

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 822

SPONSOR: Governmental Oversight & Productivity Committee and Senator Dyer

SUBJECT: Government Accountability and Legal Proceedings

DATE: April 5, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Favorable/CS
2.	_____	_____	JU	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The committee substitute provides that any contract entered into in violation of Part III of ch. 112, F.S., which provides a code of ethics for public officers and employees, is presumed void with respect to any former employee of a state agency and is voidable with respect to any private-sector third party who employs or retains any former agency employee. The committee substitute requires the general counsel of an agency to review and approve a contract for private attorney services prior to execution by the agency head. Additionally, the committee substitute requires a contingency fee contract to be “commercially reasonable” and defines that term. The committee substitute also requires the standard addendum that must be part of state contracts for private attorney services to address the internal system of governance if multiple law firms are parties to the contract and to identify the member of the firm that can legally bind the firm. The committee substitute also requires each private attorney who is under contract with the state to provide attorney services to maintain current records and to make such records available pursuant to the public records law.

This committee substitute amends the following sections of the Florida Statutes: 11.066, 112.3175, 112.3185, 287.058, 287.059, 45.062, 216.023, and 284.385.

This committee substitute creates section 60.08 of the Florida Statutes.

II. Present Situation:

Suits Seeking Monetary Damages Against the State or its Agencies - Section 11.066, F.S., relates to suits seeking monetary damages against the state or state agencies. When the state or a state agency is exercising its inherent police power to protect the public health, safety, or

welfare, it is presumed to be acting to prevent a public harm.¹ A person may rebut this presumption in a suit seeking monetary damages from the state or a state agency only by clear and convincing evidence to the contrary.

The section permits payment of monetary damages under a court judgment by the state or its agencies only pursuant to an appropriation made by law. The phrase “appropriation made by law” has the same meaning as in s. 1(c), Art. VII of the State Constitution and means “. . . money allocated for a specific purpose by the Legislature by law in a general appropriations act or a special appropriations act.” To enforce a judgment for monetary damages against the state or a state agency, the sole remedy of the judgment creditor, if there has not otherwise been an appropriation made by law to pay the judgment, is to petition the Legislature in accordance with its rules to seek an appropriation to pay the judgment.

Section 11.066(4), F.S., provides that, notwithstanding s. 74.091, F.S.,

. . . a judgment for monetary damages against the state or any of its agencies may not be enforced through execution or any common-law remedy against property of the state or its agencies, and a writ of execution therefore may not be issued against the state or its agencies. Moreover, it is a defense to an alternative writ of mandamus² issued to enforce a judgment for monetary damages against the state or a state agency that there is not appropriation made by law to pay the judgment.

Public Officers and Employees - Chapter 112, F.S., outlines general provisions affecting public officers and employees. Part III of the chapter contains a code of ethics for public officers and employees. Under s. 112. 3175, F.S., any contract which has been executed that contains provisions in violation of this code is voidable³ by

- < Any party to the contract;
- < In circuit court, by any appropriate action;
- < By the Ethics Commission;
- < By the Attorney General; or
- < Any citizen materially affected by the contract and residing in the jurisdiction represented by the officer or agency entering into such contract.

Section 112.3185, F.S., prohibits any agency employee, after retirement or termination, from having or holding any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer⁴ or employee.⁵

¹ Section 11.066(2), F.S.

² Black’s Law Dictionary, sixth edition (1990), at 961, defines “mandamus” as “. . . a writ issuing from a court of competent jurisdiction, commanding an inferior tribunal, board, corporation, or person to perform a purely ministerial duty imposed by law.”

³ A voidable contract is one which is void as to the wrongdoers but not void as to the wronged party, unless he elects to so treat it. Black’s Law Dictionary, 5th Ed. (1979).

⁴ Section 112.061(2)(c), F.S., defines *officer* to mean an individual who in the performance of his or her official duties is vested by law with sovereign powers of government and who is either elected by the people, or commissioned by the

Procurement of Personal Property and Services - Section 287.058(1), F.S., requires every procurement of contractual service in excess of the threshold amount for Category Two,⁶ except for provision of health and mental health services or drugs in the examination, diagnosis, or treatment of sick or injured state employees or other specified benefits, must be evidenced by a written agreement embodying all provisions and conditions of the procurement of such services. The section includes a number of specific conditions which must be included in the contract if applicable, including:

- < A provision that bills for fees or other compensation for services or expenses be submitted in detail sufficient for a proper preaudit and post audit thereof.
- < A provision that bills for any travel expenses be submitted in accordance with certain requirements.
- < A provision allowing unilateral cancellation by the agency for refusal by the contractor to allow public access to all documents, papers, letters, or other material subject to the provisions of ch. 119, F.S., and made or received by the contractor in conjunction with the contract.
- < A provision dividing the contract into units of deliverables, including reports, findings, and drafts, that must be received and accepted in writing by the contract manager prior to payment.
- < A provision specifying the criteria and the final date by which such criteria must be met for completion of the contract.
- < A provision specifying that the contract may be renewed on a yearly basis for a period of up to two years after the initial contract or for a period no longer than the term of the original contract, whichever period is longer, specifying the terms under which the cost may change as determined in the invitation to bid or request for proposals, and specifying that renewals shall be contingent upon satisfactory performance evaluations by the agency and subject to the availability of funds.

Section 287.059, F.S., regulates the provision of private attorney provisions by the state or state agencies.⁷ The section prohibits an agency from contracting for private attorney services without prior written approval of the Attorney General. There are, however, exceptions to obtaining prior written approval of the Attorney General. Exceptions include private attorney services:

- < Procured by the Executive Office of the Governor or any department under the exclusive jurisdiction of a single cabinet officer.
- < Provided by legal services organizations to indigent clients.

Governor and has jurisdiction extending throughout the state, or any person lawfully serving instead of either of the foregoing two classes of individuals as initial designee or successor.

⁵ Section 112.061(2)(d), F.S., defines *employee* to mean an individual, whether commissioned or not, other than an officer or authorized person . . . who is filling a regular or full-time authorized position and is responsible to an agency head.

⁶ Section 287.017, F.S., establishes the following purchasing category thresholds: (a) Category One is \$15,000; (b) Category Two is \$25,000; (c) Category Three is \$50,000; (d) Category Four is \$150,000; and (e) Category Five is \$250,000.

⁷ Section 287.059(1), F.S., defines *state agency* to include state officers, departments, boards, commissions, divisions, bureaus, councils, and units of organization, however designated, of the executive branch of state government, community and junior colleges, and multicounty special districts exclusive of those created by interlocal agreement of which have elected governing boards.

- < Necessary to represent the state in litigation involving the Florida Casualty Insurance Risk Management Trust Fund pursuant to part II of ch. 284, F.S.
- < Procured by the Board of Regents and the universities of the State University System.
- < Procured by community and junior colleges and multicounty special districts.

Under the section, an agency requesting approval for the use of private attorney services must first offer to contract with the Department of Legal Affairs for such attorney services at a cost pursuant to mutual agreement. That office must decide on a case-by-case basis to accept or decline to provide such services. If the Attorney General's office declines to provide the requested services, the Attorney General's written approval must include a statement that the private attorney service requested cannot be provided by the Attorney General's office or that the private attorney services are cost-effective in the opinion of the Attorney General.

When written approval has been received from the Attorney General, written final approval must be obtained from the agency head (or a designee) prior to contracting for private attorney services. Where approval is not needed from the Attorney General, the agency head or a designee must give written approval prior to contracting.

The Attorney General is required by law to adopt a rule setting forth a standard fee schedule for private attorney services using hourly rates or an alternative billing methodology. In setting the fee schedule, the Attorney General is required to consider:

- < The type of controversy involved and complexity of the legal service needed.
- < The geographic area where the attorney services are to be provided.
- < The novelty of the legal questions involved.
- < The amount of experience desired for the particular kind of attorney services to be provided.
- < Other factors deemed appropriate by the Attorney General.

Pursuant to the section, all agencies must use the standard fee schedule for private attorney services as established by the statute and rule unless the head of the agency or a designee, waives use of the schedule and sets forth the reasons for deviating from the schedule in writing to the Attorney General. The waiver must demonstrate the necessity based upon criteria for deviation from the schedule which the Attorney General establishes in rule.

The standard fee schedule is contained in Rule 2-37.030, F.A.C. Section (1) of the rule permits "specialized attorney services" to be billed up to \$175 per hour. All other attorney services may be billed up to \$125 per hour. Costs for paralegal and other research assistants may be billed at up to \$40 per hour. Exhibits, transcripts, and witness fees are not considered a part of the billable hour, but are reimbursed based upon documented third party vendor charges to the contract attorney.

