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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
FISCAL POLICY & RESOURCES
ANALYSIS**

BILL #: HB 1977 (PCB FPR 02-01)

RELATING TO: Competitive Bidding

SPONSOR(S): Committee on Fiscal Policy & Resources and Representative Wallace

TIED BILL(S): HB 1951 (PCB FPR 02-07)

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) FISCAL POLICY & RESOURCES YEAS 12 NAYS 0
 - (2)
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

This bill (PCB FPR 02-01) proposes several changes to implement many of the recommendations contained in the Senate Government Oversight & Productivity *Interim Project Report 2002-133*. That report was the product of months of discussion and revision of suggested changes to competitive bidding among representatives from Senate and House staff, Department of Management Services, Auditor General, administrative law attorneys, and state agency purchasing directors. The report formed the basis for the initial draft of legislative changes (and subsequent revisions) discussed among the interested parties. For more detail, please see the section-by-section analysis.

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Overview of Florida's Competitive Procurement Legislation: Since the 1950's, Florida has statutorily required competitive bidding in state procurement. Through the years, the requirements have been amended numerous times with control over the procurement process passing from the State Purchasing Commission to the Department of General Services, now known as the Department of Management Services (DMS).

Currently, part I of ch. 287, F.S., sets forth the competitive bidding requirements for the procurement of goods and services by state agencies. The stated legislative intent for the chapter is to create a system of uniform competitive bidding procedures so that fair and open competition is encouraged, and opportunities for favoritism and impropriety are reduced.

The DMS is the centralized authority tasked with overseeing the implementation of competitive bidding requirements and with creating uniform rules for procurement. Additionally, the DMS is authorized to establish state term contracts for commodities and contractual services. These contracts establish prices for items and designate the 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.

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:

- Commodities and contractual services
- Insurance
- Architectural, engineering, and registered surveying professional services
- Information technology
- Private attorney services

Procurement of commodities and contractual services: When a state executive 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 agency may issue an ITB that details the property or service sought, the bid submittal date, all contractual terms, and the criteria to be used for bid review. The ITB is used when the agency is capable of specifically defining the scope of work for which a contractual service is required or capable of establishing the precise specifications defining the commodities sought. A copy of the ITB must be forwarded to the DMS. The contract must be awarded to the lowest, qualified, responsive bidder.
- **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 or when the agency is requesting that a qualified offeror propose commodities or contractual services to meet the specifications of the solicitation. The agency is permitted to conduct discussions with qualified bidders for purposes of assuring full understanding of the solicitation. 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.
- **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. An ITN is a written solicitation that calls for responses to select one or more persons or entities with which to commence negotiations.

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.

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 approval from the DMS. 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.

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.

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; 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.

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, to develop a program for online procurement of commodities and contractual services. 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.

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.

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.

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.

Procurement of information technology resources: An agency may procure information technology 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.

Procurement of Private Attorney Services: Agencies 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.

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% of construction moneys, 25%

of architecture and engineering moneys, 24% of commodities moneys; and 50.5% of contractual service moneys. 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 subcontractors ; and (2) grant price preferences up to 10% to MBE bidders on commodity and service contracts. Agencies are required to award commodity and service contracts to a MBE if two or more equal bids are received and one of the bids is from a MBE.

- **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.
- **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.
- **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.
- **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.
- **Products with recycled content:** State agencies may allow up to a 10% 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% price preference may be allowed for bidders certifying the products are made of materials recovered in Florida.

Bid Protests: Bidders wishing to challenge the procurement process must file their notice of protest within 72 hours after: (a) publication of the ITB or RFP when challenging the ITB or RFP terms; or (b) posting the bid tabulation or after receipt of the notice of the agency decision or intended decision when challenging an award or other agency decision or intended decision. The formal written protest must be filed within 10 days after a notice of protest is filed. 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 continuance of the procurement or contract award process is necessary to avoid an immediate and serious danger to the public health, safety, or welfare.

Protestors must file a bond payable to the DMS, the water management district, or agency in an amount equal to 1 percent of the estimated total volume of the contract or \$5,000, whichever is less. The losing party in a bid protest is responsible for paying the prevailing parties' costs and charges, excluding attorney's fees. The bond must be returned to the protesting party after the payment of any costs and charges due.

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 whether the agency's proposed action is contrary to statute, the agency's rules or policies, or the bid or proposal specifications. 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.

C. EFFECT OF PROPOSED CHANGES:

This bill (PCB FPR 02-01) proposes several changes to implement many of the recommendations contained in the Senate Government Oversight & Productivity *Interim Project Report 2002-133*. That report was the product of months of discussion and revision of suggested changes to competitive bidding among representatives from Senate and House staff, Department of management Services, Auditor General, administrative law attorneys, and state agency purchasing directors. The report formed the basis for the initial draft of legislative changes (and subsequent revisions) discussed among the interested parties. For more detail, please see the section-by-section analysis below.

