

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

Prepared By: The Professional Staff of the Budget Committee

BILL: CS/SB 2036

INTRODUCER: Rules Committee and Rules Committee

SUBJECT: Outsourcing or Privatization of Agency Functions

DATE: January 23, 2012      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Sneed</u>	<u>Phelps</u>		<b>Fav/CS</b>
2.	<u>Sneed</u>	<u>Rhodes</u>		<b>Pre-Meeting</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill amends s. 216.023, F.S., as it relates to the outsourcing or privatization of agency functions. It provides additional time to meet certain requirements to provide information and analyses in an agency's legislative budget request (LBR) when the information pertains to outsourcing or privatization of an agency function that is expressly required by the General Appropriations Act or any other law. These information and analysis requirements include provision of cost-benefit analyses, business case analyses, performance contracting procedures, and impacts on performance standards.

The bill amends s. 287.0571, F.S., to provide that it does not apply to contracts for the outsourcing or privatization of agency functions when the outsourcing or privatization is expressly directed by the General Appropriation Act or any other law, except in new s. 944.7115, F.S., created in SPB 7172. This statute deals generally with outsourcing and privatization .

The bill also amends s. 945.105, F.S., to provide that it does not apply to contracts for the outsourcing or privatization of correctional facilities when the outsourcing or privatization is expressly directed by the General Appropriation Act or any other law. Section 945.105, F.S.,

provides requirements for the operation and maintenance of correctional facilities by private entities.

This bill would amend various Florida Statutes cited in Baiardi v. Tucker, (Fla. 2<sup>nd</sup> Circ Ct), Case No. 2011-CA-68 (2011), the case which declared unconstitutional a proviso in the 2011-2012 General Appropriations Act (Chapter 2011-69, Laws of Florida). There, the court found certain statutes required the Department of Corrections to initiate a privatization and submit a legislative budget request before the Legislature could direct the privatization of specified correctional facilities. This bill makes clear that the Legislature may direct privatization of an agency function itself, without any agency request. In Baiardi, the circuit court said, “if it is the will of the Legislature to initiate privatization of Florida prisons, the Legislature must do so by general law. . . .” See, Final Declaratory and Injunctive Judgment in Baiardi, p. 2.

## II. Present Situation:

### Legislative Budget Request Requirements

Section 216.023, F.S., outlines the processes each agency must follow in developing its LBR. The law requires the LBR to include, among other items, information on expenditures for three fiscal years, details on trust funds and fees, and an issue narrative justifying changes in amounts and positions requested. In addition, the LBR must include supporting information, including applicable cost-benefit analyses, business case analyses, performance contracting procedures, service comparisons, and impacts on performance standards for any request to outsource or privatize agency functions. The cost-benefit and business case analyses must include an assessment of the impact on each affected activity.

For projects that exceed \$10 million in total cost, the LBR must include the statutory reference for the existing policy or the proposed substantive policy that establishes and defines the project’s governance structure, planned scope, main business objectives that must be achieved, and estimated completion timeframes.

### Requirements for a Business Case

Section 287.0571(4), F.S., requires an agency to complete a business case for any project that has an expected cost in excess of \$10 million within a single fiscal year and lists the components that need to be included the business case for outsourcing or privatizing services. The business case must be included as supporting documentation for the agency’s LBR and be made available as part of the solicitation, but is not subject to challenge. The statute requires a number of components to be contained in the business case, including the following:

- A description of the service to be outsourced and any supporting legal authority for outsourcing.
- A description and analysis of the agency’s current performance if the agency is currently performing the service or activity.
- The desired goals to be achieved by outsourcing and the rationale for those goals.
- Citation to existing or proposed legal authorization for the outsourcing.

- Options for achieving the desired goals or objectives along with the advantages or disadvantages of each, including at least one option for the agency to continue providing the service.
- A description of the current market for the services to be outsourced.
- A cost-benefit analysis.
- Current and expected performance standards.
- Key benchmarks and timeframes.
- A contingency plan in the event of contractor nonperformance.
- An agency transition plan.

Section 287.0571(5), F.S., provides specific elements that must be addressed in a contract for outsourcing or privatization, including:

- Each of the services and deliverables.
- Quantifiable service requirements and performance objectives.
- Provisions to identify costs, payment terms and schedules.
- A transition plan.
- Performance standards.
- Monitoring and reporting requirements.
- Any penalties for failure to meet performance standards.

