

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 1132

SPONSOR: Governmental Oversight and Productivity Committee

SUBJECT: State Procurement of Commodities and Contractual Services

DATE: March 5, 2002 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Favorable/CS
2.			AGG	
3.			AP	
4.				
5.				
6.				

I. Summary:

This bill implements recommendations contained in *Interim Project Report 2002-133*, as well as other recommendations that were made by interested agencies and parties during the review process for the report. The bill's changes include: (a) amending the provisions governing the use of invitations to negotiate (ITNs) to specify when they may be used and the documentation that must be maintained, and to set forth a process for conducting an ITN procurement; (b) cross-referencing the ITN procurement method throughout the chapter; (c) revising the protest bond amount to one percent of the estimated contract amount and providing for prevailing party attorney's fees and costs in protest challenges; (d) providing for electronic posting of agency procurement matters on a centralized website; (e) amending the provisions governing requests for quote to limit usage to commodities and contractual services available on state term contract; (f) requiring competition in emergency procurements, where possible; (g) revising the requirements applicable to sole source purchases; (h) permitting the department to authorize "eligible users" by rule to participate in state term contracts and the online procurement system; (i) clarifying that state term contracts must be competitively procured; (j) creating a request for information tool to be used by the agencies to gain knowledge about the market place; (k) alphabetizing the definition section in ch. 287, F.S.; (l) defining new terms for purposes of clarity and consistency of use within ch. 287, F.S.; and (m) striking duplicative and outdated provisions contained in ch. 287, F.S.

This bill amends the following sections of the Florida Statutes: 61.1826, 120.57, 283.32, 283.33, 283.34, 283.35, 287.001, 287.012, 287.017, 287.022, 287.032, 287.042, 287.045, 287.056, 287.057, 287.0572, 287.058, 287.059, 287.0595, 287.0731, 287.0822, 287.084, 287.087, 287.093, 287.09451, 287.133, 287.134, 287.1345, 373.610, 373.611, 394.457, 394.47865, 402.73, 408.045, 413.036, 445.024, and 455.2177. The bill repeals the following sections of the Florida Statutes: 287.073 and 287.121.

II. Present Situation:

Review of Florida's Competitive Procurement Legislation—Since at least the early 1900's, Florida has statutorily required competitive bidding in state procurement in one form or another.¹ Competitive bidding requirements are not required by the Constitution, nor by common law; rather, such requirements are purely statutory in nature and all states in this nation have them in varying forms. The public policy behind the requirements is stated in s. 287.001, F.S., entitled "Legislative intent," which provides:

The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically; and that documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in the process by which commodities and contractual services are procured. It is essential to the effective and ethical procurement of commodities and contractual services that there be a system of uniform procedures to be utilized by state agencies in managing and procuring commodities and contractual services; that detailed justification of agency decisions in the procurement of commodities and contractual services be maintained; and that adherence by the agency and the contractor to specific ethical considerations be required.

Through the years, Florida's competitive bidding requirements have been amended numerous times. Currently, the competitive bidding requirements applicable to executive agencies² when procuring goods and services are set forth in Part I of ch. 287, F.S. The Department of Management Services (DMS) is the centralized authority statutorily tasked with overseeing the implementation of these requirements and with creating uniform rules for procurement.^{3 4}

In addition to its management duties, the DMS is also authorized to establish state term contracts for commodities and contractual services.⁵ These contracts establish prices for items and designate vendors with whom orders must be placed. State agencies are required to use state term contracts, except where the DMS exempts the contract from required usage or the contract contains a user surcharge.^{6 7}

¹ See Ch. 5969, Acts 1909 (1909 Legislature passed statute requiring county commissioners to award certain bids to lowest bidder).

² "Agency" is defined as any state officer, department, board, commission, division, bureau, and council, and any other division of the executive branch, except the Board of Regents and the State University System.

³ Initially, the responsibility for managing the state's procurement processes was initially placed in the State Purchasing Commission. Subsequently, these responsibilities were transferred to the Department of General Services, now known as the Department of Management Services (DMS). Ch. 69-106, L.O.F.

⁴ Sections 287.032 and 287.042, F.S.

⁵ Sections 287.042(2) and 287.057(19), F.S.

⁶ Section 287.056, F.S.

⁷ The DMS may impose a surcharge on state term contracts to fund the costs of and overhead for its procurement functions. The charge may be collected from the vendor or agency. Section 287.1345, F.S.

The state purchasing process is also partly decentralized. Except in the case of state term contracts, agencies may buy commodities and services themselves, rather than placing orders through the DMS. The applicable statutory competitive bidding requirements for both agency and DMS procurements depend upon which of the following categories of property or services are sought:

- Commodities⁸ and contractual services⁹
- Insurance
- Architectural, engineering, and registered surveying professional services
- Information technology¹⁰
- Private attorney services¹¹

Commodities and contractual services: When an agency wishes to award a contract for commodities or contractual services that costs in excess of \$25,000, the agency must use one of the following procurement methods:

- Invitation to bid (ITB): The ITB must detail the property or service sought, the bid submittal date, all contractual terms, and the criteria to be used for bid review. It is used when the agency is capable of specifically defining the scope of work for contractual services or capable of establishing the precise specifications for the commodity.¹² The contract must be awarded to the lowest, qualified, responsive bidder.^{13 14}
- Request for proposals (RFP): If the agency determines in writing that the use of an ITB is not practicable, it may issue a RFP that identifies the property and/or service sought, all contractual terms, and bid review criteria. The RFP is used when the agency is incapable of specifically defining the scope of work for which the commodities or contractual service is required and when the agency is requesting that a qualified offeror propose commodities or contractual services to meet the specifications of the solicitation.¹⁵ Unlike the ITB process, however, the agency need not award the contract to the lowest bidder; rather, the award may be given to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state, considering the price and other criteria set forth in the RFP.¹⁶

⁸ “Commodities” are defined as supplies, materials, goods, merchandise, food, equipment, certain printing, and other personal property, including portable structures less than 3,000 square feet. Excluded are commodities purchased for resale, and prescriptions and medical devices required by health care providers. Sections 287.012(4), and 287.057(4)(e), F.S.

⁹ “Contractual service” is defined as an independent contractor’s rendering of its time and effort, rather than the furnishing of specific commodities. Excluded are construction contracts entered pursuant to ch. 255, F.S. Section 287.012(7), F.S.

¹⁰ “Information technology” is defined to mean equipment, hardware, software, firmware, programs, systems, networks, infrastructure, media, and related material used to automatically, electronically, and wirelessly collect, receive, access, transmit, display, store, record, retrieve, analyze, evaluate, process, classify, manipulate, manage, assimilate, control, communicate, exchange, convert, converge, interface, switch or disseminate information of any kind or form.