D. SECTION-BY-SECTION ANALYSIS:

Overall Changes in terminology (technical changes):

- Creates and uses the term "solicitation" to include invitations to bid, requests for proposals and invitations to negotiate.
- Adds "proposals and replies" throughout chapter 287 when referring to responses from solicitations, to include request for proposals and invitations to negotiate.
- Uses the term "vendor" throughout and replaces all other similar terms, including "bidder", "contractor", "provider", etc.
- Creates the term "eligible user" and uses it where appropriate to include entities using the state purchasing system that are not agencies.
- Replaces the term "legal" holidays with "state" holidays.
- Provides that vendors responding to solicitations be "responsible" vendors.
- Deletes the term "state agency" and replaces it with "agency."
- Defines "department" as the Department of Management Services, and then deletes "Management Services" throughout the chapter when referring to the department.

Section 1. Amends section 120.57:

(3)(a) provides that solicitations and agency decisions related to chapter 287 can be posted electronically in addition to the other forms of notice.

(3)(b) provides that the 72 hour notice of protest filing time frame begins running after the posting of the notice of a decision or intended decision rather than receipt.

Technical change.

Section 2. Amends section 287.001 – Legislative Intent:

Technical change.

Section 3. Amends section 287.012 – Definitions:

- Alphabetizes the definitions.
- Adds state colleges and universities for limited purposes to "agency".
- Creates a definition for "best value."
- Amends the definition of "commodity" in the description of portable structures with floor space of less than "5,000" square feet to be in accordance with the same description on chapter 255.
- Creates a definition for "solicitation" to mean an invitation to bid, a request for proposal, or an invitation to negotiate.
- Creates a definition for "eligible user."

- Amends the definition of “Information technology” to be in accordance with 282.0041.
- Amends the definition of “ITB” to delete repetitive language that is contained in 287.057.
- Amends the definition of “ITN” to provide for when the use of an ITN is appropriate.
- Creates a definition for “request for information.”
- Amends the definition of “RFP” to delete repetitive language that is contained in 287.057.
- Amends to definition of “request for a quote” to include pricing “or services” information and clarify that it can only be used for vendors on state term contract.
- Creates a definition for “responsible vendor” similar to the definitions of “qualified bidder, offeror”, etc. that are deleted.

Section 4. Amends section 287.017 – Purchasing Categories:

Deletes provision that requires the category amount to be adjusted “annually” based upon the rate change of a nationally recognized price index and the calculation of the adjustments.

Section 5. Amends section 287.022 – Purchase of Insurance:

Technical change.

Section 6. Amends section 287.032 – Purpose of department:

Technical change.

Deletes provision requiring DMS to procure and distribute state owned surplus tangible property.

Section 7. Amends 287.042 – Powers, duties, and functions:

- Technical changes.
- Clarifies that procurements are pursuant to this chapter (not all procurement are competitively procured in 287).
- Clarifies language that currently requires DMS to plan and coordinate purchases in volume and execute all purchasing agreements.
- Clarifies that eligible users are included in the state’s procurement system.
- Deletes language that provides for the prevailing party in a solicitation protest to be reawarded a contract.
- Amends bond language requirement stating that the bond amount shall be 1% of the estimate of the total volume of the contract. Provides how the estimate can be calculated and that the estimate amount is not subject to protest.
- Provides that vendors may additionally post an official bank check in lieu of a bond.
- Provides that the prevailing party is entitled to recover attorney’s fees in a solicitation protest.
- Deletes repetitive language regarding protests of solicitation specifications that is covered in chapter 120.
- Deletes language regarding the department supervising all storerooms and commodity inventories.
- Clarifies language regarding the advertising of solicitations. Provides that advertising can be posted by electronic means, fax, or other means established by rule. Provides that the 10-day time period for submittals can be shortened if demonstrated by the agency or department that it is necessary to avoid harming the interests of the state.
- Clarifies that the purpose of written questions and answer periods is to respond to vendor questions.
- Provides that copies of purchasing rules can be provided by electronic means.

Section 8. Amends section 287.045 – Procurement of products and materials with recycled content:

Technical changes.

Section 9. Amends section 287.056 – Agency purchases from agreements and contracts executed by the department:

Includes eligible users as being able to procure from state term contracts.

Provides for the appropriate circumstance and purpose for using a request for quote.

