

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 Banking and Insurance Committee

BILL: CS/SB 1626

INTRODUCER: Banking and Insurance Committee and Senator Gaetz

SUBJECT: State Contracting

DATE: February 2, 2012 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rubio	Burgess	BI	Fav/CS
2.			GO	
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|-----------------------------------------|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The Department of Management Services (DMS) is responsible for promoting efficiency and to effect coordination in the purchase of commodities and contractual services for the state, providing uniform commodity and contractual service procurement policies, rules, procedures, and forms for use by agencies and eligible users, and procuring and distributing federal surplus tangible personal property allocated to the state by the Federal Government.

The Chief Financial Officer (CFO) is the chief fiscal officer of the state and through the Department of Financial Services (DFS) examines, audits, and settles all accounts, claims, and demands against the state, arising under any law or resolution of the Legislature, and for issuing a warrant directing the payment out of the State Treasury of such amount.

The Office of the Auditor General (AG) conducts financial audits of the accounts and records of State agencies, conducts operational and performance audits of public records and information technology systems, adopts rules for financial audits performed by independent certified public accountants of local governmental entities, and reviews all audit reports of local governmental entities.

Under the bill the duties of the Department of Management Services (DMS) are limited to the procurement of commodities and contractual services, collecting data, and preparing statistical reports on the agencies' use of methods of procurement. The responsibility and authority to develop procurement related rules, policy, and practice will be transferred to the Department of Financial Services (DFS). Provisions relating to the Chief Financial Officer's (CFO) intergovernmental contract tracking system under the Transparency Florida Act are revised by the bill. The bill also requires the CFO to conduct a study of current procurement laws to be submitted to the Legislature and Governor.

This bill substantially amends the following sections of the Florida Statutes: 11.45, 215.971, 215.985, 255.25, 287.012, 287.032, 287.042, 287.057, 287.058, 287.095, 287.133, 402.7305, 427.0135, and 946.515.

This bill repeals the following sections of the Florida Statutes: 216.0111, and ch. 287 (effective July 30, 2014).

This bill creates the following sections of the Florida Statutes: 287.044, and 287.1312.

II. Present Situation:

Department of Management Services and Chapter 287, F.S.

Under ch. 287, F.S., the Division of State Purchasing in the Department of Management Services (DMS) is responsible for developing and administering standardized procurement policies, procedures, and practices to be used by state agencies in acquiring commodities, contractual services, and information technology. A variety of procurement methods are available for use by the agencies depending on the cost and characteristics of the needed good or service, the complexity of the procurement, and the number of available vendors. To guide the procedures for the procurement method to be used, the type of review required, and the method for the award of any contract the following purchasing categories with threshold amounts have been established:

- Category one: \$20,000
- Category two: \$35,000
- Category three: \$65,000
- Category four: \$195,000
- Category five: \$325,000¹

The DMS prescribes methods of securing competitive sealed bids, proposals, and replies.² The competitive solicitation process must be used for procurement of commodities or contractual services in excess of the category two threshold amount, and include the following solicitation methods: invitations to bid, requests of proposals, and invitations to negotiate.³ Many services procured by state agencies are exempt from competitive solicitation requirements regardless of

¹ Section 287.017, F.S.

² Rule 60A-1.041, F.A.C.

³ Section 287.057, F.S.

whether the purchase exceeds the applicable cost threshold, including artistic services, auditing services, and legal services.⁴ Agencies currently must seek approval from the DMS to use an alternate contract source to purchase commodities or services from term contracts or requirements contracts competitively established by other governmental entities. In approving the alternate contract source, the DMS determines that the contract source is cost-effective and in the best interest of the State.⁵

All agreements in excess of the category two threshold must be evidenced by a written agreement and include provisions for the required minimum level of service to be performed by the contractor, criteria for evaluating the successful completion of each deliverable, and financial consequences for nonperformance. There must also be a provision 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. Each deliverable must be directly related to the scope of work and specify the required minimum level of service to be performed and criteria for evaluating the successful completion of each deliverable.⁶

