

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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BILL: SB 368

INTRODUCER: Senators Brandes and Rouson

SUBJECT: Department of Management Services

DATE: November 6, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Peacock	Caldwell	GO	<b>Pre-meeting</b>
2.			AGG	
3.			AP	

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**I. Summary:**

SB 368 creates the Statewide Procurement Efficiency Task Force to evaluate the effectiveness and value of state and local procurement laws and policies to the taxpayers of this state, determine where inconsistencies in such laws and policies exist, and submit a report by July 1, 2019. The final report of the task force must include, at a minimum, recommendations for consideration by the Legislature that promote procurement efficiency, streamline procurement policies, establish best management practices, and encourage increased use of state term contracts.

The bill takes effect upon becoming a law.

**II. Present Situation:**

**Procurement of Personal Property and Services**

*Procurement of Personal Property and Services by State Agencies*

Chapter 287, F.S., regulates state agency<sup>1</sup> procurement of personal property and services.<sup>2</sup> The Department of Management Services (DMS) is responsible for overseeing state purchasing

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<sup>1</sup> As defined in s. 287.012(1), F.S., “agency” means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. “Agency” does not include the university and college boards of trustees or the state universities and colleges.

<sup>2</sup> Personal property” is not independently defined for purposes of ch. 287, F.S., but the chapter title for Chapter 287, F.S., is “Procurement of Personal Property and Services.” Additionally, the definition of “commodity” in s. 287.012(5), F.S., is “any of the various supplies, materials, goods, merchandise, food, equipment, information technology, and other personal property, including a mobile home, trailer, or other portable structure that has less than 5,000 square feet of floor space, purchased, leased, or otherwise contracted for by the state and its agencies.” This definition is used in Part I of Ch. 287, F.S., “Commodities, Insurance, and Contractual Services.”

activity including professional and contractual services<sup>3</sup> as well as commodities needed to support agency activities.<sup>4</sup> The DMS assists state agencies and eligible users by providing uniform commodity and contractual service procurement policies, rules, procedures, and forms.<sup>5</sup>

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 methods include the following:

- Single source contracts,<sup>6</sup> 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,<sup>7</sup> which are used when an agency determines that standard services or goods will meet its needs, wide competition is available, and the vendor's experience will not greatly influence the agency's results;
- Requests for proposals (RFP),<sup>8</sup> 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 (ITN),<sup>9</sup> 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.

Criteria used to evaluate proposals received pursuant to a RFP must include, but are not limited to:

- Price;
- Renewal price, if renewal is contemplated;
- Consideration of the total cost for each year of the contract, including renewal years, as submitted by the vendor; and
- Consideration of prior relevant experience of the vendor.<sup>10</sup>

In ITNs, the criteria to be used in determining the acceptability of the reply and guiding the selection of the vendors with which the agency will negotiate must be specified in the ITN. The evaluation criteria must also include consideration of prior relevant experience of the vendor.<sup>11</sup>

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<sup>3</sup> As defined in s. 287.012(8), F.S. "contractual service" means the rendering by a contractor of its time and effort rather than the furnishing of specific commodities. The term applies only to those services rendered by individuals and firms who are independent contractors, and such services may include, but are not limited to, evaluations; consultations; maintenance; accounting; security; management systems; management consulting; educational training programs; research and development studies or reports on the findings of consultants engaged thereunder; and professional, technical, and social services. The term does not include a contract for the furnishing of labor or materials for the construction, renovation, repair, modification, or demolition of a facility, building, portion of building, utility, park, parking lot, or structure or other improvement to real property entered into pursuant to chapter 255 and rules adopted thereunder.

<sup>4</sup> See ss. 287.032 and 287.042, F.S.

<sup>5</sup> Section 287.032(2), F.S.

<sup>6</sup> Section 287.057(3)(c), F.S.

<sup>7</sup> Section 287.057(1)(a), F.S.

<sup>8</sup> Section 287.057(1)(b), F.S.

<sup>9</sup> Section 287.057(1)(c), F.S.

<sup>10</sup> Section 287.057(1)(b)3., F.S.

<sup>11</sup> Section 287.057(1)(c)3., F.S.