¹¹ Section 287.059, F.S.

¹² Section 287.012(11), F.S.

¹³ Section 287.057(1), F.S.

¹⁴ “Responsive bidder” or “responsive offeror” are defined as a person who has submitted a bid or proposal which conforms in all material respects to the ITB or RFP. Section 287.012(16), F.S.

¹⁵ Section 287.012(15), F.S.

¹⁶ Section 287.057(2), F.S.

- Invitation to negotiate (ITN): If the agency determines that use of an ITB or RFP will not result in the best value to the state, based on factors including price, quality, design, and workmanship, the agency may use an ITN.¹⁷ An ITN is a written solicitation that calls for responses to select one or more persons or entities with which to commence negotiations.¹⁸

Additionally, in the event an agency wishes to procure commodities or contractual services from vendors currently under contract with the DMS, the agency may use a request for quote (RFQ), which is defined as a solicitation that requests pricing information from qualified or registered state contract vendors.¹⁹

To allow for circumstances wherein procurement of goods or services with an ITB, RFP, ITN, or RFQ is not possible, ch. 287, F.S., provides two other procurement options:

- Emergency purchases: If the agency determines in writing that emergency action is required due to an immediate danger to the public health, safety or welfare, or other substantial loss to the state, the agency may procure goods or services without competition and without DMS approval. A copy of the written statement of emergency need must be filed with the Comptroller and the DMS. The subsection does require, however, that the procurement be made with such competition as is practicable under the circumstances.²⁰
- Single source purchases: Goods or services may be exempted from the competitive bid requirements if the purchase is for \$150,000 or less and it is documented that the good or service is only available from a single source. A single source procurement in excess of \$150,000 may not be made until approval is received from the DMS.²¹

Commodities and contractual services that are specifically exempted from the competitive procurement requirements include: prescriptive assistive devices for medical, developmental, or vocational clients; artistic services; academic program reviews; lectures by individuals; auditing services; legal services; health services; services for the mentally or physically handicapped provided by certain not-for-profit corporations; specified Medicaid services; family placement services; prevention services; certain training and education services for injured employees; Department of Transportation contracts for construction and maintenance of state roads;²² services or commodities provided by governmental agencies; certain continuing education events; and contracts where state or federal law prescribes with whom the agency must contract or the rate of payment.²³

E-procurement program for commodities and contractual services: During the 2000 Session, legislation was enacted that directed the State Technology Office, administratively housed within the DMS,²⁴ to develop a program for online procurement of commodities and contractual

¹⁷ Section 287.057(3), F.S.

¹⁸ Section 287.012(20), F.S.

¹⁹ Sections 287.012(21) and 287.057(3), F.S.

²⁰ Section 287.057(4)(a), F.S.

²¹ Section 287.057(4)(c), F.S.

²² Chapter 337, F.S., provides the competitive bid requirements for road contracts.

²³ Section 287.057(4)(e)-(g) and (10), F.S.

²⁴ Section 282.102, F.S.

services.²⁵ On March 1, 2001, an ITN was issued by the DMS for the on-line procurement system. Seventeen responses were received and scored. On October 16, 2001, the DMS issued its Intent to Award to KPMG Consulting.²⁶

State executive agencies are statutorily required to participate in the online procurement program, while other agencies are permitted to participate. Only bidders who have prequalified may participate in the program. The STO is required to promulgate rules for the program that include establishing bidder qualification criteria, criteria for eligible commodities and contractual services, procedures for access to on-line procurement, and any criteria warranting an exception to participation in on-line procurement.²⁷

The DMS and the STO may collect fees for using on line procurement, which may be imposed on an individual transaction basis or as a fixed percentage of the cost savings generated. At a minimum, the fees must cover the cost of the online program.²⁸

Procurement of insurance: The DMS is responsible for purchasing insurance for state agencies, except that agencies may purchase title insurance or may make emergency purchases for periods no greater than 30 days. The purchase of insurance, whether made by the DMS or an agency, must comply with the competitive bid requirements for commodities, except that the DMS may authorize the purchase of insurance by negotiation when this is in the best interest of the state.²⁹

Procurement of architectural, engineering, and registered surveying services: The “Consultants’ Competitive Negotiation Act”³⁰ governs the acquisition of architectural, engineering, and registered surveying professional services by Florida agencies. The term “agency” is broadly defined and applies to many public entities not otherwise subject to the chapter’s competitive bidding requirements. “Agency” means the state, a state agency, a municipality, a political subdivision, a school district, or school board.³¹

When an agency wishes to procure construction services that cost in excess of \$250,000 or planning and study services that cost in excess of \$25,000, it must publicly notice the procurement. The notice must include a description of the project and how interested consultants may apply for consideration. Any firm responding to the notice must first be certified by the agency pursuant to the agency’s regulations.³²

When evaluating responses, the agency must consider statements of qualifications and performance data, and must conduct discussions with at least three firms. The agency must select at least three firms in order of preference that are deemed to be the most qualified to perform the services.³³

²⁵ Ch. 2000-164, L.O.F., now s. 287.057(23), F.S.

²⁶ <http://www.myflorida.com/myflorida/business/search/responses/index.html>

²⁷ Section 287.057(23)(a)-(b), F.S.

²⁸ Section 287.057(23)(c), F.S.

²⁹ Sections 287.022, and 287.057(4)(a) and (d), F.S.

³⁰ Section 287.055, F.S.

³¹ Section 287.055(2)(b), F.S.

³² Section 287.055(2), F.S.

³³ Section 287.055(4), F.S.