Each agency is required to appoint at least one contract administrator responsible for maintaining a contract file and financial information on all contractual services contracts and who serves as a liaison with the contract managers and the DMS.⁷ The DMS designates certain minimum required documentation that must be in the contract file. Additionally, for each contractual services contract the agency must designate an employee to function as contract manager who shall be responsible for enforcing performance of the contract terms and conditions and serve as a liaison with the contractor, but there is no similar requirement for grants. Each contract manager who is responsible for contracts in excess of the threshold amount for category two (\$35,000) must attend training conducted by the CFO for accountability in contracts and grant management.⁸ Additional certifications were later required for contracts in excess of category four threshold⁹ and \$250,000 annual funding was appropriated to accomplish the certification, however no funding has been appropriated for this purpose for the past fiscal year.¹⁰ The DMS currently offers several training and certification programs including an optional Florida Certified Contract Manager designation.

Under s. 287.057(18), F.S., agencies must establish a review and approval process to be completed before contracts exceeding category three threshold (\$65,000) are executed. Under s. 216.3475, F.S., each agency shall maintain records to support a cost analysis, which includes a detailed budget submitted by the person or entity awarded funding and the agency's documented review of individual cost elements from the submitted budget for allowability, reasonableness, and necessity.

Using these various procurement methods the DMS also negotiates state term contracts and purchasing agreements that are intended to leverage the states' buying power. The DMS is also

⁴ Section 287.057(3)(f), F.S.

⁵ Rule 60A-1.047, F.A.C.

⁶ Section 287.058(1), F.S.

⁷ Section 287.057(15), F.S.

⁸ Section 287.057(14), F.S.

⁹ Section 287.057(16)(b), F.S.

¹⁰ Department of Management Services SB1626 Bill Analysis, January 23, 2012.

responsible for compiling statistical procurement data concerning the method of procurement, terms, usage, and disposition of commodities and contractual services by agencies.¹¹ This data is available in the Florida Accounting Information Resource Subsystem (FLAIR) and the State's My Florida Market Place (MFMP) centralized e-procurement system.¹²

The DMS facilitates the production and processing of these competitive solicitations through the MFMP system, which is the state's e-procurement system, and provides a standardized process for developing and processing solicitations. The MFMP system has four modules: the Buyer Module, Invoicing Module, Vendor Registration Module, and Sourcing Module. However, according to the DMS, the individual state agencies determine whether to use the MFMP e-procurement system.¹³ The DMS develops procedures to be used by agencies for advertising and issuing solicitations through the Vendor Bid System. Currently all solicitations and procurement related decisions/intended decisions are required to be posted on the Vendor Bid System.¹⁴ The DMS currently posts lists of firms not permitted to do business with the state online.¹⁵ The DMS also maintains a list of vendors by classes of commodities within the MFMP system.¹⁶

In August 2011, the DMS with the participation of eight agencies and nine local government representatives initiated the Procurement Process Improvement Project to examine the policy, procedure, practice, and technology for conducting procurements. The intent of the project is to improve the effectiveness and efficiency of state purchasing through establishing standardized processes and procedures, better leveraging the MFMP sourcing module, and developing a continuous improvement protocol to better monitor and actively manage sourcing activities.¹⁷

Chief Fiscal Officer

The CFO is the chief fiscal officer of the state and is responsible for examining, auditing, settling, and approving payment of all accounts against the state and keeping all state funds and securities.¹⁸ The CFO functions are carried out by the Department of Financial Services (DFS). The DFS's Division of Accounting and Auditing pays all the state's bills, including employees' salaries, payments for goods and a service used by state agencies and benefit payments, promotes financial accountability throughout state government by providing information about its fiscal soundness, and investigates allegations of waste, fraud and abuse of taxpayers' money.¹⁹

¹¹ Section 287.042(10), F.S.

¹² Department of Management Services Operational Audit, Report No. 2011-075, January 2011.

¹³ Department of Management Services SB 1626 Bill Analysis, January 23, 2012.

¹⁴ http://myflorida.com/apps/vbs/vbs_www.main_menu

¹⁵ http://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/convicted_suspended_discriminatory_complaints_vendor_lists

¹⁶ Department of Management Services SB1626 Bill Analysis, January 23, 2012.