Contracts for commodities or contractual services in excess of \$35,000 must be procured utilizing a competitive solicitation process.<sup>12</sup> However, specified contractual services and commodities, such as artistic services and legal services, are not subject to competitive solicitation requirements.<sup>13</sup>

### ***State Term Contracts***

Current law authorizes the DMS to establish purchasing agreements and procure state term contracts for commodities and contractual services using the procurement methods described above.<sup>14</sup> These contracts are generally developed for purchases of commodities and services that are ongoing and common to multiple state agencies. State agencies are required to use state term contracts when they are available.<sup>15</sup> Other eligible users,<sup>16</sup> such as counties, cities, and school districts, may also utilize state term contracts.<sup>17</sup>

### ***Procurement of Personal Property and Services by Local Governments***

Local governments are not subject to the provisions of ch. 287.057, F.S., that prescribe methods for agencies' procurement of commodities or contractual services.<sup>18</sup> Local governmental units may look to the chapter for guidance in the procurement of goods and services, but many have local policies or ordinances to address competitive solicitations.<sup>19</sup>

### ***State and Local Government Procurement of Certain Professional Services***

In 1972, Congress passed the Brooks Act (Public Law 92-582), which codified Qualifications-Based Selection (QBS) as the federal procurement method for architect and engineering services. The QBS process entails first soliciting statements of qualifications from licensed architectural and engineering providers, selecting the most qualified respondent, and then negotiating a fair and reasonable price. The vast majority of states currently require a QBS process when selecting the services of architectural and engineering professionals.<sup>20</sup>

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<sup>12</sup> Section 287.057(1), F.S., requires all projects that exceed the Category Two (\$35,000) threshold contained in s. 287.017, F.S., to be competitively bid. As defined in s. 287.012(6), F.S., "competitive solicitation" means the process of requesting and receiving two or more sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement.

<sup>13</sup> See s. 287.057(3)(e), F.S.

<sup>14</sup> Section 287.042(2)(a), F.S.

<sup>15</sup> Section 287.056(1), F.S.

<sup>16</sup> See s. 287.012(11), F.S. and Rule 60A-1.001(2), F.A.C.

<sup>17</sup> Section 287.056(1), F.S.

<sup>18</sup> See ss. 287.012(1), F.S.

<sup>19</sup> In the absence of specific constitutional or statutory requirements, a public agency has no obligation to establish a bidding procedure and may contract in any manner not arbitrary or capricious. *Volume Servs. Div. of Interstate United Corp. v. Canteen Corp.*, 369 So. 2d 391 (Fla. 2d DCA 1979).

<sup>20</sup> Forty-six states use this process. American Council of Engineering Companies, Qualifications-Based Selection Resource Center, available at <http://www.acec.org/advocacy/qbs/> (last visited October 31, 2017).

The Florida Legislature enacted the Consultants' Competitive Negotiation Act (CCNA) in 1973,<sup>21</sup> which specifies the necessary procedures when procuring professional services<sup>22</sup> by an agency.<sup>23</sup>

Currently, the CCNA, codified in s. 287.055, F.S., specifies the process that state and local government agencies must follow when procuring the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper. The CCNA requires that state agencies publicly announce, in a consistent and uniform manner, each occasion when professional services must be purchased for one of the following:<sup>24</sup>

- A project, when the agency estimates the basic construction cost to exceed \$325,000.
- A planning or study activity, when the fee for professional services exceeds \$35,000.

The public notice must provide a general description of the project and describe how the interested consultants may apply for consideration.

The CCNA provides a two-phase selection process.<sup>25</sup> In the first phase, the “competitive selection,” the agency evaluates the qualifications and past performance of no fewer than three bidders. The agency selects the bidders, ranked in order of preference, and considers the most highly qualified to perform the required services. The CCNA requires consideration of several factors in determining the most highly qualified bidders.<sup>26</sup>

The CCNA prohibits the agency from requesting, accepting, and considering, during the competitive selection process, proposals for the compensation to be paid.<sup>27</sup>

Section 287.055(2)(d), F.S., defines the term “compensation” to mean the amount paid by the agency for professional services regardless of whether stated as compensation or as other types of rates.

In the second phase, the “competitive negotiation,” the agency negotiates compensation with the most qualified of the minimum three selected firms for professional services at compensation, which the agency determines, is “fair, competitive, and reasonable.”<sup>28</sup> If the agency cannot negotiate a satisfactory contract, the agency must formally terminate negotiations with that firm

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<sup>21</sup> Chapter 73-19, Laws of Fla.