The agency is directed to negotiate a contract with the most qualified firm at a compensation determined to be fair, competitive, and reasonable. Only during this negotiation phase may fees be requested and considered. If the agency is unable to negotiate a satisfactory contract with the firm considered to be the most qualified, it must undertake negotiations with the second most qualified firm. In the event the agency is unable to negotiate a satisfactory contract with either of the top two firms, other firms are to be selected in order of competency and negotiations continued until an agreement is reached.³⁴

Procurement of information technology resources: An agency may procure information technology resources with an ITB when it is able to precisely define the resource required, and only the price is at issue. If the agency, however, determines that alternative means will meet its information technology needs and that other criteria, in addition to price, should be considered, the agency may utilize a RFP. Additionally, as with the procurement of commodities and services, the agency may be exempted from the competitive bid requirements if the resource is available only from a single source and the agency files a single source certification request with the DMS.³⁵

Procurement of Private Attorney Services: Agencies³⁶ are required to offer to contract with the Attorney General (AG) before procuring for private attorney services, except where the services are: (a) procured by the Executive Office of the Governor, a department headed by a cabinet officer, a community college, the State University System, the Florida School for the Deaf and Blind, or a multicounty special district; (b) provided by a legal services entity for indigent clients; or (c) necessary for litigation involving the State Risk Management Trust Fund. The AG must decide on a case-by-case basis whether to accept or decline the case based on staffing, expertise, or other legal or economic considerations. If the AG declines the case, the AG's written authorization for private attorney services must state that the office cannot provide the services or that private attorney services are more cost-effective.³⁷

Ch. 287, F.S., preferences in state contracting: Chapter 287, F.S., creates the following preferences in state contracting:

- Certified Minority Business Enterprises (MBEs): State agencies are encouraged to spend the following percentage of contract monies with MBEs: 21 percent of construction moneys, 25 percent of architecture and engineering moneys, 24 percent of commodities moneys; and 50.5 percent of contractual service moneys.³⁸ To achieve these goals, agencies may: (1) set-aside state contracts for bidding only among MBEs or only among bidders who agree to use MBEs as subcontractors³⁹; and (2) grant price preferences up to 10 percent to MBE bidders on commodity and service contracts.⁴⁰ Agencies are required to award commodity

³⁴ Section 287.055(4) and (5), F.S.

³⁵ Section 287.073, F.S.

³⁶ "Agency" is defined to include state officers, departments, boards, commissions, divisions, bureaus, councils, and other executive branch units, community colleges, and certain multicounty special districts.

³⁷ Section 287.059, F.S.

³⁸ Section 287.09451(4)(n), F.S.

³⁹ Sections 255.102, 287.057, and 287.093, F.S.

⁴⁰ Section 287.057(7)(c), F.S.

and service contracts to a MBE if two or more equal bids are received and one of the bids is from a MBE.⁴¹

- **Florida Businesses:** If an out-of-state business is the lowest bidder for a competitively bid state contract and if the state the business is domiciled in grants preferences to in-state bidders, the Florida agency may award a preference to an in-state bidder that is equal to the preference granted by the state of the lowest responsible bidder.⁴²
- **In-State Commodities:** Whenever two or more competitive sealed bids are received, which relate to commodities grown, or produced within Florida, and whenever the bids are equal with respect to price, quality, and service, the state commodity bid must be given preference.⁴³
- **Businesses with Drug-Free Workplace Programs:** Whenever two or more bids are received by the state or any political subdivision that are equal with respect to price, quality, and service, the bid from a business that has certified it has implemented a drug-free workplace program must be given preference.⁴⁴
- **Certain Foreign Manufacturers:** Whenever price, quality, and service are the same, a foreign manufacturing company with a factory in Florida that employs more than 200 employees shall have preference over any other foreign company.⁴⁵
- **Products with Recycled Content:** State agencies may allow up to a 10 percent price preference for responsive bidders certifying that the products contain at least the minimum percentage of recycled content set forth in the ITB. An additional 5 percent price preference may be allowed for bidders certifying the products are made of materials recovered in Florida.⁴⁶

Bid Protests: Bidders wishing to challenge the procurement process must file their notice of protest within 72 hours after: (a) receipt of notice of the ITB or RFP when challenging the ITB or RFP specifications; (b) posting the bid tabulation if challenging the contract award; or (c) receipt of the notice of any other agency decision if challenging that particular decision. The formal written protest must be filed within 10 days after a notice of protest is filed.⁴⁷ Additionally, a protestor must file a bond in the amount of 1 percent of the agency's estimated amount of the contract volume or \$5,000, whichever is less.⁴⁸ Upon receipt of a timely filed formal written protest, the agency must stop the procurement or contract award process until the protest is resolved by final agency action, unless the agency determines in writing that the

⁴¹ Section 287.057(11), F.S.

⁴² Section 287.084, F.S.

⁴³ Section 287.082, F.S.

⁴⁴ Section 287.087, F.S.

⁴⁵ Section 287.092, F.S.

⁴⁶ Section 287.045(5), F.S.

⁴⁷ Section 120.57(3)(b), F.S.

⁴⁸ Section 287.042(2)(c), F.S.

continuance of the procurement or contract award process is necessary to avoid an immediate and serious danger to the public health, safety, or welfare.⁴⁹

For bid protests to agency action other than a rejection of all bids, the administrative law judge is required to conduct a de novo proceeding to determine if the agency's proposed action is contrary to statute, rule or policy, or the bid or proposal specifications.⁵⁰ The standard of proof in these proceedings is whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. The standard of review for bid protests to the rejection of all bids is lower because such action treats all bidders equally and is thus subject to less scrutiny than when an agency treats bidders differently. An agency's decision to reject all bids will only be overturned if the agency's action is illegal, arbitrary, dishonest, or fraudulent. Statute specifically provides that no submissions that supplement or amend a bid or proposal after the bid or proposal opening may be considered during a protest. Statute does not address what submissions may be considered in an ITN procurement protest.

Review of Interim Project Report 2002-133, entitled, "Chapter 287: Competitive Procurement Process for Acquisition of Property and Services"—SB 1738, which was passed by the 2001 Legislature, amended ch. 287, F.S., by statutorily codifying two new procurement methods: invitations to negotiate and requests for quotes. During the interim, the Governmental Oversight and Productivity Committee reviewed these new methods, and considered whether clarifying changes for the statutory sections governing these methods were warranted. The report recommended several changes to the statutes creating invitations to negotiate and request for quotes, which are discussed below, and additionally, provided an overview of recommendations for other ch. 287, F.S., improvements that were suggested by interested parties during the project's review, but which were not directly related to the amendments enacted by SB 1738.

Invitations to Negotiate: The interim project found that the ITN method of procurement had been utilized by state agencies since at least 1998 by state agencies pursuant to DMS rule.⁵¹ Prior to the year 2000, former Rule 60A-1.018,⁵² provided that commodity and services contracts in excess of \$25,000 could be negotiated without using an ITB or RFP by either the DMS or an agency when the DMS determined this method was in the best interest of the state. This rule was repealed on January 2, 2000, when Rule 60A-1.001, F.A.C., took effect. The new rule now defines the ITN method of procurement as a competitive solicitation used when an ITB or RFP is not practicable, and requires an agency to document the conditions and circumstances resulting in its decision to use the ITN method.