¹⁷ Department of Management Services Bill Analysis, January 23, 2012.

¹⁸ Section 17.001, F.S.

¹⁹ Department of Financial Services website, <http://www.myfloridacfo.com/sitePages/agency/sections/AccountingAuditing.aspx>, (last viewed January 31, 2012).

Transparency Florida Act

Section 215.985, F.S., (Transparency Florida Act) authorized the establishment of a public access website to financial information of governmental entities, including state, regional, county, municipal, special district, or other political subdivisions whether executive, judicial, or legislative, any department, division, bureau, commission, authority, district, or agency thereof, or any public school, Florida College System institution, state university, or associated board.²⁰ The initial phase included appropriations data and expenditure data for all branches of state government. Under the Act, the CFO must provide public access to a state contract management system that provides information and documentation relating to contracts procured by governmental entities.²¹ The data collected in the system must include the specified information including the name of the contracting agency, the procurement method, the contract dates, and the type of commodity or service. Within 30 days after a major change to an existing contract, the affected state governmental entity or agency must update the necessary information in the system. A major change to a contract includes, but is not limited to, a renewal, termination, or extension of the contract or an amendment to the contract.

Office of the Auditor General

The Office of the Auditor General (AG) conducts financial audits of the accounts and records of State agencies, conducts operational and performance audits of public records and information technology systems, adopts rules for financial audits performed by independent certified public accountants of local governmental entities, and reviews all audit reports of local governmental entities.²² The AG must annually notify the President of the Senate, the Speaker of the House of Representatives, and the Department of Financial Services of all educational entities and water management districts that have failed to comply with transparency requirements as identified in audit reports.²³

Prison Rehabilitative Industries and Diversified Enterprise, Inc (Pride)

In 1981 the Prison Rehabilitative Industries and Diversified Enterprises, Inc. (Pride) was created as a 501(c) 3, non-profit corporation. Pride effectively transferred the administrative and operational control of Florida's prison industries from the Florida Department of Corrections to Pride. One of the missions of Pride is to provide a joint effort between the department, the correctional work programs, and other vocational training programs to reinforce relevant education, training, and post-release job placement and help reduce recommitment of inmates.²⁴ Under s. 287.095, F.S., all products offered for purchase to a state agency by Pride must be produced in majority part by inmate labor, except for products not made by inmates which products are contractually allied to products made by inmates which are offered by the corporation, provided the value of the products not made by inmates do not exceed 2 percent of the total sales of the corporation in any year.

²⁰ Section 215.985(2)(a), F.S.

²¹ Section 215.985(16), F.S.

²² Section 11.45(2), F.S.

²³ Section 11.45(7)(i), F.S.

²⁴ Section 946.501(2), F.S.

III. Effect of Proposed Changes:

Section 1 amends s. 11.45(7)(a) and (7)(i), F.S., to require the AG to provide notification of certain governmental entities' failure to comply with the requirements of s. 215.985, F.S., (Transparency Florida Act), in addition to s. 218.39, F.S., (annual financial audit reports).

Section 2 amends s. 215.971, F.S., to require an agency agreement funded with federal or state financial assistance to specify a "performance measure," defined as the required minimum level of service to be performed and the criteria for evaluating the successful completion of each deliverable. Effective October 1, 2012, before execution the agreements are required to undergo review and approval, in accordance with rules adopted by the DFS, to ensure the agreement contains a clear statement of work, quantifiable deliverables, performance measures, and financial consequences for nonperformance. Under the bill the CFO may establish dollar thresholds and criteria for sampling the agreements that are to be reviewed prior to execution. The DFS has 30 days to make a final determination regarding approval of the agreement; this review period may be extended to ensure a thorough review. The contracting agency is also required to designate an employee as the grant manager responsible for enforcing performance of the agreement terms and serve as a liaison with the recipient. The bill also requires certification of grant managers responsible for agreements in excess of category five (\$325,000) and authorizes the CFO to establish uniform procedures for payment requests. According to the DMS, since s. 287.057(18), F.S., requires agencies to establish a review and approval process for contracts exceeding category three (\$65,000), this external review requirement would slow the contracting process and create an administrative burden on existing contracting resources.²⁵