<sup>22</sup> Section 287.055(2)(a), F.S., defines “professional services” as those within the scope of the practice of architecture, professional engineering, landscape architecture, or registered surveying and mapping, as defined by the laws of the state, or those performed by any architect, professional engineer, landscape architect, or registered surveyor and mapper in connection with his or her professional employment or practice.

<sup>23</sup> Section 287.055(2)(b), F.S., defines “agency” as the state, a state agency, a municipality, a political subdivision, a school district, or a school board. The term “agency” does not extend to a nongovernmental developer that contributes public facilities to a political subdivision under s. 380.06, F.S., or ss. 163.3220-163.3243, F.S.

<sup>24</sup> Section 287.055(3)(a)1., F.S.

<sup>25</sup> Sections 287.055(4) and (5), F.S.

<sup>26</sup> Section 287.055(4)(b), F.S., requires agencies to consider the following factors: the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the firms; and, the volume of work previously awarded to each firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms.

<sup>27</sup> *Id.*

<sup>28</sup> Section 287.055(5)(a), F.S.

and must then negotiate with the second most qualified firm.<sup>29</sup> The agency must negotiate with the third most qualified firm if the negotiation with the second most qualified firm fails to produce a satisfactory contract.<sup>30</sup> If the agency cannot negotiate a satisfactory contract with any of the three selected, the agency must select additional firms in order of their competence and qualifications and continue negotiations until it reaches a contract.<sup>31</sup> Once negotiations with a firm are terminated, the agency cannot resume negotiations with that firm for the project.

In October 2011, the Attorney General opined that local governments could not create a hybrid procurement process for awarding projects and are limited to utilizing statutorily defined procedures.<sup>32</sup>

### ***Procurement of Construction Services for Public Property and Publicly Owned Buildings***

Chapter 255, F.S., specifies the procedures to be followed in the procurement of construction services for public property and publicly owned buildings. Section 255.29, F.S., requires the DMS to establish, by rule,<sup>33</sup> the following construction contract procedures for:

- Determining the qualifications and responsibility of potential bidders prior to advertisement for and receipt of bids for building construction contracts, including procedures for the rejection of bidders who are reasonably determined from prior experience to be unqualified or irresponsible to perform the work required by a proposed contract.
- Awarding each state agency construction project to the lowest qualified bidder. Additionally, the DMS must provide procedures for cases in which the DMS declares a valid emergency to exist, which would necessitate the waiver of the rules governing the award of state construction contracts to the lowest qualified bidder.
- Governing negotiations for construction contracts and modifications to contract documents when the DMS Secretary determines that such negotiations are in the best interest of the state.
- Entering into performance-based contracts for the development of public facilities when the DMS determines the use of such contracts to be in the best interest of the state.

These procedures must include, but are not limited to:<sup>34</sup>

- Prequalification of bidders;
- Criteria to be used in developing requests for proposals which may provide for singular responsibility for design and construction, developer flexibility in material selection, construction techniques, and application of state-of-the-art improvements;
- Accelerated scheduling, including the development of plans, designs, and construction simultaneously; and

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<sup>29</sup> Section 287.055(5)(b), F.S.

<sup>30</sup> *Id.*

<sup>31</sup> Section 287.055(5)(c), F.S.

<sup>32</sup> Op. Att’y Gen. Fla. 2011-21 (2011).

<sup>33</sup> See Chapter 60D-5, F.A.C., that establishes the procedures for s. 255.29, F.S. Rule 60D-5.001, F.A.C., requires procedures be followed in advertising for bids for construction contracts; in determining the eligibility of potential bidders to submit proposals for construction contracts; in awarding construction contracts; for waiver of non-material bid deviations; for rejection of bids; for disqualification of contractors; in requesting authority to negotiate contracts, and in negotiating contracts.

<sup>34</sup> Section 255.29(4)(a)-(d), F.S.

- Evaluation of proposals and award of contracts considering such factors as price, quality, and concept of the proposal.