#### **Requirements in Section 944.105, F.S., for Privatization of Corrections Activities**

Section 944.105, F.S., authorizes the Department of Corrections to enter contracts with private vendors for the operation and maintenance of correctional facilities and includes the following provisions concerning contracts with private vendors for the operation of correctional facilities:

- A prohibition against entering into such a contract unless:
  - The contract offers a substantial savings to the department, as determined by the department in consultation with the Auditor General. The cost savings calculation must include all cost components that contribute to the inmate per diem, including administrative costs associated with central and regional office administration;
  - The Contract provides for the same quality of services as that offered by the department; and,
  - The legislature has made a specific appropriation for the resulting contract.<sup>1</sup>
- A requirement that the contractor is be liable in tort with respect to the care and custody of inmates under its supervision.<sup>2</sup>
- A provision that an inmate's willful failure to remain within the supervisory control of the private contractor constitutes an escape punishable under s. 944.40, F.S.,<sup>3</sup> which prohibits escape of prisoners. This provision is also incorporated in s. 944.40, F.S., itself.
- Provisions regarding authorized use of force, training in the use of force and use of firearms, and qualifications and certification of private correctional officers.<sup>4</sup>

<sup>1</sup> Section 944.105(1), F.S.

<sup>2</sup> Section 944.105(2), F.S.

<sup>3</sup> Section 944.105(3), F.S.

<sup>4</sup> Sections 944.105(4), (5) and (7), F.S.

- A requirement for the department to comply with s. 216.311, F.S., concerning unauthorized contracts in excess of appropriations, and with s. 287.057, F.S. concerning competitive solicitations for contractual services.<sup>5</sup>
- A requirement for the department to promulgate rules pursuant to chapter 120 specifying criteria for such contractual arrangements.<sup>6</sup>

### III. Effect of Proposed Changes:

**Section 1** amends s. 216.023(4)(a), F.S., to provide that subparagraphs 7, 8, and 10 do not apply to the outsourcing or privatization of agency functions expressly required by the General Appropriation Act or any other law until submission of the agency's first LBR after execution of the contract for outsourcing or privatization. The bill also amends subparagraph 7 to apply only to agency requests to outsource or privatize an agency function, and amends subparagraph 10 to apply only to projects requested by an agency.

- Subparagraph 7 requires the LBR pertaining to any outsourcing or privatization of agency functions to contain supporting information that includes applicable cost-benefit analyses, business case analyses, performance contracting procedures, service comparisons, and impacts on performance standards. In addition, it requires the cost-benefit and business case analyses to include an assessment of the impact on each affected activity, and performance standards to include standards for each affected activity.
- Subparagraph 8 requires the LBR to include an evaluation of any major outsourcing and privatization initiatives undertaken during the last 5 fiscal years that have aggregate expenditures exceeding \$10 million during the term of the contract. This evaluation must include: (1) an assessment of contractor performance; (2) a comparison of anticipated service levels to actual service levels; and (3) a comparison of estimated savings to actual savings achieved.
- Subparagraph 10 applies to projects that exceed \$10 million in total cost. For these projects, the LBR must include the statutory reference of the existing policy or the proposed substantive policy that establishes and defines the project's governance structure, planned scope, main business objectives that must be achieved, and estimated completion timeframes. Certain information technology budget requests are exempted from the requirement.

**Section 2** amends s. 287.0571, F.S., to create an exception from applicability of the business case requirement for outsourcing or privatization of state agency functions when the outsourcing or privatization is expressly directed by the General Appropriation Act or any other law, except s. 944.7115, F.S. Section 944.7115, F.S., is a proposed new statute created by SPB 7172 that directs privatization of the operation and management of correctional facilities in eighteen counties in the Southern Florida Region of the Department of Corrections

**Section 3** amends s. 944.105, F.S., to provide that it does not apply to a contract for the outsourcing or privatization of correctional facilities when the outsourcing or privatization is expressly directed by the General Appropriation Act or any other law.

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<sup>5</sup> Section 944.105(6), F.S.

<sup>6</sup> Ibid.

**Section 4** provides an effective date of July 1, 2012.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

On line 55, the word “and” should be changed to “or” to be consistent with phrasing used earlier in the amended portion of the subparagraph.

**VII. Related Issues:**

CS/SB 2036 creates a new statute that is referenced in Section 2 of this bill.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Rules Committee on January 23, 2012:**

The committee substitute makes the following changes:

- Deletes amendments to s. 287.0571, F.S., to provide that the statute does not apply to outsourcing and privatization expressly directed in the General Appropriations Act or any other law, except new s. 944.7115, F.S.
- Requires that a business case under s. 287.0571(4), F.S., must be prepared for all privatizations – including those expressly required by law – prior to the issuance of any competitive solicitation and that the business case must be posted on the agency website, rather than be included in the procurement solicitation.
- Corrects grammar in s. 216.023(4)(a)10., F.S.

- B. **Amendments:**

None.