The ITN method of procurement was not specifically provided for in statute until the passage of SB 1738; however, the statutory authority for the ITN rule, which preceded the enactment of SB 1738, appears to be derived from s. 287.042(5)(a), F.S., that requires the DMS to prescribe methods of negotiating and awarding contracts, and s. 287.057(4)(b), F.S., that permits the DMS to except contracts from the competitive bid process.

⁴⁹ Section 120.57(3)(c), F.S.

⁵⁰ Section 120.57(3)(f), F.S.

⁵¹ See *Memorandum No. 21-97-98* by George Banks, State Purchasing Director.

⁵² Rule 60A-1.018, F.A.C., repealed January 2, 2000.

Representatives from the DMS have explained that that need for the ITN method stems from the lack of ability to negotiate the best value for the state during the ITB and RFP procurement processes. In an ITB procurement, the agency specifically defines the commodities sought or the scope of work required. Bids submitted in response to an ITB are reviewed by the agency, and the lowest bid that is responsive to the ITB solicitation must be selected for the contract award. In a RFP procurement, the agency generally identifies the commodity or scope of work sought and requests that responsible vendors propose a solution. With a RFP, both price and non-price criteria may be considered by the agency, as, pursuant to statute, the contract does not have to be awarded to the lowest priced vendor, but rather to the vendor whose proposal is the most advantageous to the state. Consideration of criteria other than price does afford flexibility in selecting the contract recipient; however, that flexibility is restricted by case law, which appears to hold that the contract that results from a RFP procurement cannot deviate in any material respect from the winning proposal. In other words, case law seems to prohibit negotiations with a vendor during a RFP procurement that occur after the vendor's proposal has been selected to receive a contract award.

In *State Department of Lottery v. Gtech, Corp.*, 26 Fla. L. Weekly D621 (Fla. 1st DCA Feb. 28, 2001), Gtech and Automated Wagering International, Inc. (AWI) were the only two vendors who filed proposals in response to a RFP issued by the Department of Lottery (DOL) for an on-line lottery system. The DOL ultimately negotiated a contract with AWI. Gtech, the losing vendor, challenged the contract, arguing that it was void because it altered certain material provisions required by the RFP and added other provisions never contemplated by the RFP.

On appeal, the court reviewed RFP Provision 8.7.2., which provided that the DOL Secretary was to negotiate a contract with the most highly qualified respondent if he/she determined that the proposal was the best method of obtaining the on-line system. The court found that the contract entered into between the DOL and AWI contravened this requirement. According to the court, the fact that the contract contained several material changes to the proposal evidenced an implicit determination by the DOL that the proposal was not the "best method." The court stated that when the DOL decided to negotiate a contract that was materially different than the AWI proposal it should have rejected both responses to the RFP and started anew.⁵³

The effect of the court's holding appears to be that the selected proposal in a RFP procurement must be reduced to a contract; i.e., negotiations after the receipt of proposals that materially change the proposal are not permitted. Such restrictiveness is harmless in cases where the proposal satisfies all of the agency's needs; however, in other cases, this restrictiveness may result in the state failing to achieve a solution best suited to its needs. For example, agencies some times lack sufficient technical expertise to draft a RFP that accurately details every aspect

⁵³ The *Gtech* Court certified two questions to the Florida Supreme Court as being matters of great public importance: (1) Does the Department of Lottery, pursuant to a specification included in a request for proposals, have the authority to negotiate substantive contract terms with the most highly qualified respondent, and pursuant to such negotiations, award a contract that must be upheld absent a finding of illegality, fraud, oppression, or misconduct?; and (2) Where the negotiation clause in a request for proposals indicates that the agency will negotiate a contract with the most highly qualified respondent, including conditions and price that the agency deems to be fair, competitive, and reasonable, may an unsuccessful proposer that has failed to administratively contest the negotiation clause later attack the contract in circuit court on the basis that the negotiations conducted pursuant to the terms of the clause were impermissible? The *Gtech* case is currently pending before the Florida Supreme Court.

of the procurement. The best an agency may be able to do in the RFP is describe the problem and request that vendors propose solutions. Thereafter, the agency may find that one or more proposals provide a good solution, but that it is necessary to further tailor the solution to agency specific needs. Short of resoliciting the entire procurement, this refinement can only occur with direct negotiations. Under *Gtech*, however, it would appear that such negotiations would be in vain as the ultimate contract cannot materially differ from the selected proposal.

Moreover, in the case of information technology procurements, it is a given that advancement occurs daily in this field. Consequently, it may be possible that advancements occur between the time a vendor submits its proposal and the time that a contract is ultimately entered. Such advancements, in order to provide the state with the best value, may warrant deviating from the specific solution proposed in the proposal. However, under the holding in *Gtech* it would appear that terms different from the original proposal would be precluded.

While providing agencies with the ability to negotiate through an ITN is desirable for the reasons explained above, it is also necessary to statutorily insure that the ITN process contains sufficient uniform procedures and accountability measures. Unfettered discretion to negotiate contractual requirements, terms, or conditions that differ from those set forth in the ITN, would undermine the legislative intent behind ch. 287, F.S., to have fair and open competition in public procurement. Plainly, fair and open competition mandates that all prospective vendors have equal opportunity to bid for the state's business.

As discussed in the report, the current statutory provisions governing ITNs do not appear to provide sufficient uniform procedures and accountability for ITN usage. These statutes fail to specify when an ITN may be used, what information should be contained in the ITN, guidelines for the selection of vendors with which to negotiate or to receive the contract award, and documentation requirements. Accordingly, this bill amends these provisions to:

- Limit ITN usage to only those situations where the agency can specify reasons in writing why negotiation is necessary for the state to achieve the best value.
- Require that an agency head or his or her designee approve ITN usage.
- Specify the type of information that must be contained in an ITN.
- Require that agencies rank responsive replies based on the criteria set forth in the ITN, and select vendors with which to negotiate based on those rankings.
- Require that the contract be awarded to the responsible and responsive vendor that the agency determines will provide the best value to the state.
- Require that the contract file contain a statement that explains the basis for vendor selection and that sets forth the vendor's deliverables and price, pursuant to the contract, with an explanation of how these deliverables and price provide the best value to the state.

These new statutory requirements should have the effect of increasing accountability for ITN procurement decisions and facilitating legislative and public review of the executive branch procurement process.

Requests for quotes: Currently, a RFQ is statutorily defined as a solicitation that requests pricing information from qualified or registered state contract vendors. As noted in the interim report, representatives from the DMS and STO have indicated that this tool is necessary to permit

agencies to obtain the lowest price possible for commodities or services available on state term contract. Often times the price of a commodity or service, for example information technology, will drop at some point after the state term contract is entered, and the apparent intent of a RFQ is to allow an agency to request price quotes that reflect actual market value from the state term contract vendors, rather than simply paying the state term contract price, which may be higher than the current market price.