The state must competitively bid contracts for construction projects that it projects to cost in excess of \$200,000.<sup>35</sup> County, municipal, or other political subdivision contracts for construction projects that are projected to cost in excess of \$200,000 also must be bid competitively.<sup>36</sup> Counties, municipalities, special districts, or other political subdivisions seeking to construct or improve a public building must bid the project competitively if the projected cost is in excess of \$300,000.<sup>37</sup>

The solicitation of competitive bids or proposals for any state construction project with anticipated costs of more than \$200,000 must be advertised publicly in the Florida Administrative Register (FAR) at least 21 days prior to the established bid opening.<sup>38</sup> If the construction project is projected to exceed \$500,000, the advertisement must be published in the FAR at least 30 days prior to the bid opening, and at least once in a newspaper of general circulation in the county where the project is located 30 days prior to the bid opening and at least 5 days prior to any scheduled prebid conference.<sup>39</sup>

### **Advisory Bodies**

Section 20.052, F.S., provides that an advisory body created by specific statutory enactment as an adjunct to an executive agency must be established, evaluated, or maintained in accordance with certain requirements. An advisory body may be created only when it is found to be necessary and beneficial to the furtherance of a public purpose,<sup>40</sup> and it must be terminated by the Legislature when it is no longer necessary and beneficial to the furtherance of the public purpose.<sup>41</sup> The private citizen members of an advisory body that is adjunct to an executive agency must be appointed by the Governor, the head of the department, the executive director of the department, or a Cabinet officer.<sup>42</sup>

### **III. Effect of Proposed Changes:**

**Section 1** creates the Statewide Procurement Efficiency Task Force (task force) to evaluate the effectiveness and value of state and local procurement laws and policies to the taxpayers of this state and to determine where inconsistencies in such laws and policies exist. The task force is to be chaired by the DMS Secretary, or their designee, and composed of:

- Six members appointed by the Governor: one county government official, one municipal government official, one district school board member, and three representatives of the business community;

<sup>35</sup> Section 255.0525(1), F.S. Also, see Rules 60D-5.002(2) and 60D-5.0073, F.A.C.

<sup>36</sup> Section 255.0525(2), F.S.

<sup>37</sup> Section 255.20(1), F.S. (Special district as defined in ch. 189, F.S.). For electrical work, local governments must competitively award projects estimated to cost more than \$75,000 to an appropriately licensed contractor.

<sup>38</sup> Section 255.0525(1), F.S.

<sup>39</sup> *Id.* Similar publishing provisions apply to construction projects projected to cost more than \$200,000 for counties, municipalities, and other political subdivisions. See Section 255.0525(2), F.S.

<sup>40</sup> Section 20.052(1), F.S.

<sup>41</sup> Section 20.052(2), F.S.

<sup>42</sup> Section 20.052(5)(a), F.S.

- Two members appointed by the Speaker of the House of Representatives: one member of the House of Representatives and one attorney who is a Florida Bar member in good standing and has expertise in procurement law; and
- Two members appointed by the President of the Senate: one member of the Senate and one attorney who is a Florida Bar member in good standing and has expertise in procurement law.

Members of the task force are to serve without compensation and are not entitled to reimbursement for per diem or travel expenses.

The bill also requires appointments to be made by July 31, 2018. By August 31, 2018, the task force is to have met to organize. The task force shall meet at the call of the chair. A majority of task force members constitutes a quorum, and a quorum is necessary for the purpose of voting on any action or recommendation of the task force. All meetings must be held in Tallahassee, unless otherwise decided by the task force, and no more than two such meetings may be held in other locations for the purpose of taking public testimony. The DMS is to provide administrative and technical support for the task force. The final report of the task force is to be submitted to the Governor, President of the Senate, and the Speaker of the House by July 1, 2019, and must include, at a minimum, recommendations for consideration by the Legislature to promote procurement efficiency, streamline procurement policies, establish best management practices, and encourage increased use of state term contracts. The task force is to be terminated December 31, 2019.

**Section 2** provides that the bill takes effect upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

##### **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:**

Indeterminate.

**C. Government Sector Impact:**

As the DMS is required to provide administrative and technical support to the Statewide Procurement Efficiency Task Force, it will incur an indeterminate amount of administrative expenses.<sup>43</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates an undesignated section of the Florida Statutes.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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

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<sup>43</sup> 2018 Agency Legislative Bill Analysis from the Department of Management Services, October 31, 2017, on file in the office of the Senate Committee on Governmental Oversight and Accountability.