Section 10. Amends section 287.057 – Procurement of commodities or contractual services:

- (1)(a) Technical changes to make all section include similar language.
- (2)(a) Provides for language regarding the relative importance of price and other evaluation criteria in an RFP. This language was originally in the definition of an RFP and is being deleted and placed in this section.
- Deletes language regarding discussions with vendors in the RFP process.
- (2)(b) Requires the agency to keep documentation supporting contract award in the contract file.
- (3)(a) Provides for when it is appropriate and the procedure for using an ITN. Includes similar standard language regarding the opening of the solicitation that is included for ITB (1) and RFP (2).
- (3)(b) Provides for the selection process of a contract award for an ITN, specifically including negotiations.
- (4) Provides for the use conference and questions and answer periods with vendors prior to the receipt of bids, proposals, or replies.
- (5)(a) Provides the agency the opportunity to change the requirements in the solicitation specifications prior to receiving the bids, proposals, or replies.
- (5)(b) Provides that notices of amendments to the solicitation can be made by electronic publication or other means established by rule.
- (6)(b) Provides that the department must provide an agency exception to the competitive procurement process in writing.
- (6)(c) Provides for use of a single source and proper procedure for using it. Requires agency to obtain department approval prior to entering into a single source contract. Provides that request for approval shall be in a form prescribed by the department, which may be an electronic form. Provides that the department will electronically post such requests for 7 days and any potential competitor may file protest within 10 days.
- (6)(f) Provides that services and commodities provided by a university or college are not subject to the competitive solicitation process.
- (13) renumbered to (15) Provides for period of renewal not to exceed 3 years.
- (16) renumbered to (18) Deletes language referring to selection teams. Provides for two kinds of teams for procurements above category four, (1) evaluation team and (2) negotiation team, and provides for a make-up of each.
- (17) renumbered (19) Provides that a vendor responding to an RFI is not prohibited from entering into a contract with an agency.
- (19) Deletes provision that states department may establish state contractual service term contracts.
- (23) renumbered (24) Provides that the department, not STO, in consultation with the STO and the Comptroller, will develop e-procurement (program for online procurement). Provides that the department, not STO, in consultation with the STO will adopt rules for online procurement.

Section 11. Amends section 287.0572 – Present Value Methodology:

Technical changes.

Section 12. Amends 287.058 – Contract Document:

Technical changes.

(f) Clarifies that contract renewals shall not exceed the longer of three years or the original contract term, are subject to the same terms and conditions as the original contract, and are contingent upon satisfactory performance evaluations by the agency.

Section 13. Amends section 287.059 – Private attorney services:
Technical changes.

Section 14. Amends section 287.0731 – Team for contract negotiations:
Clarifies that the department, not the State Technology Office, shall establish a team for IT procurements with a chief negotiator specializing in conducting negotiations, for ITN negotiations.

Section 15. Amends section 287.0822 – Beef and pork; prohibition on purchase; bid specifications; penalty:
Technical changes.

Section 16. Amends section 287.084 – Preference to Florida businesses:
Technical changes.

Section 17. Amends section 287.087 – Preference to businesses with drug-free workplace programs:
Technical changes.

Section 18. Amends section 287.093 – Minority business enterprises; procurement of personal property and services from funds set aside for such purpose:
Technical change.

Section 19. Amends section 287.09451 – Office of Supplier Diversity:
Technical changes.

Section 20. Creates section 287.096 – Thresholds for exempt programs:
Requires that the PRIDE and RESPECT programs offer products (which are exempt from competitive bidding process) produced in majority part by inmate or blind or severely handicapped persons.

Section 21. Amends section 287.133 – Public entity crime; denial or revocation of the right to transact business with public entities:
Technical changes.

Section 22. Amends section 287.134 – Discrimination; denial or revocation of the right to transact business with public entities:
(3)(c) Provides that the initial list and quarterly lists of those entities which have been disqualified from the public contracting and purchasing process shall be published electronically and not in the Florida Administrative Weekly.

Section 23. Amends section 287.1345 – Surcharge on users of state term contracts; deposit of proceeds collected:

- Technical changes.
- Clarifies that the fee or surcharge imposed on eligible users can be collected by the vendor directly.
- Clarifies that the department may establish the retainage of such fees in a method the department deems feasible, without requiring negotiation.

Section 24. Amends section 283.33 – Printing of publications; lowest bidder awards:
Technical change.

Section 25. Deletes section 287.073 – Procurement of information technology resources, and deletes section 287.121 – Assistance of Department of Legal Affairs:
IT resources can be procured like all other commodities and services under the revised process. Deletes provision requiring the Department of Legal Affairs to assist in the preparation of contracts.

Section 26: Provides an effective date of July 1, 2002.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

By promoting the better use of ITNs and other procurement methods, state agencies and eligible users may achieve savings through more economical purchases.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require cities or counties to expend funds or to take actions requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority of cities or counties to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with cities or counties.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

This bill clarifies rulemaking authority of DMS relating to competitive bidding.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON FISCAL POLICY & RESOURCES:

Prepared by:

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