The report found, however, that the current statutory definition of RFQ should be clarified. While the RFQ is desirable when used in the manner described above, the RFQ, as currently defined, can also be used to purchase goods and services not available on state term contract. The only statutory requirement is that a RFQ be made to a state term contract vendor. Thus, an agency could obviate competitive solicitation requirements by purchasing goods or services not included within the scope of a vendor's state term contract, but which are otherwise offered by the vendor. Accordingly, as recommended in the report, this bill creates a new statutory provisions governing the use of a RFQ so that it may only be used to determine if a price, term, or condition more favorable to the agency or eligible user than that provided in the state term contract is available.

Additional ch. 287, F.S., issues: During the review conducted for the interim report and during the drafting of this bill, numerous other recommendations for ch. 287, F.S., improvements were provided by interested agencies and parties. The following recommendations are implemented in this bill:

- Defining the term “eligible users” as municipalities, political subdivisions, and certain non-profit businesses that may be authorized by the DMS to use state term contracts and participate in the online procurement system. This authority will enable the state to achieve greater economies of scale in state purchasing.
- Defining the term “state term contract,” as a term contract competitively procured by the DMS for use by agencies and eligible users. “State term contract” is not currently defined in ch. 287, F.S., and it has been unclear as to whether the contract is required to be competitively procured. Under the bill’s definition, competitive procurement will be mandated.
- Defining the term “request for information” as a written request made by an agency to prospective vendor for information about commodities or contractual services. This tool should enable agencies to become more knowledgeable about the current marketplace prior to drafting solicitations.
- Requiring agencies to obtain pricing information from at least two vendors prior to making a non-competitive emergency purchase, unless it is documented in writing that it doing so will increase the immediate danger. This new requirement is in response to an Auditor General report in which it was found that current law’s requirement that emergency purchases be made with such competition as is practicable was not adequate. The report indicated that agencies were often failing to demonstrate the impracticability of competition.⁵⁴ The bill’s enhanced documentation requirements should help address this issue and improve agency accountability.

⁵⁴ *Single Source and Emergency Procurement, Selected State Agencies and the Department of Management Services Operational Audit*, Auditor General, September 2001.

- Requiring agencies to electronically post descriptions of desired purchases on a website for at least seven days whenever the agency believes that the commodities or contractual services are only available from single source. This new requirement is in response to an Auditor General report in which it was found that agencies were sometimes failing to document their decision to use the single source exception, and additionally that agency documentation sometimes failed to support the assertion that the vendor was the single source available.⁵⁵

Other issues suggested by interested parties and mentioned in the report, which the Legislature may wish to consider in upcoming sessions, included:

- Reviewing the continued public purpose for the numerous exemptions to the competitive solicitation process contained in ch. 287, F.S.
- Reviewing the continued public purpose for the numerous purchasing preferences contained in ch. 287, F.S.
- Determining whether the purchasing category amounts contained in s. 287.017, F.S., should be increased.
- Monitoring the implementation of the new ITN procurement process, and determining whether further statutory amendment is needed.
- Reviewing best practice methods for conducting negotiations pursuant to ss. 287.055 and 287.057, F.S., and determining if any of these methods should be codified.
- Monitoring the implementation of the online procurement system during the next year and determining what statutory changes may be necessitated by this revolution in how Florida does business.

The Legislature may wish to direct staff to review these issues during the 2002-2003 interim.

III. Effect of Proposed Changes:

Section 1. The bill amends s. 61.1826, F.S., to conform a cross-reference to changes made by the act.

Section 2. The bill amends s. 120.57(3)(a), F.S., which requires notice of agency procurement decisions to be given by posting at the DMS office or the place where the bids were opened, or by mail or hand delivery. The bill amends this section to set forth one uniform method of noticing agency procurement decisions. Under the bill, an agency is required to electronically post notice of a decision or intended decision concerning a solicitation, contract award, or exceptional purchase. “Electronically post” is defined in s. 287.012(11), F.S., of the bill as, “the posting of solicitations, agency decisions or intended decision, or other matters, relating to procurement, on a centralized Internet website designated by the department for this purpose.”

The bill amends s. 120.57(3)(b), F.S., to incorporate the term “solicitation” as defined by the act in s. 287.012(7), F.S., and to provide that the 72-hour time frame for protesting an agency’s decision or intended decision begins when the notice is posted, rather than when the notice is received as is provided in current law. Further, the bill moves a provision currently contained in

⁵⁵ *Id.*

s. 287.042(2)(d), F.S., that specifies the procedures applicable to a protest of the terms, conditions, and specifications contained in a solicitation, to s. 120.57(3)(b), F.S., as its content is relevant to the provisions of paragraph (3)(b).

The bill amends s. 120.57(3)(b) through (3)(d), F.S., to provide that state, rather than legal, holidays are not included in the computation of time required by the subsection. Holidays recognized by the state are set forth in s. 110.117, F.S.

The bill specifies in s. 120.57(3)(f), F.S., that in an ITN procurement no submissions that amend or supplement a reply after the announcement of the contract award may be considered in a protest proceeding.

Finally, the bill provides in s. 120.57(3)(g), F.S., that the definitions contained in s. 287.012, F.S., apply to the subsection.

Sections 3-6. The bill amends ss. 283.32, 283.33, 283.34, and 283.35, F.S., which relate to state procurement of printing services, to conform cross-references and terms to changes made by this act.

Section 7. The bill amends s. 287.001, F.S., to conform a term to changes made by this act.

Section 8. The bill amends s. 287.012, F.S., to alphabetize the definitions, revise existing definitions, and create new definitions.

The bill amends the term “agency” to provide that the University and College Boards of Trustees or state universities and colleges are exempted from the provisions of ch. 287, F.S. Existing law refers to the Board of Regents or State University System, which are no longer in existence.⁵⁶

The bill creates the term, “best value,” which means the highest overall value to the state based on objective factors that include, but are not limited to, price, quality, design, and workmanship.

The bill adds the term “information technology” to the definition of “commodity.” It also amends the definition so that “portable structures with floor space of less than 5,000 square feet,” rather than 3,000 square feet as provided in current law, are considered a “commodity.”

The bill grammatically clarifies the meaning of the terms, “competitive sealed bids” and “competitive sealed proposals,” and adds a reference to “competitively sealed replies,” due to the addition of the ITN method of procurement. Additionally, the bill removes the terms “bidder” and “offeror,” and substitutes the term “vendor.”

