

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 Appropriations

BILL: CS/SB 1150

INTRODUCER: Governmental Oversight and Accountability Committee; and Senators Benacquisto and Brandes

SUBJECT: State Contracting

DATE: April 16, 2013

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	McVaney	GO	Fav/CS
2.	Betta	Hansen	AP	Pre-meeting
3.				
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:

CS/SB 1150 revises provisions relating to state agency contracting, and creates new duties for the Chief Financial Officer (CFO) in the state agency contracting process. The bill:

- Requires that specified accountability provisions be included in grant agreements;
- Requires certified grant managers on grant agreements valued over \$35,000;
- Permits the CFO to audit grant agreements before execution, and requires the CFO audit of grant agreements after execution;
- Permits the CFO to audit certain agency contracts before execution, and requires a CFO audit of certain agency contracts after execution;
- Requires that every contract of more than \$35,000 must have a certified contract manager; and
- Specifies the types of information that agencies must make available on the contract tracking system.

The bill may have a minimal fiscal impact on state agencies related to the training and certification of grant and contract managers. This fiscal impact is indeterminate and could most

likely be handled within existing agency resources. SB 1764 related to transparency in government spending provides four positions and \$713,067 to support the contract tracking system within the Department of Financial Services.

This bill substantially amends the following sections of the Florida Statutes: 215.971, 215.985, 287.057, and 287.058.

The bill repeals section 216.0111, Florida Statutes.

The bill creates section 287.136, Florida Statutes.

II. Present Situation:

State Procurement of and Contracts for Personal Property and Services

Chapter 287, Florida Statutes

Chapter 287, F.S., regulates state agency¹ procurement of personal property and services.² The Department of Management Services (DMS) is responsible for overseeing state purchasing activity including professional and contractual services as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology.³ The Division of State Purchasing in the DMS establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.

Agencies may use a variety of procurement methods, depending on the cost and characteristics of the needed good or service, the complexity of the procurement, and the number of available vendors. These include the following:

- "Single source contracts," which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- "Invitations to bid," which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- "Requests for proposals," which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- "Invitations to negotiate," which are used when negotiations are determined to be necessary to obtain the best value and involve a request for high complexity, customized, mission-critical services, by an agency dealing with a limited number of vendors.⁴

¹ As defined in s. 287.012(1), F.S., "agency" means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. "Agency" does not include the university and college boards of trustees or the state universities and colleges.

² Local governments are not subject to the provisions of ch. 287, F.S. Local governmental units may look to the chapter for guidance in the procurement of goods and services, but many have local policies or ordinances to address competitive solicitations.

³ See ss. 287.032 and 287.042, F.S.

⁴ See ss. 287.012(6) and 287.057, F.S.

Contracts for commodities or contractual services in excess of \$35,000 must be procured utilizing a competitive solicitation process.⁵ However, specified contractual services and commodities are not subject to competitive solicitation requirements.⁶

The chapter establishes a process by which a person may file an action protesting a decision or intended decision pertaining to contracts administered by the DMS, a water management district, or certain other agencies.⁷

Agreements Funded with Federal and State Assistance

Current law requires an agency agreement that provides state financial assistance to a recipient or subrecipient,⁸ or that provides federal financial assistance to a subrecipient,⁹ to include a provision specifying a scope of work that clearly establishes the tasks the recipient or subrecipient is required to perform, and a provision dividing the agreement into quantifiable units of deliverables that must be received and accepted in writing by the agency before payment. Each deliverable must be directly related to the scope of work and must specify the required minimum level of service to be performed and the criteria for evaluating the successful completion of each deliverable.¹⁰

Reporting of State Agency Contract Information

Current law requires each state agency to report to the Department of Financial Services (DFS) the following information relating to certain contracted activities:

- The nature of the commodities or services provided;
- The term of the contract;
- The final obligation made by the agency;
- A summary of any time constraints that apply to the procurement;
- The justification for not using a competitive solicitation, including any statutory exemption or exception; and
- Other information regarding the contract or the procurement that the DFS requires.¹¹

Qualifications for Contract Managers and Contract Negotiators

Current law requires certain contract managers to attend training conducted by the Chief Financial Officer (CFO).¹² It also requires certain contract negotiators to be certified based upon rules adopted by the DMS.¹³

⁵ Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold contained in s. 287.017, F.S., to be competitively bid. As defined in s. 287.012(6), F.S., “competitive solicitation” means 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 the method of procurement.

