finish registering, receive information on upcoming bids, post information on products and services, receive purchase orders electronically, view payment information, and review their performance.⁵⁵

Vendor Bid System

⁴³ Section 287.136(2), F.S.

⁴⁴ Section 287.057(14), F.S.

⁴⁵ *Id.*

⁴⁶ Section 287.057(15), F.S.

⁴⁷ Pursuant to s. 17.03(3), F.S., the CFO may adopt and disseminate to the agencies procedural and documentation standards for payment requests and may provide training and technical assistance to the agencies for these standards. The procedures must include procedures for monitoring and documenting contractor performance, reviewing and documenting all deliverables for which payment is requested by vendors, and providing written certification by contract managers of the agency's receipt of goods and services.

⁴⁸ Section 287.057(14)(a), F.S.

⁴⁹ DMS, *TRAINING OPPORTUNITY: Florida Certified Contract Manager (FCCM) Training*, available at https://www.dms.myflorida.com/business_operations/state_purchasing/state_purchasing_service_updates/training_opportunity_florida_certified_contract_manager_fccm_training7 (last visited April 1, 2021).

⁵⁰ Section 287.057(14)(b), F.S.

⁵¹ FCCM certification is valid for four years or until the expiration date stated on the employee's FCCM Certificate, whichever is later. Rule 60A-1.041(1)(c), F.A.C.

⁵² Section 287.057(14)(b), F.S.

⁵³ The Department of Management Services, *Vendor Resources*, available at https://www.dms.myflorida.com/business_operations/state_purchasing/vendor_resources (last visited, April 1, 2021).

⁵⁴ *Id.*

⁵⁵ *Id.*

The Vendor Bid System (VBS) allows agencies to post competitive solicitations of \$35,000 or more for all vendors to review. Vendors can then bid, submit proposals, or submit a request to negotiate with the agency through the VBS, and be notified if their bid has been chosen.⁵⁶

DMS Vendor Lists

Vendor Lists and the Process for Vendors in Default

DMS maintains a vendor list based on the vendor registration process in s. 287.042, F.S., and has been granted authority to remove from its vendor list any source of supply that fails to fulfill any of its duties specified in a contract. DMS maintains the following lists of vendors:

- Suspended Vendor List;⁵⁷
- Convicted Vendor List;⁵⁸
- Discriminatory Vendor List;⁵⁹
- Scrutinized List of Prohibited Companies;⁶⁰ and
- Vendor Complaint List.

Suspended Vendor List

DMS maintains a list of vendors that have been removed from the vendor list for failing to fulfill any of its duties specified in a contract with the state.⁶¹ If a vendor fails to perform the duties provided in the vendor's contract, the agency must notify the vendor, in writing, of the nature of the failure to perform and provide a timeframe for correcting the failure. The written notice must alert the vendor that if the vendor fails to perform within the time provided, the vendor will be found in default and removed from the vendor list pursuant to s. 287.042(1)(b), F.S.⁶² A vendor that is in default of its contract is not eligible to receive a contract from any agency until the vendor reimburses the agency for the defaulted contract.⁶³ The vendor may petition for an administrative hearing to remain on the vendor list and to remain off the suspended vendor list.⁶⁴

Currently, five vendors are on the suspended vendor list.⁶⁵

Convicted Vendor List

DMS has a list of vendors who have been disqualified from the public contracting and purchasing process due to conviction of a public entity crime.⁶⁶ A vendor who has been placed on the convicted vendor list following a conviction may not submit a bid, proposal, or reply on a contract to provide goods or services to a public entity, and a public entity may not accept any bid, proposal, or reply from, award any contract to, or contract any business with a vendor on the convicted vendor list.⁶⁷

⁵⁶ *Id.*

⁵⁷ Rule 60A-1.006(2), F.A.C. (vendors that have been removed for failing to fulfill any of its duties specified in a state contract).

⁵⁸ Section 287.133, F.S.

⁵⁹ Section 287.134(1)(b), F.S.

⁶⁰ Section 287.135, F.S.