Section 3 amends s. 215.985(16), F.S., (Transparency Florida Act) to require the CFO to establish and maintain a secure, shared, intergovernmental contract tracking system. The bill requires certain state entities and effective November 1, 2013, local governmental entities, independent special districts, district school boards, board of governors of the state university system, and the board of trustees for each Florida college system to post within 30 calendar days after executing a contract certain specified information and documentation, with any exempt or confidential information properly redacted, on the contract tracking system. Within 30 calendar days of a major modification or amendment to an existing contract, as determined by the CFO, the agency must update the information in the system. The bill provides for a party to a contract to request exempt or confidential information on the system to be redacted through a written request submitted by approved means. The bill provides a disclaimer from liability for the failure to redact information properly for the CFO and the DFS. The bill allows the CFO to make information posted on the system available for viewing and downloading by the public. The CFO may prohibit the posting of records on the public website that could jeopardize the health, safety, or welfare of the public. Additionally the bill requires certain disclosures to be conspicuously displayed on the website. The bill provides the DFS authority to adopt rules to administer the subsection. According to the DMS the MFMP system will be required to be adapted to assist in the collection of data necessary.²⁶

²⁵ Department of Management Services SB 1626 Bill Analysis, January 23, 2012.

²⁶ Department of Management Services SB 1626 Bill Analysis, January 23, 2012.

Section 4 repeals s. 216.0111, F.S., and transfers the list of certain information agencies are required to provide to the DFS regarding the agencies' contracted activities to s. 215.985, F.S.

Section 5 amends s. 287.032, F.S., to limit the responsibility of the DMS, effective October 1, 2013, to coordinating the purchase of commodities and contractual services for the state and procuring and distributing federal surplus tangible personal property allocated to the state by the federal government. The bill transfers the responsibility of providing uniform commodity and contractual service procurement policies, rules, procedures, and forms for use by agencies and eligible users to the DFS. The DFS is also required to monitor agencies compliance.

Section 6 amends s. 287.042, F.S., effective October 1, 2013, to list the revised power, duties, and functions of the DMS in procuring commodities and contractual services for agencies. The bill revises certain references from the DMS to the DFS. Under the bill, the DMS is not responsible for the establishment of policies or procedures for procurement and contracting, therefore provisions relating to these are deleted from s. 287.042, F.S. The bill requires the DMS to develop and maintain a list of interested vendors, of which vendors barred by the CFO may not be included. Under the bill the DMS continues to be responsible for preparing statistical data concerning the method of procurement, terms, usage, and disposition of commodities and contractual services by agencies. The DMS indicates that it is currently engaged in a pilot program to revise its spend analytics function used to enhance the agencies' ability to identify needs and assess the market for their product or service and its procurement process improvement project is in the process of developing new initiatives that will be piloted for state purchasing contracts. However, these will would be delayed or cancelled as a result of the transition of responsibilities.²⁷

Section 7 creates s. 287.044, F.S., effective October 1, 2013, and transfers the powers, duties, and functions associated with establishing a system of coordinated and uniform procurement policies, procedures, and practices to be used by agencies when acquiring commodities and contractual services from the DMS to the DFS. The bill requires the DFS to develop numerous procurement procedures to be used by an agency including procedures for advertising solicitations, issuing requests for information and quotes, procuring information technology commodities or contractual services, entering contracts to ensure standard formats and measurable deliverables, and maintaining a contract file. The bill removes the requirement that state agencies provide an explanation to unsuccessful bidders and the requirement that DFS develop a methodology to calculate cost savings achieved under a contract. The bill requires the DFS to establish a list of vendors that are not allowed to do business with the state.