⁶ See s. 287.057(3)(f), F.S.

⁷ See s. 287.042(2)(c), F.S.

⁸ As defined in s. 215.97, F.S.

⁹ As defined by applicable United States Office of Management and Budget circulars.

¹⁰ See s. 215.971, F.S.

¹¹ See s. 216.0111, F.S.

Chief Financial Officer and Department of Financial Services

The CFO is an elected constitutional Cabinet member.¹⁴ The CFO serves as the chief fiscal officer of the state and is responsible for settling and approving accounts against the state and keeping all state funds and securities.¹⁵ Such responsibilities include, but are not limited to, auditing and adjusting accounts of officers and those indebted to the state,¹⁶ paying state employee salaries,¹⁷ and reporting all disbursements of funds administered by the CFO.¹⁸

The CFO also serves as the head of the DFS, which executes the duties of the CFO.¹⁹ The DFS consists of the following divisions:

- The Division of Accounting and Auditing;
- The Division of State Fire Marshal;
- The Division of Risk Management;
- The Division of Treasury;
- The Division of Insurance Fraud;
- The Division of Rehabilitation and Liquidation;
- The Division of Insurance Agents and Agency Services;
- The Division of Consumer Services;
- The Division of Workers' Compensation;
- The Division of Administration;
- The Division of Legal Services;
- The Division of Information Systems;
- The Office of Insurance Consumer Advocate;
- The Division of Funeral, Cemetery, and Consumer Services; and
- The Division of Public Assistance Fraud.²⁰

The Financial Services Commission;²¹ Board of Funeral, Cemetery, and Consumer Services;²² and Strategic Markets Research and Assessment Unit²³ also are established within the DFS.

¹² See s. 287.057(14), F.S.

¹³ See s. 287.057(16)(b), F.S.

¹⁴ See art. 4, s. 4(a) and (c), Fla. Const.

¹⁵ See art. 4, s. 4(c), Fla. Const., and s. 17.001, F.S.

¹⁶ See s. 17.04, F.S.

¹⁷ See s. 17.09, F.S.

¹⁸ See s. 17.11, F.S.

¹⁹ See s. 20.121, F.S.

²⁰ Section 20.121(2), F.S.

²¹ The Financial Services Commission is composed of the Governor and of the Cabinet members, and includes the Office of Insurance Regulation and the Office of Financial Regulation. The offices are responsible for activities of the commission relating to regulation and investigation of violations of laws relating to insurance and financial institutions. See s. 20.121(3)(a), F.S.

²² The Board of Funeral, Cemetery, and Consumer Services is created within the Division of Funeral, Cemetery, and Consumer Services, and regulates licenses issued under ch. 497, F.S. (Funeral, Cemetery, and Consumer Services). See ss. 20.121(4) and 497.103, F.S.

²³ The Strategic Markets Research and Assessment Unit creates reports on issues, trends, and threats that broadly impact the condition of the financial services industries. See s. 20.121(6), F.S.

Transparency Florida Act

The Transparency Florida Act (act)²⁴ created financial reporting requirements for certain public entities for the purpose of making that information publicly available. Among other provisions, it required:

- The Executive Office of the Governor to establish a website making certain information relating to state financial expenditures available to the public;²⁵
- Each water management district to make a monthly financial statement available on its website;²⁶ and
- The CFO to provide public access to a state contract management system providing information and documentation relating to government contracts. The act specifies data that must be collected in the system and provides that in the event of a major contract change or a new contract, the affected state governmental entity must update the system within 30 days.²⁷

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.²⁸

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act²⁹ provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.

²⁴ Chapter 2009-74, s. 2, L.O.F. (codified at s. 215.985, F.S.).

²⁵ See s. 215.985(3), F.S.

²⁶ See s. 215.985(12), F.S.

²⁷ See s. 215.985(16), F.S.

²⁸ Article I, s. 24(c) of the Fla. Const.

²⁹ See s. 119.15, F.S.

III. Effect of Proposed Changes:

Additional Requirements for Grant Agreements

Section 1 amends s. 215.971, F.S., to add additional requirements for agreements funded with federal or state assistance. Specifically, the bill requires that such agreements must include:

- A provision specifying the financial consequences that apply if the recipient or subrecipient fails to perform the minimum level of service required by the agreement. The provision can be excluded from the agreement only if financial consequences are prohibited by the federal agency awarding the grant. Funds refunded to a state agency from a recipient or subrecipient for failure to perform as required under the agreement may be expended only in direct support of the program from which the agreement originated.
- A provision specifying that a recipient or subrecipient of federal or state financial assistance may expend funds only for allowable costs resulting from obligations incurred during the specified agreement period.
- A provision specifying that any balance of unobligated funds which has been advanced or paid must be refunded to the state agency.
- A provision specifying that any funds paid in excess of the amount to which the recipient or subrecipient is entitled under the terms and conditions of the agreement must be refunded to the state agency.
- Any additional information required pursuant to the Florida Single Audit Act.