⁶¹ See *Vendor Registration and Vendor Lists*, available at

https://www.dms.myflorida.com/business_operations/state_purchasing/state_agency_resources/vendor_registration_and_vendor_lists (last visited April 1, 2021).

⁶² Rule 60A-1.006(3)(a), F.A.C.

⁶³ Rule 60A-1.006(3)(c), F.A.C.

⁶⁴ Rule 60A-1.006(3)(d), F.A.C.

⁶⁵ The following vendors are on the suspended vendor list: Building Maintenance of America, LLC d/b/a Florida Building Maintenance; Club Tex, Inc.; Correctional Consultants, LLC; iColor Printing and Mailing, Inc.; and Visual Image Design Firm. See *Suspended Vendor List*, available at https://www.dms.myflorida.com/business_operations/state_purchasing/state_agency_resources/vendor_registration_and_vendor_lists/suspended_vendor_list (last visited April 1, 2021).

⁶⁶ Section 287.133, F.S.; s. 287.133(1)(f), F.S., defines the term "public entity" to mean the State of Florida, any of its departments or agencies, or any political subdivision; s. 287.133(1)(g), F.S., defines the term "public entity crime" to mean a violation of any state or federal law by a person with respect to and directly related to the transaction of business with any public entity or with an agency or political subdivision of any other state or with the United States, including, but not limited to, any bid, proposal, reply, or contract for goods or services, any lease for real property, or any contract for the construction or repair of a public building or public work, involving antitrust, fraud, theft, bribery, collusion, racketeering, conspiracy, or material misrepresentation.

⁶⁷ Section 287.133(2)(b), F.S.

After receiving information that a vendor has been convicted of a public entity crime, DMS must investigate and determine whether good cause exists to place the vendor on the convicted vendor list. If good cause exists, DMS must provide written notification to the vendor of its intent to place that vendor on the convicted vendor list and of the vendors' legal rights. If the vendor does not request an administrative hearing, DMS must enter a final order placing the vendor on the convicted vendor list.⁶⁸

A vendor placed on the convicted vendor list may petition for removal from the list no sooner than six months from the date of the final order placing the vendor on that list. A vendor's removal is subject to such conditions as may be prescribed by the administrative law judge (ALJ) upon a determination that removal is in the public interest. If a petition for removal is denied, the vendor may not petition for another hearing on removal for a period of nine months after such denial, unless the petition is based upon a reversal of the conviction on appellate review or a pardon. DMS may petition for removal prior to the expiration of such period if, in its discretion, it determines that removal would be in the public interest.⁶⁹

Since 2016, five vendors have petitioned not to be placed on the convicted vendor list. Currently, one vendor is on the convicted vendor list.⁷⁰

Discriminatory Vendor List

DMS maintains a list of entities that have been disqualified from participating in the public contracting and purchasing process due to a violation of any state or federal law prohibiting discrimination on the basis of race, gender, national origin, disability, or religion.⁷¹ An entity or affiliate who has been placed on the discriminatory vendor list may not submit a bid, proposal, or reply on a contract to provide any goods or services to a public entity.⁷²

The investigative and administrative process for discriminatory vendors is the same as that described above for the convicted vendor list, including the removal process and specified timelines.

Currently, there are no vendors on the discriminatory vendor list.

Scrutinized List of Prohibited Companies

Companies on the Scrutinized Companies with Activities in Sudan list or on the Scrutinized Companies with Activities in the Iran Petroleum Energy Sector list are prohibited from bidding on, submitting a proposal for, or entering into or renewing a contract with an agency or local government entity for goods or services of \$1 million or more.⁷³ The State Board of Administration is charged with maintaining a complete list of scrutinized companies based on the criteria outlined in s. 215.473, F.S.

There are currently 78 companies on the scrutinized list of prohibited companies; however, no companies were added to the scrutinized list in the fourth quarter of 2020.

Vendor Complaint List

DMS tracks formal complaints issued to vendors by state agencies. The complaints, and information associated with them, are provided to agencies to assist in determining vendor responsibility. There are currently no vendors on the vendor complaint list.⁷⁴

Effect of the Bill

⁶⁸ Section 287.133(3)(e), F.S.

