

By the Committee on Governmental Oversight and Accountability;
and Senator Boyd

585-02905-23

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1 A bill to be entitled
2 An act relating to contract liability; amending s.
3 287.058, F.S.; requiring that certain procurement
4 contracts contain a provision specifying a finite
5 maximum limit of liability for a contractor; requiring
6 maximum liability terms for such contract or purchase
7 order to be specified as a defined monetary threshold
8 or formula; providing applicability; requiring that
9 certain procurement agreements or purchase orders
10 include a specified provision; reenacting ss.
11 287.0571(5) and 1002.84(13), F.S., relating to
12 contract requirements for proposed outsourcing and
13 procurement contract requirements for early learning
14 coalitions, respectively, to incorporate the amendment
15 made to s. 287.058, F.S., in references thereto;
16 providing an effective date.

17
18 Be It Enacted by the Legislature of the State of Florida:

19
20 Section 1. Present paragraph (i) of subsection (1) of
21 section 287.058, Florida Statutes, is redesignated as paragraph
22 (j), a new paragraph (i) is added to that subsection, and
23 subsection (8) is added to that section, to read:

24 287.058 Contract document.—

25 (1) Every procurement of contractual services in excess of
26 the threshold amount provided in s. 287.017 for CATEGORY TWO,
27 except for the providing of health and mental health services or
28 drugs in the examination, diagnosis, or treatment of sick or
29 injured state employees or the providing of other benefits as

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30 required by chapter 440, shall be evidenced by a written
31 agreement embodying all provisions and conditions of the
32 procurement of such services, which shall, where applicable,
33 include, but not be limited to, a provision:

34 (i) Specifying a finite maximum limit of liability for the
35 contractor by a defined monetary threshold or monetary formula.

36 1. Liability terms as enumerated under any contract or
37 purchase order of a governmental entity must specify a defined
38 monetary threshold or monetary formula that establishes the
39 maximum liability of the contractor for the contract or purchase
40 order.

41 2. The monetary threshold or monetary formula may not apply
42 to claims arising under separate contractual provisions specific
43 to indemnification.

44
45 In lieu of a written agreement, the agency may authorize the use
46 of a purchase order for classes of contractual services if the
47 provisions of paragraphs (a)-(j) ~~(a)-(i)~~ are included in the
48 purchase order or solicitation. The purchase order must include,
49 but need not be limited to, an adequate description of the
50 services, the contract period, and the method of payment. In
51 lieu of printing the provisions of paragraphs (a)-(c) and (g) in
52 the contract document or purchase order, agencies may
53 incorporate the requirements of paragraphs (a)-(c) and (g) by
54 reference.

55 (8) Every procurement of contractual services in excess of
56 the threshold amount provided in s. 287.017 for CATEGORY TWO
57 must be evidenced by a written agreement that includes the
58 following provision:

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60 For all claims against the contractor under any
61 contract or purchase order, regardless of the basis on
62 which the claim is made, the contractor's liability
63 for direct damages under a contract or purchase order
64 must be limited to the greater of \$100,000, the dollar
65 amount of the contract or purchase order, or two times
66 the charges rendered by the contractor under the
67 purchase order. This limitation does not apply to
68 claims arising under the indemnity section of the
69 agreement. Unless otherwise specifically enumerated in
70 the contract or in the purchase order, a party may not
71 be liable to another for special, indirect, punitive,
72 or consequential damages, including lost data or
73 records, unless the contract or purchase order
74 requires the contractor to back up such data or
75 records, even if the party has been advised that such
76 damages are possible. A party may not be liable for
77 lost profits, lost revenue, or lost institutional
78 operating savings. The state and agency may, in
79 addition to other remedies available to them at law or
80 equity and upon notice to the contractor, retain such
81 monies from amounts due to the contractor as may be
82 necessary to satisfy any claim for damages, penalties,
83 costs, and the like asserted by or against them. The
84 state may offset any liability or other obligation of
85 the contractor or its affiliates to the state against
86 any payments due to the contractor under any contract
87 with the state.

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88 Section 2. For the purpose of incorporating the amendment
89 made by this act to section 287.058, Florida Statutes, in a
90 reference thereto, subsection (5) of section 287.0571, Florida
91 Statutes, is reenacted to read:

92 287.0571 Business case to outsource; applicability.—

93 (5) In addition to the contract requirements provided in s.
94 287.058, each contract for a proposed outsourcing, pursuant to
95 this section, must include, but need not be limited to, the
96 following contractual provisions:

97 (a) A scope-of-work provision that clearly specifies each
98 service or deliverable to be provided, including a description
99 of each deliverable or activity that is quantifiable,
100 measurable, and verifiable. This provision must include a clause
101 that states if a particular service or deliverable is
102 inadvertently omitted or not clearly specified but determined to
103 be operationally necessary and verified to have been performed
104 by the agency within the 12 months before the execution of the
105 contract, such service or deliverable will be provided by the
106 contractor through the identified contract-amendment process.