Section 8 amends and creates certain subsections to s. 287.057, F.S. The bill changes reference to the DMS in s. 287.057(16), F.S., to the DFS; therefore requiring the DFS to adopt rules for certifying contract negotiators. The bill deletes the exemptions from competitive solicitation requirements for artistic services, academic program reviews, lectures by individuals, and training and education services provided to injured employees. The bill removes the language requiring state agencies consider all purchases of the same commodity or service during one year to be part of a single purchase. The bill adds a provision to the section that allows agencies to

²⁷ Department of Management Services SB 1626 Bill Analysis, January 23, 2012.

purchase commodities or services through another agency's existing contract if in the best interest of the state.

Section 9 amends s. 287.058, F.S., by defining the minimum level of service to be performed and criteria for evaluating the successful completion of each deliverable specified in a contract as a performance measure. The bill provides that the CFO may review and approve contracts prior to execution in accordance with rules adopted by the DFS. The CFO may establish dollar thresholds and criteria for sampling the agreements that are to be reviewed prior to execution. The bill also provides a list of documentation the DFS may search for when reviewing contracts. The DFS has 30 days to make a final determination regarding approval of a contract, which may be extended to ensure a thorough review.

Section 10 repeals s. 287.095(3), F.S., which required the products offered for purchase to a state agency by the non-profit corporation organized to lease and manage the correctional work programs under ch. 946, F.S., be produced in majority part by inmate labor.

Section 11 creates s. 287.1312, F.S., requiring the DFS to establish a certification program for managers and negotiators of contracts and grants. In order to manage an agreement in excess of the category five threshold (\$325,000), contract and grant managers must hold a valid certification from the DFS. The bill lists the areas of training that must be included in the certification program. The bill requires the DFS to monitor the program and annually publish results of agency manager audits and error rates related to contract and grant management on its website.

Sections 12 -17 provide technical, conforming changes.

Section 18 requires the CFO to review and investigate current procurement and submit the report findings and recommendations to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2012.

Section 19 provides for the repeal of ch. 287, F.S., effective July 30, 2014.

Section 20 provides an appropriation to implement the provisions of the bill. See Government Sector Impact.

Section 21 provides an effective date of July 1, 2012, except as otherwise expressly provided.

Other Potential Implications:

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, s. 18, Florida Constitution:

“No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds

unless the legislature has determined that such law fulfills an important state interest...”

If the Florida Transparency Act posting requirement for local governmental entities under the bill will result in additional expenditures for the local entities then one of the additional requirements under Article VII, s. 18, Florida Constitution, must be met.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

It is indeterminate whether the transfer of duties from DMS to DFS will impact potential vendors with the state.

C. Government Sector Impact:

The bill provides for an appropriation during the 2012-13 fiscal year of \$400,000 in nonrecurring funds from the Administrative Trust Fund in the DFS for the CFO’s review of the state’s procurement process. The bill also provides for \$375,000 in nonrecurring funds from the Administrative Trust Fund in the DFS to contract for the CFO’s administration of the certified contract manager and negotiator program. For the 2012-13 fiscal year an indeterminate amount of recurring funds from the General Revenue fund and an indeterminate number of full-time positions are appropriated to the CFO for the purpose of implementing the CFO’s expanded contract auditing responsibilities. At the end of the 2013-14 fiscal year any remaining funds shall revert and be re-appropriated for the same purpose.

VI. Technical Deficiencies:

None.

VII. Related Issues:

With the transition of the responsibility to establish and enforce procurement policies, procedures, and practices to be used by agencies when acquiring commodities and contractual services to the DFS; it is unclear whether the DMS would lose the transaction fees assessed for use of the MFMP system.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on February 2, 2012:

The bill retains many of the same provisions of the bill as filed and makes the following major changes:

- Provides for the establishment, by the CFO, of dollar thresholds and criteria for determining agreements funded with state or federal assistance that are to be reviewed prior to execution.
- Provides that the CFO may review and approve contracts prior to execution in accordance with rules adopted by the DFS.
- Allots 30 days for the DFS to make a final determination regarding approval of the agreement; which may be extended to ensure a thorough review.
- Provides a list of records the DFS may search for when reviewing contracts.
- Requires the DFS to establish a training certification program for negotiators of contracts and grants.
- Inserts and revises effective dates for certain provisions.
- Makes drafting changes to the bill by inserting and revising sections and deleting certain language.

- B. **Amendments:**

None.