

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1057 Evidence of Vendor Financial Stability

**SPONSOR(S):** State Affairs Committee, Government Operations Subcommittee, Andrade

**TIED BILLS:** IDEN./SIM. **BILLS:** CS/SB 1952

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	18 Y, 0 N, As CS	Roth	Toliver
2) State Affairs Committee	18 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. 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. 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.

A competitive solicitation for contractual services in excess of \$35,000 must be evidenced in writing by a written agreement embodying all provisions and conditions of the procurement of such services.

When agencies conduct procurements, they may consider a vendor's financial stability as part of the procurement.

The bill provides that when an agency is determining whether a vendor is a responsible vendor, an agency may establish financial stability criteria and require a vendor to demonstrate its financial stability. If an agency requires a vendor to demonstrate its financial stability during the competitive solicitation process, the agency must accept any of the following documents as evidence of the vendor's financial stability:

- Audited financial statements that demonstrate the vendor's satisfaction of financial stability criteria.
- Documentation of an investment grade rating from a credit rating agency designated as a nationally recognized statistical rating organization by the Securities and Exchange Commission.
- For a vendor with annual revenues exceeding \$1 billion, a letter containing a written declaration issued by the chief financial officer or controller attesting that the vendor is financially stable and meets the definition of financial stability.
- For a vendor with annual revenues of \$1 billion or less, documentation, based on criteria established by the agency, evidencing that the vendor is financially stable and meets the definition of financial stability. The criteria established by the agency must be reasonably related to the value of the contract and may not include audited financial statements.

The bill does not preclude an agency from requiring a performance bond for the duration of the contract, when appropriate.

The bill defines the term "financial stability" to mean, at a minimum, having adequate income and capital and the capacity to efficiently allocate resources, assess and manage financial risks, and maintain financial soundness through the term of the contract.

The bill does not appear to have a fiscal impact on the state or local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Competitive Solicitation for Commodities or Contractual Services

Chapter 287, F.S., regulates state agency procurement of personal property and services. The Department of Management Services (DMS) oversees state purchasing, including professional and contractual services, as well as commodities needed to support agency activities.<sup>1</sup>

Current law establishes the following purchasing categories:

- Category One: \$20,000.
- Category Two: \$35,000.
- Category Three: \$65,000.
- Category Four: \$195,000.
- Category Five: \$325,000.<sup>2</sup>

Florida law requires state agencies procuring for commodities or contractual services in excess of \$35,000<sup>3</sup> to use a competitive solicitation process.<sup>4</sup> 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.<sup>5</sup> 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,<sup>6</sup> request for proposals,<sup>7</sup> or invitation to negotiate.<sup>8</sup>

##### *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<sup>9</sup> and responsive vendor<sup>10</sup> who submits the lowest responsive bid.<sup>11</sup>

##### *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

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<sup>1</sup> See ss. 287.032 and 287.042, F.S., which establish the powers and duties of DMS.

<sup>2</sup> Section 287.017, F.S.

<sup>3</sup> See s. 287.017, F.S., for a list of purchasing categories and their corresponding threshold amounts.

<sup>4</sup> Section 287.057(1), F.S.

<sup>5</sup> Section 287.012(6), F.S.

<sup>6</sup> Section 287.057(1)(a), F.S.

<sup>7</sup> Section 287.057(1)(b), F.S.

<sup>8</sup> Section 287.057(1)(c), F.S.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> Section 287.057(1)(a), F.S.

written notice to the responsible and responsive vendor whose proposal is most advantageous to the state.<sup>12</sup>

### *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.<sup>13</sup>

### Contract Evaluations and Negotiations

For a contract in excess of \$195,000, the agency head must appoint at least three people to independently 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.<sup>14</sup> In addition, the agency head must appoint three persons to a negotiation team 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.<sup>15</sup>

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)<sup>16</sup> 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.<sup>17</sup> 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 certified by the Project Management Institute.<sup>18, 19</sup>

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<sup>12</sup> Section 287.057(1)(b), F.S.

<sup>13</sup> Section 287.057(1)(c), F.S.

<sup>14</sup> Section 287.057(17)(a)1., F.S.

<sup>15</sup> Section 287.057(17)(a)2., F.S.

<sup>16</sup> 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.

<sup>17</sup> Section 287.057(17)(b)1., F.S.

<sup>18</sup> See Project Management Institute, available at <https://www.pmi.org/> (last visited January 20, 2022).

<sup>19</sup> Section 287.057(17)(b)2., F.S.

## Contracts

A competitive solicitation for contractual services in excess of \$35,000<sup>20</sup> must be evidenced in writing by a written agreement embodying all provisions and conditions of the procurement of such services.<sup>21</sup> The written agreement must include, but not be limited to, a provision:

- 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.<sup>22</sup>
- 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.
- 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.<sup>23</sup>

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.<sup>24, 25</sup> 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 certain services that are exempt from competitive solicitation requirements.<sup>26,27</sup> 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.<sup>28</sup>

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

- 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.<sup>29</sup>

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<sup>20</sup> There is 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.

<sup>21</sup> Section 287.058(1), F.S.

<sup>22</sup> See s. 112.061, F.S.

<sup>23</sup> Section 287.058(1)(a)-(i), F.S.

<sup>24</sup> There is an exception in the case of a valid emergency as certified by the agency head.

<sup>25</sup> Section 287.058(2), F.S.

<sup>26</sup> Section 287.058(5), F.S.