⁶⁹ *Id.*

⁷⁰ Calixte, Jacques A. (Haitian American Association Against Cancer, Inc.) is on the convicted vendor list.

⁷¹ Section 287.134(3)(c), F.S.

⁷² Section 287.134(2)(a), F.S.

⁷³ Section 287.135(2), F.S.

⁷⁴ *See Vendor Complaint List*, available at

https://www.dms.myflorida.com/business_operations/state_purchasing/state_agency_resources/vendor_registration_and_vendor_lists/vendor_complaint_list (last visited April 1, 2021)

Competitive Solicitations

The bill provides that a state agency may not initiate a competitive solicitation for a product or service if the completion of the competitive solicitation would require a change in law or change to the agency's budget (other than a transfer authorized in law) unless the initiation of the competitive solicitation is specifically authorized in law, in the GAA, or by the Legislative Budget Commission. This prohibition does not apply to a competitive solicitation when the agency head certifies that a valid emergency exists.

The bill specifies that for contracts in excess of \$195,000, the agency head must appoint at least three persons to *independently* evaluate proposals and replies who collectively have experience and knowledge in the program areas and service requirements for the commodity or contractual services sought. In addition, a negotiation team for a competitively procured contract in excess of \$1 million in any fiscal year must include a certified contract negotiator.

Contracts

The bill prohibits a contract from containing a nondisclosure clause that prohibits a contractor from disclosing information relevant to the performance of the contract to members or staff of the Senate or the House of Representatives.

The bill reenacts s. 216.1366, F.S., and removes the July 1, 2021, termination date, to require each agency contract for services to include authorization for the agency to inspect certain records of the contractor. These records include both financial and programmatic records, papers, and documents of the contractor directly related to the performance of the contract and that are deemed necessary by the agency to monitor the performance of the contract. The contract must require the contractor to provide such records, papers, and documents requested by the agency within 10 business days after the request is made.

Contract Renewals or Amendments

For contract renewals or amendments that result in a longer contract term or increased payments, the bill decreases from \$10 million to \$5 million the total contract threshold for when a report concerning contract performance must be submitted to the Governor, the President of the Senate, and the Speaker of the House at least 90 days before an agency executes the renewal or amendment.

Alternate Contract Sources

The bill requires the Secretary of Management Services to evaluate alternate contract sources and make a determination in writing that the contract will provide the best value to the state, instead of determining that it is in the best interest of the state, before entering into an agreement authorizing an agency to make purchases under the contract. "Best value" means the highest overall value to the state based on factors that include, but are not limited to, price, quality, design, and workmanship.⁷⁵

State Term Contracts

The bill requires an agency issuing an RFQ for contractual services from a state term contract to issue the request to all approved vendors if there are 25 approved vendors or fewer for the service. However, for any contract with more than 25 approved vendors, the agency must issue an RFQ to a minimum of 25 of the approved vendors. Further, the bill immediately disqualifies a vendor from state term contract eligibility if the vendor has been placed on the suspended or disqualified vendor list.

Single-source Contracts

The bill revises the process for an agency to enter into a single-source contract. The bill increases the number of days the agency must post the commodity or service sought from seven business days to 15 business days. In addition, the bill requires agencies to report to DMS, on a quarterly basis, all single-source contracts entered into for that period. Beginning January 1, 2022, DMS must annually report such information to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

⁷⁵ Section 287.012(4), F.S.
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Compliance Audit

Beginning October 1, 2021, and every three years thereafter, the bill requires each agency inspector general to complete a risk-based compliance audit of all contracts executed by the agency for the preceding three fiscal years. The audit must identify and evaluate any trend in vendor preference. The audit findings must be submitted to the agency head, the Secretary of Management Services, and the Governor.