Chief Financial Officer Audit of Proposed Grant Agreements

The bill provides that the Chief Financial Officer (CFO) may audit agreements funded with state or federal assistance before the execution of the agreements in accordance with rules adopted by the Department of Financial Services (DFS). The audit must ensure that applicable laws have been met; that the agreement document contains a clear statement of work, quantifiable and measurable deliverables, performance measures, financial consequences for nonperformance, and clear terms and conditions that protect the interests of the state; and that the associated costs of the agreement are not unreasonable or inappropriate. The audit must ensure that all contracting laws have been met and that documentation is available to support the contract. A contract that does not comply with this section may be returned to the submitting agency for revision.

The CFO may establish dollar thresholds and other criteria for determining which agreements will be audited before execution. The CFO may revise such thresholds and other criteria for an agency or a unit of an agency as he or she deems appropriate. The CFO has up to 10 business days after receipt of the proposed grant agreement to make a final determination regarding deficiencies in the agreement. The CFO and the agency entering into the contract may agree to a longer review period. The CFO will provide the agency with information regarding any contract deficiencies. The agency will be responsible for addressing the deficiencies, and has the option of resubmitting the agreement for subsequent reviews. The CFO must perform a subsequent review to verify that all deficiencies have been addressed upon processing the first payment.

Grant Management

For each grant agreement, the state agency must designate an employee to function as a grant manager responsible for enforcing performance of the agreement's terms and conditions and who must serve as a liaison with the recipient or subrecipient. Each grant manager responsible for agreements in excess of \$35,000 must complete the training and become a certified contract manager as provided under s. 287.057(14), F.S.

The CFO must establish and disseminate uniform procedures for grant management pursuant to s. 17.03(3), F.S., to ensure that services have been rendered in accordance with agreement terms before the agency processes an invoice for payment. The procedures must include, but need not be limited to, procedures for monitoring and documenting recipient or subrecipient performance, reviewing and documenting all deliverables for which payment is requested by the recipient or subrecipient, and providing written certification by the grant manager of the agency's receipt of goods and services. The grant manager must reconcile and verify all funds received against all funds expended during the grant agreement period and produce a final reconciliation report.

Chief Financial Officer Audit of Executed Grant Agreements

The CFO must perform audits of the executed state and federal grant agreement documents and grant manager's records. 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. Within 30 days after the receipt of the final audit report, the agency head must submit to the CFO a written statement of explanation or rebuttal concerning findings requiring corrective action, including corrective action to be taken to preclude a recurrence.

State Contract Tracking System

Section 2 amends s. 215.985(16), F.S., to modify the CFO's duties with regards to the state contract tracking system. Within 30 calendar days after executing a contract, each state agency as defined in s. 216.011(1), F.S.,³⁰ must post on the contract tracking system the following contract information and documentation:

- The names of the contracting entities.
- The procurement method.
- The contract beginning and end dates.
- The nature or type of the commodities or services purchased.
- Applicable contract unit prices and deliverables.
- Total compensation to be paid or received under the contract.
- All payments made to the contractor to date.
- Applicable contract performance measures.
- The justification for not using competitive solicitation to procure the contract, including citation to any statutory exemption or exception from competitive solicitation.

³⁰ Section 216.011(1)(qq), F.S., defines "state agency" or "agency" as any official, officer, commission, board, authority, council, committee, or department of the executive branch of state government.

- Electronic copies of the contract and procurement documents that have been redacted to conceal exempt or confidential information.
- Any other information required by the Chief Financial Officer.

Each governmental entity must redact exempt or confidential information from the procurement or contract documents before posting. If a state agency becomes aware that an electronic copy of a contract or procurement document that it posted has not been properly redacted, the state agency must immediately notify the CFO so that the contract or procurement document may be removed. Within 7 business days, the state agency must provide the CFO with a properly redacted copy for posting.

If a party to a contract discovers that a document has not been properly redacted, the party may request that the posting entity redact the information; upon receipt of such a request, the posting entity must redact the confidential or exempt information.