The bill creates the terms, “competitive solicitation” and “solicitation,” which are defined to mean an invitation to bid, request for proposals, or an invitation to negotiate.

⁵⁶ See Ch. 2000-321, L.O.F.

The bill creates the terms, “electronic posting” or “electronically post,” which are defined as, the posting of solicitations, agency decisions or intended decisions, or other matters relating to procurement, on a centralized Internet website designated by the DMS.

The bill creates the term “eligible user,” which is defined as any person or entity authorized by the department, pursuant to rule, to purchase from state term contracts or to use the on-line procurement system.

The bill grammatically clarifies the definition for “exceptional purchase,” adds references to “replies” that are received in ITN procurements, and adds that purchases made by agencies, after receiving approval from the DMS, from a contract competitively procured by another agency are considered exceptional purchases. The bill also strikes existing language that permitted the DMS to grant exceptions to agencies to make purchases of commodities from vendors other than state term contract vendors.

The bill amends the definition of “information technology” by cross-referencing s. 282.0041, F.S., the section of law that defines “information technology” for purposes of ch. 282, F.S., entitled the “Information Resources Management Act.”

The bill amends the definitions of “invitation to bid,” “request for proposals,” and “invitations to negotiate” to make the provisions parallel within this definition section and within s. 287.057, F.S., where the terms are further discussed. Further, the bill amends the definition of “invitation to negotiate” to add that the ITN is to be used when the agency determines that negotiations may be necessary for the state to receive the best value.

The bill creates the term, “negotiation,” which is defined as discussions between the agency and vendors that may result in clarification or revision of a vendor’s reply to an invitation to negotiate.

The bill creates the term, “request for information,” which is defined as a written request made by an agency to vendors for information about commodities or contractual services. Responses to these requests are not offers and cannot be accepted to form binding contracts.

The bill amends the definition for the term, “request for quote,” to provide that it is an oral or written request for written pricing or services information from a state term contract vendor for commodities and contractual services available on a state term contract from that vendor.

The bill clarifies the definitions of “qualified bidder,” “responsible bidder,” “qualified offeror,” or “responsible offeror” to achieve consistent usage within ch. 287, F.S. The term “vendor” is substituted for the terms “bidder” and “offeror.” The term “qualified” is stricken, and thus, only the term “responsible vendor” remains. The substantive definition for this term is otherwise unchanged by the bill.

The bill amends the definitions of “responsive bid” and “responsive proposal” by also adding “responsive reply.” The new terms, “vendor” and “solicitation” used in the bill are substituted for terms within the definition, but the substantive meaning of the definition is not changed.

The bill substitutes the term “responsive vendor” for the terms, “responsive bidder” and “responsive offeror.” The bill adds reference to the terms, “reply” and “solicitation,” but does not amend the substantive meaning of the definition.

The bill defines the term “state term contract” as meaning a term contract that is competitively procured by the DMS pursuant to s. 287.057, F.S., and that is used by agencies and eligible users pursuant to s. 287.056, F.S.

The bill grammatically clarifies the definition of “term contract.”

Section 9. The bill amends s. 287.017, F.S., to delete the requirement that the DMS annually adjust the purchasing category amounts.

Section 10. The bill amends s. 287.022, F.S., to correct a cross-reference.

Section 11. The bill amends s. 287.032, F.S., to state that the DMS is to provide uniform policies for the procurement of commodities and contractual services for use by agencies and eligible users. The bill deletes the requirement that the DMS have responsibility for state-owned surplus tangible personal property, as that responsibility was passed to the agencies in 1996 by s. 273.055, F.S.

Section 12. The bill grammatically clarifies s. 287.042, F.S., eliminates obsolete date references, and makes conforming changes with the bill’s new terms.

The bill creates s. 287.042(1)(g), F.S., to provide that products and services, which are offered by a non-profit agency for the blind or for the other severely handicapped qualified pursuant to ch. 413, F.S., and which are determined to be suitable for purchase pursuant to s. 413.035, F.S., must be included in any DMS listing of state term contracts.

The bill clarifies s. 287.042(2)(a), F.S., to provide that the DMS has the authority to establish purchase agreements and to competitively procure state term contracts to be utilized by agencies and eligible users.

The bill amends s. 287.042(2)(b), F.S., to provide that when the state does not prevail in a bid protest that the contract may be cancelled and reawarded. Existing law provides that the reaward is to be made to the prevailing party; however, the prevailing party is not necessarily the next vendor in line for the contract.

The bill amends s. 287.042(2)(c), F.S., to provide that the protest bond amount shall be one percent of the estimated contract amount. The estimated contract amount is either the contract price submitted by the protestor, or if no price was submitted, the amount is determined by the agency based on factors including, but not limited to, the price of similar previous or existing contracts, the Legislative appropriation for the contract, or the fair market value of similar commodities or contractual services. The bill specifies that the agency must provide the estimated contract amount to the vendor within 72 hours after the filing of a notice of protest, and that the estimated contract amount cannot be protested. The bill provides that an official

bank check may be accepted in lieu of a bond. Finally, the bill provides for prevailing party attorney's fees and costs.

The bill deletes the DMS's responsibility for general supervision over all state storerooms and all agency commodities contained in s. 287.042(3), F.S., in order to clarify that the ultimate accountability for such supervision is within each state agency.

The bill amends s. 287.042(3)(b), F.S., which provides that solicitations are to be noticed by publication in the Florida Administrative Weekly, on Government Services Direct, or by mail at least before the date set for the receipt of bids, proposals, or replies. Under the bill, solicitations are to be electronically posted for at least 10 days, unless the department or other agency determines in writing that a shorter period of time is necessary to avoid harming the interests of the state. Further, the bill specifies that the DMS shall designate a centralized Internet website for all agency postings, and requires the DMS to publish that Internet address in the Florida Administrative Weekly for one year after the effective date of the bill.

The bill amends s. 287.042(3)(f), F.S., to require the DMS to develop procedures to be used by agencies issuing solicitations, that include requirements to describe commodities, services, scope of work, and deliverables in such a manner as to promote competition.

The bill creates s. 287.042(3)(g), F.S., to require the DMS to develop procedures to be used by agencies when issuing requests for quotes and requests for information.

The bill amends s. 287.042(4), F.S., to provide that the DMS shall prescribe methods for conducting conferences or written question and answer periods for purposes of responding to vendor questions.

The bill amends s. 287.042(8), F.S., to provide that the DMS shall provide commodity and contractual service purchasing rules to the Comptroller and agency through an electronic medium or any other means.

