

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.)

Prepared By: Governmental Operations Committee

BILL: SPB 7080

INTRODUCER: For consideration by Governmental Operations Committee

SUBJECT: Leasing of Private Property by State Agencies

DATE: February 12, 2007 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson		Pre-meeting
2.				
3.				
4.				
5.				
6.				

I. Summary:

By creating a definition of the term “competitive solicitation” to include invitations to negotiate, and using the term in sections 255.249 and 255.25, F.S., the bill provides for state agency use of invitations to negotiate when soliciting for leased space in privately owned buildings. An invitation to negotiate may be used only if an invitation to bid or request for proposal will not result in the best value to the state.

The bill makes permanent four expiring provisions:

- A requirement that the Department of Management Services (DMS) annually publish a report of expiring agency leases.
- A requirement that lease terms include certain specified clauses.
- A requirement that DMS may not approve agency amendment of standard lease terms unless a comprehensive financial analysis demonstrates that the amendment is in the state’s long-term best interest.
- A requirement that DMS annually update its plan for implementing stated legislative policy of using state-owned buildings before leasing privately owned buildings.

The bill takes effect July 1, 2007.

This bill substantially amends sections 255.248, 255.249, and 255.25 of the Florida Statutes.

II. Present Situation:

According to DMS,¹ the state leases a total of 8.4 million square feet in private sector leases with an annual rent of \$140 million. Of that total, 7.3 million square feet requires competitive solicitation;² the annual rent for the competitively solicited leases is \$119 million.³ The total amount of leased space in the private sector is 95 percent office space and 5 percent warehouse-type space.

Leasing Provisions in Chapter 255, F.S.: Pursuant to s. 255.25(2)(a), F.S., no state agency may lease a building or any part thereof unless prior approval of the lease conditions and of the need therefor is first obtained from the Department of Management Services. Any approved lease may include an option to purchase or an option to renew the lease, or both, upon such terms and conditions as are established by the department subject to final approval by the head of the Department of Management Services and s. 255.2502, F.S.

The approval of DMS, except for technical sufficiency, need not be obtained for the lease of less than 5,000 square feet of space within a privately owned building, provided the agency head or the agency head's designated representative has certified that all criteria for leasing have been fully complied with,⁴ and has determined such lease to be in the best interest of the state.⁵ Such a lease, which is for a term extending beyond the end of a fiscal year, is subject to the provisions of ss. 216.311, 255.2502, and 255.2503.⁶

The DMS has the authority to approve leases of greater than 5,000 square feet that cover more than one fiscal year by operation of s. 255.25(3)(a), which provides that except as provided in s. 255.25(10), F.S., for emergency space needs,⁷ no state agency shall enter into a lease as lessee for the use of 5,000 square feet or more of space in a privately owned building except upon advertisement for and receipt of competitive bids and award to the lowest and best bidder, subject to the provisions of ss. 216.311, 255.2501,⁸ 255.2502, and 255.2503, if such lease is, in the judgment of the department, in the best interests of the state.⁹ Section 255.25(3)(a), F.S., does not apply to buildings or facilities of any size leased for the purpose of providing care and living space for persons.

¹ 2006 Annual Leasing Report and email of October 12, 2006.

² Section 255.25(3)(a), F.S., requires that leases for 5,000 square feet or more may be entered only upon "advertisement for and receipt of competitive bids and award to the lowest and best bidder."

³ The "master leases" in Tallahassee (Koger, Winewood, Northwood and Ft. Knox) constitute \$23.1 million annually in rent.

⁴ Pursuant to s. 255.249(4)(k), F.S.

⁵ Section 255.25(2)(b), F.S.

⁶ Relating, respectively, to statutory provisions concerning unauthorized contracts in excess of appropriations, contingency statements in contracts which require annual appropriations, and certain prohibited provisions in contracts for the leasing of buildings.

⁷ Section 255.25(10), F.S., provides that the DMS may approve emergency acquisition of space without competitive bids if existing state-owned or state-leased space is destroyed or rendered uninhabitable by an act of God, fire, malicious destruction, or structural failure, or by legal action, if the chief administrator of the state agency or designated representative certifies that no other agency-controlled space is available to meet this emergency need, but in no case shall the lease for such space exceed 11 months.

⁸ Relating to leases of space financed with local government obligations.

⁹ The size at which a leased space must be competitively bid was raised in 1990 from 2,000 square feet to 3,000 square feet by s. 3, ch. 90-224, L.O.F., and raised in 1999 to 5,000 square feet by s. 22, ch. 99-399, L.O.F.

Section 255.449(4)(b), F.S., requires DMS to promulgate rules providing procedures for soliciting and accepting competitive proposals for leased space of 5,000 square feet or more in privately owned buildings, for evaluating the proposals received, for exemption from competitive bidding requirements of any lease the purpose of which is the provision of care and living space for persons or emergency space needs as provided in s. 255.25(10), F.S., and for the securing of at least three documented quotes for a lease that is not required to be competitively bid.

In sum, while DMS is responsible for prior approval of lease terms for leases over 5,000 square feet, the lease is executed between the landlord and the agency. For leases less than 5,000 square feet, approval by DMS is not necessary, except for technical sufficiency, so long as the agency head or their designee has certified compliance with applicable leasing criteria and has determined the lease is in the best interest of the state. Leases under 5,000 square feet need not be competitively bid. The terms “bids” and “proposals” are used throughout the leasing provisions of ch. 255, F.S.; the term “invitation to negotiate” does not appear in the chapter.