Contract Oversight

The bill clarifies that for contracts of \$500,000 or less annually, the contract administrator may serve as both the contract administrator and the contract manager. However, for contracts greater than \$500,000 annually, the contract administrator may not serve in both roles. In addition, the bill stipulates that a contract manager may not be an individual who has been employed, within the previous five years, by the vendor awarded the contractual services contract.

The bill requires the establishment of a “continuing oversight team” for each contractual services contract of \$5 million or greater. After a contract has been awarded, the agency head must establish a continuing oversight team and appoint at least four persons to the team with one of the members being the certified contract manager. If the value of the contractual services contract is \$10 million or greater, at least one person on the continuing oversight team must possess at least five years’ experience in managing contracts of similar scope or size. Additionally, if the value of the contractual services contract is \$20 million or greater, the continuing oversight team must consist of at least five persons, with at least one of the persons being from a state agency other than the agency or agencies participating in the contract.

Members of the continuing oversight team must be employees of the state and must collectively have experience and knowledge in contract management, contract administration, contract enforcement, and the program areas and service requirements for the contractual services purchased.

The bill requires continuing oversight teams to meet at least quarterly for contracts of \$5 million or greater and monthly for contracts of \$10 million or greater. A representative of the contractor must be made available to members of the continuing oversight team for at least one meeting every calendar quarter to respond to any questions or requests for information from the continuing oversight team.

Within 30 days after the formation of the continuing oversight team, an initial meeting between the continuing oversight team and representatives of the contractor must convene to achieve a mutual understanding of the contract requirements, to provide the contractor with an orientation to the contract management process, and to explain the role of the continuing oversight team, contract manager, and contract administrator.

The continuing oversight team must meet to discuss the status of the contract, the pace of deliverables, the quality of deliverables, contractor responsiveness, and contractor performance. The contract administrator must be present at each meeting with the contract file and all applicable financial information. The continuing oversight team may submit written questions to the contractor concerning any items discussed during a continuing oversight team meeting. The contractor must respond to the team’s questions within 10 business days of receiving the written questions. The questions and responses must be included in the contract file.

The bill requires the continuing oversight team to provide written notice to the agency head, DMS, the Office of Policy and Budget (OPB) in the Executive Office of the Governor, and the legislative appropriations committees in certain instances. Specifically, the bill requires the continuing oversight team to notify in writing:

- The agency head and DMS of any deficiency in a contractor's performance that substantially affects the pace of deliverables or the likelihood of the successful completion of the contract.
- The agency head, DMS, and OPB in the Executive Office of the Governor of any significant change in contract scope or any increase in the cost of the contract that is 5 percent of the planned contract cost or greater within the fiscal year for contractual service contracts of at least \$5 million.

- The agency head, DMS, OPB in the Executive Office of the Governor, and the legislative appropriations committees of any significant change in contract scope or any increase in the cost of the contract that is 5 percent of the planned contract cost or greater within the fiscal year for contractual service contracts of \$10 million or greater.

Contract Professionals

Certified Contract Negotiators

In order to receive certification as a contract negotiator, the bill requires an individual to complete specific training established by DMS and to meet the following experience requirements:

- At least 12 months' experience as a purchasing agent, contract manager, or contract administrator for an agency or local governmental entity where at least 50 percent of the duties included procuring commodities or contractual services, participating in contract negotiations, contract management, or contract administration; or work as an agency attorney whose duties included providing legal counsel to the agency's purchasing or contracting staff.
- Experience during the preceding five years in leading at least two federal, state, or local government negotiation teams or participation in at least three federal, state, or local government negotiated procurements.

The bill requires a certified contract negotiator to complete training every five years for certification renewal.

The bill requires the certification training provided by DMS to ensure that certified contract negotiators are knowledgeable about effective negotiation strategies, capable of successfully implementing those strategies, and involved appropriately in the procurement process. DMS must evaluate the training every five years to assess its effectiveness and update the curriculum.

Contract Managers

The bill specifies that the primary responsibilities of a contract manager include:

- Participating in the solicitation development and review of contract documents.
- Monitoring the contractor's progress and performance to ensure procured products and services conform to the contract requirements and keep timely records of findings.
- Managing and documenting any changes to the contract through the amendment process authorized by the terms of the contract.
- Monitoring the contract budget to ensure sufficient funds are available throughout the term of the contract.
- Exercising applicable remedies, as appropriate, when a contractor's performance is deficient.