Rule 2-37.040, F.A.C., contains a procedure for obtaining an exception to the standard fee schedule. Any agency wishing to exceed the standard fee schedule for attorney services must demonstrate necessity for such action to the Attorney General through a statement of waiver which must be signed by the appropriate agency head or designee. Specified waiver criteria include:

- < The inability of the agency to obtain adequate legal representation within the confines of the standard fee schedule. A detailed statement describing agency efforts at procurement must be provided.
- < The agency is unable to obtain attorney services with the special expertise necessary to perform the particular legal function which the agency requires within the fee schedule. A detailed statement describing why special expertise is necessary in the agency's particular circumstance, the analysis which led it to that conclusion, and the reasons why the agency was unable to find such expertise at a price within the standard fee schedule, must be provided.
- < The waiver is necessary in order to provide attorney services as a result of an emergency, an immediate danger to the public health, safety and welfare, or an opportunity for the state to preserve or enhance the public fiscal resources, and that failure to contract immediately for attorney services in excess of the standard fee schedule will work to the detriment of the state. A detailed statement describing the emergency, danger or opportunity in question, any efforts at procurement or attorney services within the standard fee schedule and the reasons why such efforts failed, or a justification why the emergency, danger or opportunity required immediate contracting in excess of the standard fee schedule, must be provided.

Standards for determining when to select outside legal firms for attorney services are also contained in the section. Included among the standards are the magnitude of the case, the firm's ratings and certifications, the firm's minority status, and the firm's prior experience with the agency.

Settlements, Conditions, or Orders When an Agency of the Executive Branch is a Party – Section 45.062, F.S., limits the ability of counsel or a party to an action involving a state executive agency or officer to settle an action, to consent to any condition, or agree to any order in connection therewith, on behalf of the state agency or officer, if the settlement, condition, or order requires the expenditure of or the obligation to expend any state funds or other state resources, or the establishment of any new program, unless the expenditure is provided for by an existing appropriation or program established by law. Prior written notification must be given within 5 business days of the date the settlement or presettlement agreement or order is to be made final to the President of the Senate, the Speaker of the House of Representatives, the Senate and House minority leaders, and the Attorney General.

This section also requires the state executive branch agency or officer to negotiate a closure as soon as possible for the civil action, and prohibits the agency or officer from pledging any current or future action of another branch of state government as a condition of settling a civil action.

Legislative Budget Requests to be Furnished to Legislature by Agencies – Section 216.023, F.S., requires the head of each state agency to submit a final legislative budget request to the Legislature and the Governor. This section provides for the creation of budget instructions by the Executive Office of the Governor, and the appropriations committees of both houses of the Legislature, and, the submission of preliminary budget requests by state agencies, as well as other guidelines on the form, content, and submission dates of budget requests.

Reporting and Handling of Claims – Section 284.385, F.S., requires all departments covered by the Florida Casualty Insurance Risk Management Trust Fund to report all known or potential claims to the Department of Insurance for handling, except employment complaints which have not been filed with the Florida Human Relations Commission, Equal Employment Opportunity Commission, or similar agency. Counsel assigned to such claims by the Department of Insurance are to report regularly to the department on the status of such claims or litigation as required by the department. No claims may be compromised or settled for monetary compensation without the prior approval of the department. Payments for the settlement of any claim covered or reported under this section must be made from the Florida Casualty Insurance Risk Management Trust Fund.

III. **Effect of Proposed Changes:**

The committee substitute is designed to protect the property of the state in lawsuits; to facilitate injunctions against certain criminal conduct; to heighten notification requirements of state agencies regarding claims and lawsuits against an agency and settlements thereof; to enhance certain requirements of contracts for private attorney services; and to tighten restrictions on contracts in violation of ethics laws.

Suits Seeking Monetary Damages Against the State or its Entities - The committee substitute amends s. 11.066 by adding a new subsection (5) that prohibits the placement of a lien upon state property or a monetary recovery made on the state's behalf unless expressly authorized by law.

Public Officers and Employees - The committee substitute modifies section and paragraph numbers in s. 112.3175, F.S., and adds a new subsection (2) that provides that any contract executed in violation of the code of ethics is presumed void with respect to any former *employee* of a state agency and is voidable with respect to any private-sector third party who employs or retains in any capacity any such former *agency employee*. It does not, however, apply to former public officials.

Section 112.3185, F.S., is amended to provide that agency employees who *resign* their positions with the agency are precluded from having any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation while an officer or employee. Currently, only agency employees who *retire or are terminated* are included within the prohibition.

Procurement of Personal Property and Services - Section 287.058, F.S., gives the state the ability to unilaterally cancel contracts when the contractor has refused to allow access to public records relating to the contract; this committee substitute adds the phrase “. . . unless the records are exempt from s. 119.07(1).”