107 (b) A service-level-agreement provision describing all
108 services to be provided under the terms of the agreement, the
109 state agency's service requirements and performance objectives,
110 specific responsibilities of the state agency and the
111 contractor, and the process for amending any portion of the
112 service-level agreement. Each service-level agreement must
113 contain an exclusivity clause that allows the state agency to
114 retain the right to perform the service or activity, directly or
115 with another contractor, if service levels are not being
116 achieved.

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117 (c) A provision that identifies all associated costs,
118 specific payment terms, and payment schedules, including
119 provisions governing incentives and financial disincentives and
120 criteria governing payment.

121 (d) A provision that identifies a clear and specific
122 transition plan that will be implemented in order to complete
123 all required activities needed to transfer the service or
124 activity from the state agency to the contractor and operate the
125 service or activity successfully.

126 (e) A performance-standards provision that identifies all
127 required performance standards, which must include, at a
128 minimum:

129 1. Detailed and measurable acceptance criteria for each
130 deliverable and service to be provided to the state agency under
131 the terms of the contract which document the required
132 performance level.

133 2. A method for monitoring and reporting progress in
134 achieving specified performance standards and levels.

135 3. The sanctions or disincentives that shall be imposed for
136 nonperformance by the contractor or state agency.

137 (f) A provision that requires the contractor and its
138 subcontractors to maintain adequate accounting records that
139 comply with all applicable federal and state laws and generally
140 accepted accounting principles.

141 (g) A provision that authorizes the state agency to have
142 access to and to audit all records related to the contract and
143 subcontracts, or any responsibilities or functions under the
144 contract and subcontracts, for purposes of legislative
145 oversight, and a requirement for audits by a service

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146 organization in accordance with professional auditing standards,
147 if appropriate.

148 (h) A provision that requires the contractor to interview
149 and consider for employment with the contractor each displaced
150 state employee who is interested in such employment.

151 (i) A contingency-plan provision that describes the
152 mechanism for continuing the operation of the service or
153 activity, including transferring the service or activity back to
154 the state agency or successor contractor if the contractor fails
155 to perform and comply with the performance standards and levels
156 of the contract and the contract is terminated.

157 (j) A provision that requires the contractor and its
158 subcontractors to comply with public records laws, specifically
159 to:

160 1. Keep and maintain the public records that ordinarily and
161 necessarily would be required by the state agency in order to
162 perform the service or activity.

163 2. Provide the public with access to such public records on
164 the same terms and conditions that the state agency would
165 provide the records and at a cost that does not exceed that
166 provided in chapter 119 or as otherwise provided by law.

167 3. Ensure that records that are exempt or records that are
168 confidential and exempt are not disclosed except as authorized
169 by law.

170 4. Meet all requirements for retaining records and transfer
171 to the state agency, at no cost, all public records in
172 possession of the contractor upon termination of the contract
173 and destroy any duplicate public records that are exempt or
174 confidential and exempt. All records stored electronically must

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175 be provided to the state agency in a format that is compatible
176 with the information technology systems of the state agency.

177 (k)1. A provision that provides that any copyrightable or
178 patentable intellectual property produced as a result of work or
179 services performed under the contract, or in any way connected
180 with the contract, shall be the property of the state, with only
181 such exceptions as are clearly expressed and reasonably valued
182 in the contract.

183 2. A provision that provides that, if the primary purpose
184 of the contract is the creation of intellectual property, the
185 state shall retain an unencumbered right to use such property.

186 (l) If applicable, a provision that allows the agency to
187 purchase from the contractor, at its depreciated value, assets
188 used by the contractor in the performance of the contract. If
189 assets have not depreciated, the agency shall retain the right
190 to negotiate to purchase at an agreed-upon cost.

191 Section 3. For the purpose of incorporating the amendment
192 made by this act to section 287.058, Florida Statutes, in a
193 reference thereto, subsection (13) of section 1002.84, Florida
194 Statutes, is reenacted to read:

195 1002.84 Early learning coalitions; school readiness powers
196 and duties.—Each early learning coalition shall:

197 (13) Comply with federal procurement requirements and the
198 procurement requirements of ss. 215.971, 287.057, and 287.058,
199 except that an early learning coalition is not required to
200 competitively procure direct services for school readiness
201 program and Voluntary Prekindergarten Education Program
202 providers.

203 Section 4. This act shall take effect July 1, 2023.