In addition to completing the CFO's training on accountability in contracts and grant management, the bill requires a contract manager to complete training to become a certified contract manager within six months of being assigned a contract in excess of \$100,000. The bill specifies that the certification training to become a certified contract manager, which is conducted jointly by DMS and DFS, must promote the best practices and procedures related to negotiating, managing, and ensuring accountability in agency contracts and grant agreements. The bill requires the CFO and DMS to evaluate their training programs every five years in order to assess the effectiveness of the programs and to update the training curriculum used. A certified contract manager must complete training every five years for certification renewal.

The bill requires a contract manager who is responsible for a contract in excess of \$10 million annually to possess at least five years of experience managing contracts in excess of \$5 million annually.

Supervisors of Contract Managers and Contract Administrators

Beginning July 1, 2022, the bill requires any person who supervises certain contract administrators or contract or grant managers to annually complete public procurement training for supervisors within 12 months after appointment to the supervisory position. DMS is responsible for establishing and disseminating the training course content required for supervisors.

Suspended Vendor List

The bill prohibits a vendor that is in default on any contract with an agency or has otherwise repeatedly demonstrated an inability to fulfill the terms and conditions of previous state contracts from submitting a bid, proposal, or reply to an agency or enter into or renew a contract to provide goods or services to an agency after its placement on the suspended vendor list. An agency may not accept a bid, proposal, or reply from, or enter into or renew any contract with, a vendor that is on the suspended vendor list until the vendor has been removed from such list and returned to the vendor list by DMS. The bill defines the term "vendor" as a person or an entity that provides goods or services to an agency under a contract or submits a bid, proposal, or reply to provide goods or services to an agency.

An agency must notify DMS of any vendor that has met the grounds for suspension and must provide documentation to DMS evidencing the vendor's default or other grounds for suspension. DMS must review the submitted documentation and decide whether good cause exists to remove the vendor from the vendor list and to place it on the suspended vendor list. DMS must notify the vendor in writing of its intent to remove the vendor from the vendor list and of the vendor's right to an administrative hearing, as well as the applicable procedures and time requirements for any such hearing. A vendor may not be removed from the vendor list without receiving an individual notice of intent from DMS.

If a vendor does not request an administrative hearing, DMS must enter a final order removing the vendor from the vendor list.

Within 21 days after receipt of the notice of intent, a vendor may file with DMS a petition for a formal hearing to challenge the department's decision. If a vendor does not file a petition in a timely manner, it is deemed to have waived its right to a hearing and the department's decision to remove the vendor from the list becomes final agency action.

If a vendor is placed on the suspended vendor list, the vendor may file a petition with DMS one year or more after entry of the final order of its suspension. A proceeding on the petition must be conducted in accordance with ch. 120, F.S., and an ALJ may remove a vendor from the suspended vendor list if the ALJ determines it would be in the public interest. In determining whether removal from the list would be in the public interest, the ALJ may consider whether the suspended vendor has prepared a corrective action plan to address the original grounds for default or failure to fulfill the terms and conditions of the contract, reimbursed the agency for any procurement costs, or provided additional evidence that the vendor has taken other remedial action.

If a petition for removal from the suspended vendor list is denied, the vendor may not petition for another hearing for at least nine months after the date of denial. However, DMS may petition for the suspended vendor's removal before the expiration period if, in DMS's discretion, the removal of the vendor from the suspended list would be in the public's interest.

Cross-references

The bill makes conforming changes to cross-references.

B. SECTION DIRECTORY:

Section 1: Reenacts and amends s. 216.1366, F.S., relating to contract terms.

Section 2: Amends s. 287.042, F.S., relating to powers, duties, and functions.

Section 3: Amends s. 287.056, F.S., relating to purchases from purchasing agreements and state term contracts.