The bill amends s. 287.042(13), F.S., to require that the determination that it is in the state's best interest to award contracts to multiple suppliers be in writing. Further, the bill specifies that only vendors who are both responsible and responsive may receive contract awards.

The bill amends s. 287.042(14), F.S., to delete the requirement that the DMS have responsibility for state-owned surplus tangible personal property.

The bill amends s. 287.042(16), F.S., to require that the determination that it is cost-effective and in the best interest of the state to allow agencies to make purchases from contracts let by governmental entities be in writing.

Section 13. The bill amends s. 287.045, F.S., to clarify that its requirements apply to the DMS and other agencies, and to make conforming changes for the bill's new terms.

Section 14. The bill amends s. 287.056, F.S., to specify that eligible users may purchase from state term contracts procured pursuant to s. 287.057, F.S. The bill also provides that agencies and

eligible users may use a request for quote to obtain written pricing or services information from a state term contract vendor for commodities or contractual services available on a state term contract from that vendor. The bill specifies that the purpose of a request for quote is to determine whether a price, term, or condition more favorable to the agency or eligible user than that provided in the state term contract is available. Finally, the bill specifies that a request for quote is not subject to protest under s. 120.57(3), F.S.

Section 15. The bill amends s. 287.057(1)-(3), F.S., to make the provisions grammatically parallel within this section, and amends s. 287.057, F.S., to correct cross-references and make conforming changes with the bill's new terms.

The bill amends s. 287.057 (1), F.S., to clarify that the contract award in an ITB procurement shall be made to the lowest, responsible, and responsive vendor.

The bill amends s. 287.057(2), F.S., to clarify that documentation supporting the basis on which a contract award is made in a RFP procurement must be contained in the contract file.

The bill amends s. 287.057(3), F.S., to set forth a new process for ITN procurements. Under the bill, the agency may not use the ITN method of procurement unless it determines in writing that neither an ITB nor RFP will result in the best value to the state. This written determination must contain reasons that specify why negotiations may be necessary for the state, and must be approved by the agency head or his or her designee prior to the advertisement of an ITN.

The ITN is required to be made available simultaneously to all vendors, and must include a statement of the commodities or contractual services sought; the time and date for the submittal of replies and of the public opening; and all terms and conditions applicable to the procurement, including the criteria to be used in determining the acceptability of the reply.

The agency must evaluate and rank responsive replies, and must select, based on the ranking, one or more vendors with which to negotiate. After negotiations, the agency is required to award the contract to the responsible and responsive vendor that the agency determines in writing will provide the best value to the state. The contract file must contain a written statement that explains the basis for vendor selection, and that sets forth the vendor's deliverables and price, pursuant to the contract, with an explanation of how these deliverables and price provide the best value to state.

The bill creates a new subsection (4) that authorizes agencies to conduct conferences or written question and answer periods, prior to the submittal of bids, proposal, or replies, for purposes of assuring the vendors' full understanding of the solicitation requirements. The vendors must be accorded fair and equal treatment with respect to any opportunity for discussion and revision of bids, proposals, or replies.

The bill amends paragraph (5)(a), to require that agencies obtain pricing information from at least two vendors prior to making an emergency procurement, unless the agency determines in writing that the time required to obtain pricing information would increase the immediate danger to the public health, safety, or welfare or other substantial loss to the state.

The bill clarifies paragraph (5)(b), to provide that purchases made by an agency from a state term contract are exempted from the chapter's competitive solicitation requirements, as state term contracts have been competitively procured. Further, the bill provides that an agency's purchase, after receiving approval from the DMS, from a contract competitively procured by another agency is exempt.

The bill amends paragraph (5)(c), to provide a new requirement for sole source purchases. Under the bill, an agency that believes a commodity or contractual service is only available from a single source must electronically post a description of the commodity or service for a period of at least 7 business days. The description must also request that prospective vendors provide information regarding their ability to supply the commodities or contractual services described. If it is determined in writing by the agency after reviewing any information received from prospective vendors that the commodity or service is only available from a single source, the agency may proceed with the purchase if the price is less than \$150,000, or must request the approval of the DMS if the price is more than \$150,000.

The bill amends subsection (6), to clarify that its requirements apply to both the DMS and the agencies.

The bill amends subsection (7), to provide that an agency need only forward a copy of a solicitation issued by the agency when requested by the DMS.

The bill amends subsection (12), which provides that if two equal responses to an ITB or RFP are received and one is from a certified minority business enterprise, that the contract shall be awarded to the certified minority business enterprise. The bill adds reference to an ITN and RFQ in this subsection.

The bill amends subsection (14), to clarify that emergency or sole source contracts cannot be renewed; to specify that contracts may be renewed for a period no longer than 3 years or the original term, whichever is longer; to add reference to ITNs; to specify that costs associated with a renewal may not be charged; and to provide that renewals are subject to the availability of funds.

The bill amends subsection (17), to provide for the appointment by the agency head of persons to evaluate and to negotiate contracts in procurements costing in excess of \$150,000. Under the bill, three persons must be appointed as evaluators, who, collectively, have experience and knowledge in the relevant program areas and service requirements. Further, three persons must be appointed as negotiators, who, collectively, have experience and knowledge in negotiating contracts, contract procurement and the relevant program areas and service requirements.

The bill grammatically clarifies subsection (18), and clarifies that vendors who respond to a request for information are not prohibited by the subsection from contracting with an agency.

The bill strikes current subsection (19), as this is duplicative authority for the DMS to establish state term contracts.

The bill amends subsection (23) to specify that DMS, in consultation with the STO and the Comptroller, shall establish the online procurement program. Further, the bill provides that the DMS, in consultation with the STO, shall adopt rules for the online procurement program.

Section 16. The bill amends s. 287.0572, F.S., to refer to ITNs and to provide that all state contracts that include provisions for unequal payment streams or unequal time payment periods shall be evaluated using present-value methodology.

Section 17. The bill amends s. 287.058, F.S., to correct cross-references and make conforming changes for the bill's new terms. It also amends s. 287.058(1), F.S., to clarify that emergency or sole source contracts cannot be renewed; to specify that contracts may be renewed for a period no longer than 3 years or the original term, whichever is longer; to add reference to ITNs; and to specify that costs associated with a renewal may not be charged.

Section 18. The bill amends s. 287.059, F.S., to refer to the University and College Boards of Trustees or state universities and colleges, as the Board of Regents and State University System are no longer in existence.

Section 19. The bill amends s. 287.0595, F.S., to reference ITNs and to make conforming changes with the bill's new terms.

