

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 7229 PCB GVOPS 11-16 Procurement

SPONSOR(S): State Affairs Committee, Government Operations Subcommittee, Patronis

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee	12 Y, 0 N	McDonald	Williamson
1) State Affairs Committee	18 Y, 0 N, As CS	McDonald	Hamby

SUMMARY ANALYSIS

The Department of Management Services (DMS) is responsible for overseeing state purchasing activity including professional and construction services as well as commodities needed to support agency activities. The Division of State Purchasing in DMS establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power. Agencies may use a variety of procurement methods, depending on the cost and characteristics of the needed good or service, the complexity of the procurement, and the number of available vendors. These include, but are not limited to, single source contracts, invitations to bid, requests for proposals, and invitations to negotiate. Purchasing categories with threshold amounts have been established in law to guide procedures for the procurement method to be used, type of review and evaluation required and method of contract award. Finally, many services state agencies procure are exempted from competitive solicitation requirements.

In 2010, the Legislature enacted substantial changes to Florida's procurement law. These revisions clarified the state's competitive solicitation processes; updated the purchasing category threshold amounts to bring them more in line with today's contracting; provided for greater coordination of contracted services, improved contract management and oversight; updated and expanded the conflict of interest provisions to avoid, neutralize or mitigate potential conflicts of interest before award of a contract; and increased contractual requirements relating to protection of state interests.

The bill amends procurement provisions enacted last year to do the following:

- Delete duplicative provisions and make clarifying changes;
- Require bid evaluations in an invitation to bid to provide preference in the award being given to the lowest responsive and responsible bid determined to meet the bid requirements and criteria;
- Require the agency in an invitation to negotiate to include an indication if renewals are anticipated and require the reply to provide a cost for each renewal year;
- Clarify mitigation of conflict provisions to state if an agency thinks there is a conflict, it may request the vendor to propose a mitigation plan with its competitive solicitation response and to clarify when an unfair competitive advantage exists; and
- Provide that a person who develops a program for implementation is not eligible to contract with the agency for contracts pertaining to the subject matter, nor can any firm that the person has an interest, unless a mitigation plan is developed.

The bill also repeals obsolete provisions of law.

The bill does not appear to have a fiscal impact on state or local government.

The bill takes effect July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Department of Management Services -- Procurement

The Department of Management Services is responsible for overseeing state purchasing activity including professional and construction services as well as commodities needed to support agency activities, such as office supplies, vehicles, and information technology. The Division of State Purchasing in the department establishes statewide purchasing rules and negotiates contracts and purchasing agreements that are intended to leverage the state's buying power.¹

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

These include the following:

- "Single source contracts," which are used when an agency determines that only one vendor is available to provide a commodity or service at the time of purchase;
- "Invitations to bid," which are used when an agency determines that standard services or goods will meet needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- "Requests for proposal," which are used when the procurement requirements allow for consideration of various solutions and the agency believes more than two or three vendors exist who can provide the required goods or services; and
- "Invitations to negotiate," which are used when negotiations are determined to be necessary to obtain the best value and involve a request for high complexity, customized, mission-critical services, by an agency dealing with a limited number of vendors.²

Prior to using one of these methods, an agency might use a "request for information." This is used when an agency wants to solicit information from vendors for information concerning commodities or contractual services.

In 2010, substantial revisions were made to provisions to chapter 287, F.S., to revise statutory provisions related to competitive solicitation processes, coordination of contracted services, contract management and oversight; to increase contractual requirements relating to protection of state interests; and to update and expand the conflict of interest provisions.^{3,4}

Obsolete Statutory References and Provisions

Department of Labor and Employment Security

The Department of Labor and Employment Security (DLES) was created in 1978 when it was removed from the Florida Department of Commerce.⁵ It consisted of one administrative support division, six program divisions, and administratively housed several independent entities.⁶ The process for the abolishment of DLES began in the 1999 Legislative Session, and subdivisions and programs of the

¹ Chapter 287, F.S., provides requirements for the procurement of personal property and services. Part I of that chapter pertains to commodities, insurance, and contractual services, and part II pertains to motor vehicles.

² See ss. 287.012 and 287.057, F.S.

³ Chapter 2010-151, F.S.

⁴ During the interim, committee staff met with representatives of the Department of Management Services and others to discuss the need for clarification and revision to the recent changes that had been made to chapter 287, F.S. Many suggestions in this proposal are a result of those discussions.

⁵ Chapter 78-201, L.O.F.

⁶ See Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 230, dated April 19, 1999.

department were transferred or repealed through several legislative bills until the department was formally abolished by the Legislature in 2002.⁷ Throughout the Florida Statutes there are still 35 references to the former Department of Labor and Employment Security, or one of its former programs.⁸ Three of those 35 sections are found in chapter 287, F.S., relating to procurement.⁹

Chief Financial Officer

The Chief Financial Officer is required to submit to the Auditor General an annual report on those contractual service contracts disallowed by the Chief Financial Officer. The report is required to include the name of the user agency, the name of the firm or individual from which the contractual service was to be acquired, a description of the contractual service, the financial terms of the contract, and the reason for rejection.¹⁰ According to the office of the Chief Financial Officer, this provision of law has not aligned with their processes for many years. The office disallows individual payments,¹¹ but does not disallow specific contracts. The annual audit report has not been prepared and submitted to the Auditor General in over three years.¹²

According to the Office of the Auditor General, it has not seen nor requested these reports. The Office felt the information, if needed, could be gotten from other sources.¹³