<sup>27</sup> Section 287.057(3)(e), F.S., exempts certain services from the competitive solicitation requirements of chapter 287, F.S.

<sup>28</sup> Section 287.058(6), F.S.

<sup>29</sup> Section 216.1366(1), F.S.

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.<sup>30</sup>

### 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.<sup>31</sup>

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 exceeding \$5 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.<sup>32</sup>

### Tests of Financial Stability

When agencies conduct procurements, they may consider a vendor's financial stability as part of the procurement process.<sup>33</sup> DMS has provided guidelines for agency that suggest the following financial viability tests in order to determine a vendor's financial stability:<sup>34</sup>

- Audited financials, where the vendor provides financials audited by an independent auditor, and the independent auditor offers an opinion as to the financial viability of the vendor.
- Unaudited financials, where the vendor provides financials prepared internally and no opinion is provided as to the financial viability of the vendor.<sup>35</sup>
- Certification by company officers, where the vendors with over \$1 billion in annual revenue may be required to provide a written certification by their CEO, CFO, or Comptroller that the company meets generally accepted financial stability criteria.
- Performance bonds, where the resultant contract would require the provision of a performance bond that may be used to provide a source of funds to the agency if the vendor fails to perform.<sup>36</sup>

### Written Declaration

A written declaration is a statement made under penalty of perjury, except when a verification on information or belief is permitted by law. A written declaration is printed or typed and signed by the person making the declaration.<sup>37</sup> A person who knowingly makes a false declaration is subject to prosecution for perjury by false written declaration, which is a third degree felony.<sup>38, 39</sup>

### **Effect of the Bill**

The bill provides that when an agency is determining whether a vendor is a responsible vendor, an agency may establish financial stability criteria and require a vendor to demonstrate its financial

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<sup>30</sup> Section 216.1366(2), F.S.

<sup>31</sup> Section 287.057(14), F.S.

<sup>32</sup> *Id.*

<sup>33</sup> DMS, Division of State Purchasing, *Information for Agencies Regarding Tests of Financial Viability*, on file with the Government Operations Subcommittee.

<sup>34</sup> *Id.*

<sup>35</sup> Agencies typically review the financials provided and may employ their own external expert to test against specific standards specified in the procurement.

<sup>36</sup> Agencies often set the bond at 10 percent of the value of the contract, but the amount may vary depending on the particulars of the project. The bond may be imposed for the length of the contract or may be reduced over the term of the contract. Provisions requiring performance bonds should include clear and binding contractual terms for when and how the agency may access the funds.

<sup>37</sup> Section 92.525(2), F.S.

<sup>38</sup> See ss. 775.082, 775.083, and 775.084, F.S.

<sup>39</sup> Section 92.525(3), F.S.

stability. If an agency requires a vendor to demonstrate its financial stability during the competitive solicitation process, the agency must accept any of the following documents as evidence of such stability:

- Audited financial statements that demonstrate the vendor's satisfaction of financial stability criteria.
- Documentation of an investment grade rating from a credit rating agency designated as a nationally recognized statistical rating organization by the Securities and Exchange Commission.
- For a vendor with annual revenues exceeding \$1 billion, a letter containing a written declaration, pursuant to s. 92.525, F.S., issued by the chief financial officer or controller attesting that the vendor is financially stable and meets the definition of financial stability.
- For a vendor with annual revenues of \$1 billion or less, documentation, based on criteria established by the agency, evidencing that the vendor is financially stable and meets the definition of financial stability. The criteria established by the agency must be reasonably related to the value of the contract and may not include audited financial statements.

The bill does not prohibit agencies from accepting additional documentation as evidence of financial stability and it does not preclude an agency from requiring a performance bond for the duration of the contract, when appropriate.

The bill defines the term "financial stability" to mean, at a minimum, having adequate income and capital and the capacity to efficiently allocate resources, assess and manage financial risks, and maintain financial soundness through the term of the contract.

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 287.057, F.S., relating to procurement of commodities or contractual services.

**Section 2:** Provides an effective date of upon becoming a law.

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

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

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:  
Not applicable. The bill does not appear to affect county or municipal governments.
2. Other:  
None.

#### B. RULE-MAKING AUTHORITY:

There is neither rule-making authority granted in the bill nor does there seem to be a need for rule-making.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 27, 2022, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment changed the bill in the following ways:

- Permitted an agency to require a vendor to demonstrate its financial stability during the competitive solicitation process and to establish financial stability criteria when determining whether a vendor is “responsible,” as that term is defined in s. 287.012, F.S.;
- Clarified language regarding the evidence of the vendor’s financial stability; and
- Defined the term “financial stability” to mean the capacity to, at a minimum and for the term of the contract, efficiently allocate resources, assess and manage financial risks, and fully perform the contract requirements.

On February 28, 2022, the State Affairs Committee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS differed from the bill in that it:

- Revised the letter that a vendor with an annual revenue exceeding \$1 billion may submit to demonstrate its financial stability to require that it include a written declaration pursuant to s. 92.525, F.S.
- Provided that a vendor with an annual revenue of \$1 billion or less can provide documentation, based on criteria established by the agency, evidencing that the vendor is financially stable and meets the definition of financial stability. The criteria established by the agency must be reasonably related to the value of the contract and may not include audited financial statements.
- Revised the term “financial stability” to mean, at a minimum, having adequate income and capital and the capacity to efficiently allocate resources, assess and manage financial risks, and maintain financial soundness through the term of the contract.
- Provided that an agency may still require a performance bond for the duration of a contract, when appropriate.

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