The bill provides a disclaimer from liability to the CFO and DFS for the failure of a posting entity to properly redact information. 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. Requests for copies of documents in the system, or subpoenas for documents, must be made to or served on the entity that maintains the original documents, not the CFO or DFS. The bill provides DFS authority to adopt rules to administer the subsection.

Section 3 repeals s. 216.0111, F.S., which specifies the agency contract information required to be submitted to DFS. That information is now included in s. 215.985, F.S.

Contract Managers

Section 4 amends s. 287.057(14), F.S., to require that every contract manager responsible for a contract of more than \$35,000 must be certified as a contract manager.

Pre-execution Audit of Contracts by Chief Financial Officer

Section 5 amends s. 287.058, F.S., by giving the CFO the authority to review contracts before execution. The review must ensure that all contracting laws have been met; that the contract document contains a clear statement of work, quantifiable and measureable deliverables, performance measures, financial consequences for nonperformance, and clear terms and conditions that protect the interests of the state; that documentation is available to support the contract; and that the associated costs of the contract are not unreasonable or inappropriate. A contract that does not comply may be returned to the submitting agency for revision.

The CFO may establish dollar thresholds and other criteria for sampling the agreements that are to be reviewed prior to execution.

DFS has 10 business days to make a final determination regarding deficiencies in the contract. DFS and the agency entering into the contract may agree to a longer review period. The CFO will provide the agency with information regarding any contract deficiencies. The agency will be

responsible for addressing the deficiencies, and has the option of resubmitting the agreement for subsequent reviews. The CFO must perform a subsequent review to verify that all deficiencies have been addressed upon processing the first payment.

Chief Financial Officer Audit of Executed Contract Documents

Section 6 creates s. 287.136, F.S., which requires the CFO to perform audits of the executed contract documents 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. At the conclusion of the audit, the CFO must discuss the audit and potential findings with the official whose office is subject to audit. The final audit report shall be submitted to the agency head. Within 30 days after the receipt of the final audit report, the agency head must submit to the CFO a written statement of explanation or rebuttal concerning findings requiring corrective action, including corrective action to be taken to preclude a recurrence.

Effective Date

Section 7 provides an effective date of July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The separation of powers provision in the Constitution of the State of Florida states:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The separation of powers doctrine encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power. *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 264 (Fla.1991). Under the nondelegation doctrine the legislature may not delegate the power to enact a law or the right to exercise

unrestricted discretion in applying the law. *Sims v. State*, 754 So.2d 657, 668 (2000). Further, the nondelegation doctrine precludes the legislature from delegating its powers absent ascertainable minimal standards and guidelines. *Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Jones*, 474 So.2d 359, 361 (Fla. 1st DCA 1985).

In this bill, the CFO is permitted to audit grant agreements and certain state agency contracts before they are executed, but the bill provides no legislative standards or thresholds specifying when the CFO may exercise this discretion. The bill specifies that the CFO may establish the dollar thresholds and other criteria for sampling the contracts to be audited before execution. Absent legislative direction on the standards and guidelines to be utilized by the CFO when determining which contracts are to audited, those provisions potentially violate the nondelegation portion of the separation of powers doctrine.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill may have a minimal fiscal impact on state agencies related to the training and certification of grant and contract managers. This fiscal impact is indeterminate and could most likely be handled within existing agency resources.

Senate Bill 1764, which contains substantively the same provisions with regard to the state contract tracking system, provides a 2013-2014 fiscal year appropriation of \$326,775 in recurring funds and \$386,292 in nonrecurring funds from the General Revenue Fund, as well as four fulltime equivalent positions with associated salary rate of 231,409, to the DFS for implementation of the state contract tracking system.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 5 of the bill provides that as part of the CFO's pre-execution audit of contracts, a contract that does not comply with the contract requirement provisions of s. 287.058, F.S., "may be returned to the submitting agency for revision." Requirements in paragraph (b) of that section make it clear the CFO must return the contract to the agency, so this line could be clarified to make the duty mandatory, or could be merged into subsection (b), or eliminated.

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 Governmental Oversight and Accountability on March 14, 2013:

The CS removes provisions in the bill that gave the CFO “approval” authority before execution of contracts, and shortens the time the CFO has to report contract deficiencies back to the agency from 21 days to 10 business days. The CS also specifies that the CFO will provide information about the contract deficiencies to the agency, which is responsible for addressing the deficiencies.

- B. **Amendments:**

None.