Section 4: Amends s. 287.057, F.S., relating to procurement of commodities or contractual services.

Section 5: Amends s. 287.058, F.S., relating to contract document.

Section 6: Creates s. 287.1351, F.S., relating to suspended vendors; state contracts.

Section 7: Amends s. 287.136, F.S., relating to audit of executed contract documents.

Section 8: Amends s. 43.16, F.S., relating to Justice Administrative Commission; membership, powers and duties.

Section 9: Amends s. 215.971, F.S., relating to agreements funded with federal or state assistance.

Section 10: Amends s. 287.0571, F.S., relating to business case to outsource; applicability.

Section 11: Amends s. 295.187, F.S., relating to Florida Veteran Business Enterprise Opportunity Act.

Section 12: Amends s. 394.47865, F.S., relating to South Florida State Hospital; privatization.

Section 13: Amends s. 402.7305, F.S., relating to Department of Children and Families; procurement of contractual services; contract management.

Section 14: Amends s. 408.045, F.S., relating to certificate of need; competitive sealed proposals.

Section 15: Amends s. 570.07, F.S., relating to Department of Agriculture and Consumer Services; functions, powers, and duties.

Section 16: Amends s. 627.351, F.S., relating to insurance risk apportionment plans.

Section 17: Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not impact state government revenues.

2. Expenditures:

The bill may have an indeterminate but likely insignificant negative fiscal impact on state government expenditures related to additional workload for:

- Additional contract performance reporting before executing a contract renewal or amendment due to lowering the reporting threshold;
- A potential increase in the number of vendors responding to RFQs for contractual services; and
- Expanding contract monitoring through continuing oversight teams and by requiring agency inspectors general to perform additional contract auditing.

DMS will incur increased workload for the oversight and management of contracts, for providing additional training for contract professionals, and for maintaining and administering the suspended vendor list.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to impact local government revenues.

2. Expenditures:

The bill does not appear to impact local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to create an economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill may require DMS to create rules; however, DMS currently has broad rulemaking authority and is able to adopt rules as necessary.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 17, 2021, the Government Operations Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS differed from HB 1079 in that it:

- Provided that an agency may not initiate a competitive solicitation that would require a change in law or change to the agency's budget, unless specifically authorized.
- Required each agency contract to include authorization for the agency to inspect certain financial and programmatic records of the contractor relevant to the performance of the contract.
- Provided that a contract may not contain a nondisclosure clause exempting certain information.
- Revised the requirement that an agency issuing an RFQ for contractual services from a state term contract issue the request to all approved vendors to require an RFQ be issued to all approved vendors if there are fewer than 100 approved vendors for the service and to at least 100 of the approved vendors when there are more than 100 approved vendors.
- Required DMS to report certain single source contract information to the Governor and Legislature by a specified date.
- Removed the requirement that a contract manager who is responsible for contracts in excess of \$10 million annually be a Project Management Professional and instead required such person to meet certain experience thresholds.
- Increased the threshold for when a contract administrator may also serve as a contract manager from a contract value of \$250,000 to a contract value of \$500,000.
- Required supervisors of contract administrators or contract or grant managers to complete training within a specified period.
- Provided additional membership, specified meeting frequency, and specified contract notification requirements for a continuing oversight team.
- Revised the requirement that each agency inspector general complete an audit of all contract documents executed by the agency every three years to completing a risk-based compliance audit of all contracts executed by the agency.
- Provided that a vendor who is placed on the suspended vendor list is disqualified from bidding on or renewing contracts with the state.

On April 6, 2021, the State Affairs Committee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment revised the requirements related to requests for quotes for contractual services available on state term contract. The amendment provided that if there are 25 or fewer approved vendors on the state term contract, then the agency must issue a request for quote to all approved vendors. If there are more than 25 approved vendors, then the agency must issue the request for quote to at least 25 of the approved vendors on the state term contract. The amendment also increased certain contract thresholds that trigger certain oversight by the continuing oversight team and made conforming changes to cross-references.

This analysis is drafted to the committee substitute as adopted by the State Affairs Committee.