Section 20. The bill repeals s. 287.073, F.S., Currently, s. 287.073, F.S., sets forth procurement processes for information technology (IT) resources. Under the section, an agency may procure IT resources with an ITB or RFP. It does not provide ITN authority. Repeal of this section in combination with the bill's addition of "information technology" to the ch. 287 definition of "commodity" will enable "information technology" to be purchased in the same manner as a "commodity."

Section 21. The bill amends s. 287.0731, F.S., to provide that the DMS shall establish a team that includes a chief negotiator for the procurement of information technology with an invitation to negotiate.

Sections 22 through 26. The bill amends ss. 287.0822, 287.084, 287.087, 287.093, and 287.09451, to reference ITNs and make conforming changes with the bill's new terms.

Section 27. The bill repeals s. 287.121, F.S., which provides for the Department of Legal Affairs to assist in the preparation of contract forms for use in ch. 287, F.S., contracts. This section was enacted in 1969, and is no longer followed in practice. DMS and agency attorneys now draft contract forms for agency use.

Section 28 through 29. The bill amends ss. 287.133 and 287.134, F.S., to reference ITNs and make conforming changes with the bill's new terms.

Section 30. The bill amends s. 287.1345, F.S., to provide that surcharges permitted to be assessed by DMS for state term contracts may be collected from an eligible user, as well as an agency.

Section 31. The bill amends s. 373.610, F.S., to delete an unnecessary reference to “vendors” in the section’s catch line. The section only applies to “contractors.”

Section 32. The bill amends s. 373.611, F.S., to clarify that water management districts may enter into contracts to limit or alter the amount of damages recoverable from a vendor or contractor when the district is procuring commodities and contractual services. Current law does not mention contractors, and is somewhat unclear as to whether its provisions apply to both commodities and contractual services.

Sections 33 through 36. The bill amends ss. 394.457, 394.47865, 402.73, and 408.045, F.S., to correct cross-references and to make conforming changes for the changes made by the bill.

Section 37. The bill amends s. 413.036, F.S., to clarify that purchases made from a non-profit agency for the blind or for the other severely handicapped, which is qualified pursuant to ch. 413, F.S., are not subject to the competitive solicitation requirements of ch. 287, F.S. Further, the bill specifies that the following contract language must be contained in contracts where a product or service approved by the commission is available from such non-profit agency: “It is expressly understood and agreed that any articles which are the subject of, or required to carry out, this contract shall be purchased from a non-profit agency for the blind or for the severely handicapped that is qualified pursuant to Chapter 413, in the same manner and under the same procedures set forth in Section 413.036(1) and (2); and for purposes of this contract the person, firm, or other business entity carrying out the provisions of this contract shall be deemed to be substituted for the state agency insofar as dealing with such qualified non-profit agency are concerned.”

Sections 38 through 39. The bill amends ss. 445.024 and 455.2177, F.S., to correct cross-references.

Section 40. The bill provides an effective date of July 1, 2002.

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:

Prevailing party attorney's fees and costs: The bill provides for prevailing party attorney's fees and cost awards in procurement protests. Accordingly, in the event a protestor to a state agency procurement loses, he or she will incur additional expenses. Alternatively, if the protestor wins, the protestor's attorney's fees and costs will be paid for by the losing party.

Protest bond amount: Currently, statute requires a procurement protestor to file a bond in the amount of 1 percent of the agency's estimated amount of the contract volume or \$5,000, whichever is less. The bill amends this requirement to provide that the bond shall be 1 percent of the estimated contract amount. Consequently, vendors may incur higher costs to obtain bonds when filing protests to agency procurement decisions.

C. Government Sector Impact:

Prevailing party attorney's fees and costs: The bill provides for prevailing party attorney's fees and cost awards in procurement protests. The fiscal impact of this provision is indeterminate. *See* "Related Issues," *infra*.

Electronic posting: Current law requires agencies to mail or hand deliver certain procurement decisions, and to post others at the DMS office or the place where the bids were opened. The bill creates a uniform noticing process that permits agencies to electronically post all solicitations, decisions, and other procurement matters on a centralized website maintained by the DMS. The bill should result in saving agencies costs for postage. The DMS indicates that it will incur a one-time cost of approximately \$20,000 to upgrade its current website so that all agencies may access it in accordance with the bill's provisions. This website will temporarily host the electronic posting required by this bill until the online procurement system begins to function.

Request for quote: The bill's restriction of RFQ use may result in saving money during commodity and contractual services purchases. Under the bill, the RFQ may be used to obtain state term contract commodities and services at a price, term, or condition more favorable to the agency than that available on the state term contract; whereas, under current law, the RFQ provisions can be interpreted as allowing any commodities and contractual services to be purchased from a state term contract vendor without following the competitive solicitation requirements.

Eligible Users: The bill provides that the DMS may authorize persons or entities as "eligible users" of state term contracts and the online procurement system. Greater numbers of persons participating in state procurement should result in better economies of scale for state purchasing

Emergency procurements: The bill strengthens the requirements associated with emergency purchases. Under current law, an emergency procurement is required to be made with such competition as is practicable; however, the bill requires that pricing information be obtained from at least two vendors prior to the purchase, unless it is documented in writing that doing so will increase the danger or loss to the public. This provision may result in lower prices in emergency procurements.

Single source procurements: Current law does not specify what precisely an agency must do when it determines that a purchase is only available from a single source; however, under the bill, agencies are required to electronically post descriptions of potential single source purchases on the DMS website for at least seven days so that vendors, unknown to the agency, have an opportunity to indicate their ability to supply the goods or services to be purchased. This provision may result in greater competition, and in turn, greater savings in state purchasing.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill provides for prevailing party attorney's fees and cost awards in procurement protests. The fiscal impact of this provision is indeterminate. According to information received from the DOAH and obtained from the DOAH's website,⁵⁷ 154 bid protests were filed during the three-year period between October 19, 1998, and October 19, 2001. Of the 154 protests, 79 were dismissed without a hearing, 29 were resolved in favor of the protestor, and 46 were resolved in favor of the agency.⁵⁸ These figures indicate that agencies prevailed at the DOAH level in 61 percent of the protests that proceeded to a hearing. Potentially, the award of attorney's fees and costs could result in a positive fiscal impact to the state if the state wins more protest litigation than it loses; however, if the state loses more often than it wins or if it loses complex cases in which attorney's fees and costs are high, the state could realize a negative fiscal impact.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

⁵⁷ <http://www.doah.state.fl.us>

⁵⁸ These figures reflect the resolution of cases by the DOAH. The figures do not reflect agency or court consideration occurring after the DOAH's recommended order.