Rulemaking: Chapter 60H-1 of the Florida Administrative Code contains DMS-promulgated rules relating to leases for real property; statutory authority for these rules is provided in ch. 255, F.S. In 2004, DMS, through the rulemaking process of ch. 120, F.S., added a definition to Rule 60H 1.001(13), F.A.C., that a “competitive solicitation” means an invitation to bid (ITB), a request for proposal (RFP), or an *invitation to negotiate* (ITN). The Joint Administrative Procedures Committee (JAPC) sent DMS an Objection Report on March 17, 2005, noting that the rule is an invalid exercise of delegated legislative authority, because it enlarges the specific provisions of s. 255.25(3)(a), F.S. JAPC deferred consideration of the rule during the 2005 session, when the DMS suggested it would seek legislative authority for conducting lease procurements using ITNs. Though legislation was introduced during the 2004 session specifically authorizing the DMS to use ITNs in the leasing of space, that legislation failed to pass. During the 2005 and 2006 legislative sessions, the Legislature did not enact legislation giving agencies or the DMS the authority to use ITNs in leasing. Pursuant to JAPC Rule 7.2, the DMS rule must be placed on a future JAPC meeting agenda for a committee vote on the proposed objection. If the committee objects to the rule and DMS does not modify, amend, withdraw, or repeal the rule, JAPC must file with the Department of State a notice of its objection, and the Department of State must publish in the Florida Administrative Code a reference to JAPC’s objection.¹⁰

ITN as Procurement Method: Chapter 287, F.S., governs the procurement of personal property and services. The invitation to bid (ITB) and request for proposals (RFP) have long been statutorily authorized options for executive agency procurement of commodities and contractual services. The ITN had been utilized by agencies since the ‘90s, pursuant to DMS rule that lacked specific statutory authority,¹¹ but was only statutorily authorized during the 2001 Regular Session.¹²

¹⁰ Section 120.545(9), F.S.

¹¹ See Rule 60A-1.018, F.A.C., *repealed* January 2, 2000.

¹² Section 4, ch. 2001-278, L.O.F.

In procuring commodities or contractual services, an agency may use an ITN when it determines in writing that negotiation¹³ is necessary for the state to achieve the best value.¹⁴ After ranking the replies received in response to the ITN, the agency must select, based on the rankings, one or more vendors with which to commence negotiations. The contract must be awarded to the responsible and responsive vendor that the agency determines will provide the best value to the state.¹⁵ Training materials from the DMS suggest that ITNs offer the greatest flexibility of the three procurement methods, but are also the most complex and most time consuming.¹⁶

According to DMS, for leasing procurements, the main advantage in using an ITN over an ITB or RFP is flexibility, and the maximization of competition, which are important when dealing with a unique and specialized item like real estate. Specifically, the DMS believes that using an ITB or RFP would not allow for enough flexibility to achieve best value to the state in transactions involving multiple vendors, and evaluations of tenant improvement dollars compared with rental rate.

III. Effect of Proposed Changes:

The bill creates in s. 255.248, F.S., a definition for the new term “competitive solicitation,” to include an invitation to bid, a request for proposal, and an invitation to negotiate. The bill replaces references to “bids” and “proposals” with the new term in sections 255.249 and 255.25, F.S., thereby providing the authority to agencies to use invitations to negotiate in procuring leased space in privately owned buildings.

The bill provides that an agency may only procure leased space by invitation to negotiate if the agency determines in writing that use of an invitation to bid or request for proposal will not result in the best value to the state, and provides basic award criteria and methodology for use with all three solicitation methods.

The bill makes permanent four provisions that would otherwise have expired on July 1, 2007:

- A requirement that DMS annually publish a report of expiring agency leases, to include a list of amendments and supplements to lease terms and conditions.
- A requirement that DMS rules must provide that lease terms have to include a clause that the state’s performance under the lease is contingent upon appropriations, and that the state may with notice terminate a lease to occupy a state-owned building.
- A requirement that DMS may not approve lease terms that have been modified unless the modification has been subject to comprehensive financial analysis showing that such modification is in the best interest of the state.
- A requirement that DMS annually update its plan to implement the legislative policy of using state-owned buildings before leasing privately owned buildings.

¹³ Sections 287.012(17) and 287.057(3), F.S.

¹⁴ “Best value” means, “. . . the highest overall value to the state based on objective factors that include, but are not limited to, price, quality, design, and workmanship.” Section 287.012(4), F.S.

¹⁵ Section 287.057(3), F.S.

¹⁶ *Procurement Methods*, a PowerPoint presentation revised 9/6/05, located on 10/11/06 at http://dms.myflorida.com/business_operations/state_purchasing/florida_s_public_purchasing_training_and_certification/presentations_and_materials.

The bill takes effect July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

It is unclear whether replies submitted in response to an invitation to negotiate for leased space may be subject to the provisions of s. 119.071(1)(b)2., F.S., which exempts replies to ch. 287 ITNs from public inspection during certain specified time periods.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The required lease clause allowing an agency to terminate a lease to occupy a state-owned building could affect the rental rates offered by landlords. A landlord concerned the state could break a lease may require higher rental rates to compensate for the uncertainty. The amount of difference is difficult to prospectively determine.

C. Government Sector Impact:

Agencies could potentially incur higher lease rates relating to the clause allowing agency termination of leases to occupy state-owned buildings. Those costs are indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.

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