Section 287.059, F.S., is amended to require an agency's general counsel to review the form and legality of a contract for private attorney services and to indicate his or her approval by signing the contract. The agency head is still required to sign the contract, but not until after the general

counsel has approved it. The agency head is specifically required to maintain custody of the contract.

The committee substitute also creates a new subsection (7), which relates to contingency fee contracts for attorney services. Under the new subsection, a contingency fee contract must be “commercially reasonable.” The term “commercially reasonable” is defined to mean the amount permissible pursuant to Rule 4-1.5 of the Rules Regulating The Florida Bar and case law interpreting that rule. Florida Bar Rule 4-1.5 defines the term “commercially reasonable” to mean a reasonable fee that does not exceed:

- < Thirty percent of any recovery of an amount less than \$2 million.
- < Twenty percent of any recovery of an amount equal to \$2 million but less than \$10 million.
- < Ten percent of any recovery of an amount equal to \$10 million or greater.

The committee substitute provides that if the amount of the fee is in dispute, the counsel retained by the state is required to participate in mandatory, binding arbitration. Payment of all attorneys’ fees is subject to appropriation. The committee substitute also provides that attorney’s fees must be forfeited if, during the pendency of the case, the counsel retained by the state takes a public position that is adverse to the state’s litigation or settlement posture.

Further, the committee substitute modifies subsection (10), which is renumbered as subsection (11), which relates to the standard addendum to every contract for attorney services that the Attorney General has adopted for use by all agencies. The addendum is now required to address the internal system of governance if multiple law firms are parties to the contract and must, at a minimum, require that each firm identify one member who is authorized to legally bind the firm.

The committee substitute also creates a new subsection (16) that requires each private attorney who is under contract to provide attorney services for the state to maintain detailed current records, including documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of such attorney services. The section clarifies that these records are subject to the requirements of ch. 119, F.S.

Injunctions – The committee substitute creates s. 60.08, F.S. It states that an action for injunctive relief sought by the state or a state agency must be issued without bond or surety and no bond or surety⁸ will be required during the term of the injunction.

Severability Clause – The committee substitute provides a severability clause.

Settlements, Conditions, or Orders When an Executive Branch Agency is a Party – The committee substitute amends s. 45.062, F.S., to require notices of settlement or presettlement to specify how the agency involved will address the costs in future years, within the limits of current appropriations. It provides that settlements that commit the state to spending in excess of current appropriations or to policy changes inconsistent with current state law will be contingent

⁸ Black’s Law Dictionary, sixth edition (1990) defines “surety” as a person who is primarily liable for payment of debt or performance of obligation of another.

upon and subject to legislative appropriation or statutory amendment. State agencies or officers may agree to use all efforts to procure legislative funding or statutory amendments. It also directs funds received in a settlement by the state to be deposited in the General Revenue Fund or in the appropriate agency trust fund, and states that it is the intent of the Legislature that state agencies and officers advise the appropriate fiscal and substantive legislative committees of appropriate jurisdiction of potential settlements which may commit the state to spending in excess of current appropriations or to policy changes inconsistent with current state law and of progress thereon during the settlement process.

Legislative Budget Requests to be Furnished to Legislature by Agencies –

Section 216.023, F.S., is amended to require the head of each state agency to include in its legislative budget request an inventory of all litigation, in which the agency is involved, that may require additional appropriations to the agency or amendments to the law under which the agency operates. The inventory must include:

- < The names of the parties.
- < The court with jurisdiction.
- < A summary of the complaint.
- < The amount of the claim.
- < The specific laws challenged.
- < The status of the case.

Reporting and Handling of Claims – The Division of Risk Management’s assigned counsel is required to report regularly to the covered department in addition to the Department of Insurance. Prior notification is required under the committee substitute in order to compromise or settle a claim for monetary compensation.

The act takes effect July 1, 2001.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminable; however, in cases where a private attorney or law firm has entered into a contract with the state or a state agency, there will be clearer standards regarding contingency fee amounts that are authorized and these fee amounts will be diminished.

C. Government Sector Impact:

Indeterminable; however, in cases where the state or a state agency enters into a contract with the state or a state agency, there will be clearer standards regarding contingency fee amounts that are authorized and a greater percentage of any monetary award should be paid to the state.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The Attorney General publishes a roster of private law firms that lists the specialty of the firm, the hourly rate, and reference to an agency that has obtained services from the firm.

VIII. Amendments:

None.