

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 Fiscal Policy

BILL: CS/SB 1188

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Boyd

SUBJECT: Contract Liability

DATE: April 12, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>McVaney</u>	<u>McVaney</u>	<u>GO</u>	<u>Fav/CS</u>
2.	<u>McVaney</u>	<u>Yeatman</u>	<u>FP</u>	<u>Pre-meeting</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1188 requires each contract for more than \$35,000 of commodities or contractual services to include a provision limiting a vendor's liability to a defined monetary threshold. The bill requires all contracts for services in excess of \$35,000 to include a provision limiting vendor liability for direct damages to the greater of \$100,000, the dollar amount of the contract or purchase order, or two times the charges rendered by the contractor under the purchase order.

This requirement also applies to purchases by the early learning coalitions.

The bill is expected to have an indeterminate impact on state expenditures.

The bill takes effect July 1, 2023.

II. Present Situation:

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.¹

Current law establishes the following purchasing categories:

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

- Category One: \$20,000.
- Category Two: \$35,000.
- Category Three: \$65,000.
- Category Four: \$195,000.
- Category Five: \$325,000.²

Florida law requires state agencies procuring for commodities or contractual services in excess of \$35,000³ to use a competitive solicitation process.⁴ 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.⁵ 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,⁶ request for proposals,⁷ or invitation to negotiate.⁸

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 responsible⁹ and responsive vendor¹⁰ who submits the lowest responsive bid.¹¹

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 responsible and responsive vendor whose proposal is most advantageous to the state.¹²

² Section 287.017, F.S.

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

⁴ Section 287.057(1), F.S.

⁵ Section 287.012(6), F.S.

⁶ Section 287.057(1)(a), F.S.

⁷ Section 287.057(1)(b), F.S.

⁸ Section 287.057(1)(c), F.S.

⁹ 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.

¹⁰ 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.

¹¹ Section 287.057(1)(a), F.S.

¹² Section 287.057(1)(b), F.S.

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.¹³

Contracts

A competitive solicitation for contractual services in excess of \$35,000¹⁴ must be evidenced in writing by a written agreement embodying all provisions and conditions of the procurement of such services.¹⁵ 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.¹⁶
- 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.

¹³ Section 287.057(1)(c), F.S.

¹⁴ 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.

¹⁵ Section 287.058(1), F.S.

¹⁶ See s. 112.061, F.S.

- 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.¹⁷

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.^{18, 19} 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.^{20,21} 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.²²

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.²³

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.²⁴

State Purchasing Rules

The DMS has adopted Form PUR 1000 General Contracting Conditions which must be included in any contract competitively procured by an agency, unless superseded through negotiation with the vendor. There are 47 distinct provisions that must be included. The twentieth, “Limitation of Liability”, in pertinent part, provides:

Limitation of Liability. For all claims against the Contractor under any contract or purchase order, and regardless of the basis on which the claim is made, the Contractor’s liability under a contract or purchase order for *direct damages shall be limited to the greater of \$100,000, the dollar amount of the contract or purchase order, or two times the charges rendered by the Contractor under the purchase order.* This limitation shall not apply to claims arising under the Indemnity paragraph contain in this agreement.

¹⁷ Section 287.058(1)(a)-(i), F.S.

¹⁸ There is an exception in the case of a valid emergency as certified by the agency head.

¹⁹ Section 287.058(2), F.S.

²⁰ Section 287.058(5), F.S.

²¹ Section 287.057(3)(e), F.S., exempts certain services from the competitive solicitation requirements of chapter 287, F.S.

²² Section 287.058(6), F.S.

²³ Section 216.1366(1), F.S.

²⁴ Section 216.1366(2), F.S.

The DMS has also adopted Special Contract Conditions to be used in state term contracts and alternative source contracts. These conditions supersede the PUR 1000 conditions and serve as a baseline for all agency purchases off a state term contract or alternative contract source. These conditions do not include a cap on vendor liability.

III. Effect of Proposed Changes:

Section 1 amends s. 287.058, F.S., to require contracts for services in excess of \$35,000, except contracts providing of health and mental health services or drugs in the examination, diagnosis, or treatment of sick or injured state employees or the providing of other benefits required in the worker compensation program, to specify a finite maximum limit of liability for the contractor by a defined monetary threshold or monetary formula.

Section 1 also requires all contracts for services in excess of \$35,000, without exceptions for any services, to include a specific contractual provision that limits the vendor's liability for direct damages to the greater of \$100,000, the dollar amount of the contract or purchase order, or two times the charges rendered by the contractor under the purchase order.

Section 2 reenacts s. 287.0571, F.S., to incorporate by reference the changes made in section 1 to be included in the business case to outsource services.

Section 3 reenacts s. 1002.84, F.S., to incorporate by reference the changes made in section 1 to require each early learning coalition to comply with the new requirement.

Section 4 provides that the bill takes effect July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. 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 shared with counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. **Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may significantly limit a vendor's liability under a contract with a state agency.

C. Government Sector Impact:

State agencies will have more limited remedies to offset costs associated with a vendor's breach of contract, including damages related to data breaches, lost revenues, and institutional savings.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends sections 287.058, 287.0571, and 1002.84 of the Florida Statutes.

IX. **Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Governmental Oversight and Accountability on March 22, 2023:

The committee substitute requires all contracts for services in excess of \$35,000 to include a provision limiting vendor liability for direct damages to the greater of \$100,000, the dollar amount of the contract or purchase order, or two times the charges rendered by the contractor under the purchase order.

B. Amendments:

None.