Products with Recycled Content

In 1988, requirements were placed in law for the Department of Management Services, in cooperation with the Department of Environmental Protection, to review and revise existing procurement procedures and specifications for the purchase of products and materials to eliminate procedures and specifications that explicitly discriminated against products and materials with recycled content unless they were needed to protect public health, safety, and welfare.¹⁴ The law created a price preference for a vendor who used recycled materials. When enacted, five positions were provided and annual funding of approximately \$600,000 was provided to conduct necessary research and bid specification review. The funding for the program was stopped approximately nine years ago and as a result the Department of Management Services stopped most activities associated with the provision in law. The testing lab that was established to handle the required testing is no longer in place at the Department of Agriculture and Consumer Services. The State Negotiated Agreement Price Schedule (SNAPS) program was implemented to achieve greater efficiencies in the recycled content program and to help meet the need for review. The SNAPS program assisted in the approval of approximately 600 agreements. According to the Department of Management Services, the majority of the agreements were never used. The SNAPS program was phased out in 2004.¹⁵

Although the provision in chapter 287, F.S., was repealed, a section of law still exists that refers to the repealed section and bases decisions on the provisions of the repealed law. The section requires agencies to purchase recycled content. The decision not to procure is based upon findings by the Department of Management Services among which are a "determination that the procurement fails to meet the performance standards set forth in the applicable specifications, or fails to meet the performance standards of the agency."¹⁶ The section also states agencies are subject to the procurement requirements of the repealed provision in chapter 287, F.S.¹⁷

⁷ Chapter 99-240, L.O.F.

⁸ See Senate Bill Analysis and Fiscal Impact Statement for SPB 7052, dated February 21, 2011.

⁹ Sections 287.09431, 287.09451, and 287.0947, F.S.

¹⁰ Section 287.115, F.S.

¹¹ Under the Chief Financial Officer's authority in chapter 17, F.S.

¹² Information obtained from Mr. Chris Tanner, Deputy Director of Legislative Affairs, Office of the Chief Financial Officer, March 16, 2011.

¹³ Information obtained from staff of the Office of the Auditor General, March 17, 2011.

¹⁴ Section 287.045, F.S., relating to recycled content, was repealed by s. 17, chapter 2010-151, L.O.F.

¹⁵ Information obtained from a Department of Management Analysis of HB 59 in 2009, dated February 27, 2009.

¹⁶ Section 403.7065, F.S.

¹⁷ *Id.*

Proposed Changes

Department of Management Services -- Procurement

The bill amends procurement provisions enacted last year to do the following:

- Delete duplicative provisions and make clarifying changes;
- Require that, in an invitation to bid, bid evaluations provide preference in the award being given to the lowest responsive and responsible bid determined to meet the requirements and criteria in the invitation to bid;
- Require that, in an invitation to negotiate, the agency include an indication if renewals are anticipated and require the reply to provide a cost for each renewal year;
- Clarify the mitigation of conflict provisions to state if an agency thinks there is a conflict, it may request the vendor to propose a mitigation plan with its competitive solicitation response and to clarify when an unfair competitive advantage exists; and
- Prohibit a person who develops a program for implementation, and any firm the person has an interest, from contracting with the agency for contracts dealing with the subject matter, unless a mitigation plan is developed.

Obsolete Statutory References and Provisions

The bill revises references to the Department of Labor and Employment Security contained in chapter 287, F.S., to the Department of Management Services, to the Secretary of Management Services, or deletes the reference, where appropriate.

The requirement for the Chief Financial Officer to provide the Auditor General with an annual report on disallowed contractual service contracts is repealed.

The provision relating to products with recycled content is repealed.

B. SECTION DIRECTORY:

Section 1. Amends s. 287.056, F.S., deleting duplicative language.

Section 2. Amends s. 287.057, F.S., giving preference in award of an invitation to bid to the lowest responsive and responsible bidder meeting requirements and criteria; requiring that an invitation to negotiate must include contemplation of contract renewal and require cost per year for renewal in the reply; revising requirements for mitigation of conflicts of interest, the development of a mitigation plan, and prohibitions that cannot be mitigated.

Section 3. Amends s. 287.058, F.S., making editorial changes.

Section 4. Amends s. 287.09431, F.S., removing references to the Department of Labor and Employment Security; replacing such references with the Department of Management Services, where appropriate.

Section 5. Amends s. 287.09451, F.S., removing references to the Department of Labor and Employment Security.

Section 6. Amends s. 287.0947, F.S., removing reference to the Secretary of the Department of Labor and Employment Security and replacing with the Secretary of Management Services; removing obsolete provisions; correcting a cross-reference.

Section 7. Amends s. 61.1826, F.S., correcting a cross-reference.

Section 8. Amends s. 403.7061, F.S., revising criteria with respect to construction of a new waste-to-energy facility or the expansion of existing waste-to-energy facilities to conform to the repeal of s. 403.7065, F.S.

Section 9. Repeals s. 287.115, F.S., requiring the Chief Financial Officer to provide to the Auditor General an annual report on disallowed contractual service contracts.

Section 10. Repeals s. 403.7065, F.S., relating to procurement of products or materials with recycled content.

Section 11. Provides an effective date of July 1, 2011.

II. 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:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal government.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 7, the State Affairs Committee adopted three amendments to HB 7229 and passed the bill as a committee substitute. The committee substitute differs from the original bill in the following ways:

- Returns criteria for determining the responsiveness of a reply to current law which is acceptability and relative merit.
- Adds requirement that preference in an award given to the lowest bid must not only be responsive but also responsible to conform to similar criteria in Chapter 287, F.S.