

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/CS/HB 1159 Contractual Services Contract Liability Limits

**SPONSOR(S):** State Affairs Committee and Constitutional Rights, Rule of Law & Government Operations Subcommittee, Yarkosky

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/CS/SB 1188

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**FINAL HOUSE FLOOR ACTION:** 117 Y's 0 N's **GOVERNOR'S ACTION:** Vetoed

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### SUMMARY ANALYSIS

CS/CS/HB 1159 passed the House on May 2, 2023, as CS/CS/SB 1188.

Florida law requires state agencies seeking to procure commodities or contractual services in excess of \$35,000 to use a competitive solicitation process. Depending on the type of contract and scope of work or goods sought, an agency may use one of three procurement methods: invitation to bid, request for proposals, or invitation to negotiate. A competitive solicitation for contractual services in excess of \$35,000 must be evidenced by a written agreement embodying all provisions and conditions of the procurement of such services, including the financial consequence that the agency must apply if the contractor fails to perform in accordance with the contract. However, current law does not provide mandatory minimum or maximum measures for liability under such contracts.

The bill requires the written agreement for an agency procurement of contractual services in excess of \$35,000 to include a contract provision that limits the contractor's liability for direct damages to the greater of \$100,000, the dollar amount of the contract or purchase order, or two times the charges rendered by the contractor under the purchase order. The bill includes the specific provisions that must be part of the limited liability provision of the contract, including a provision that the limitation does not apply to claims arising under the indemnity section of the agreement relating to insurance coverage for the provision of professional services, unless otherwise agreed to by the parties to the contract.

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

The effective date of this bill was July 1, 2023; however, this bill was vetoed by the Governor on June 30, 2023.

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF CHANGES:

#### Competitive Solicitation for Commodities or Contractual Services

Florida law requires state agencies use a competitive solicitation process<sup>1</sup> when procuring commodities or contractual services in excess of \$35,000.<sup>2</sup> A competitive solicitation is 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 procurement method.<sup>3</sup> Depending on the type of contract and scope of work or goods sought, an agency may use one of three procurement methods: invitation to bid,<sup>4</sup> request for proposals,<sup>5</sup> or invitation to negotiate.<sup>6</sup>

#### *Invitation to Bid*

An agency must use an invitation to bid (ITB) if the agency can define the scope of work or specific commodity sought. An ITB must include a detailed description of the commodity or contractual service sought and whether the agency contemplates renewal of the contract. If the agency contemplates renewal of the contract, then each bid submitted in response to an ITB must include the price for each year for which the contract may be renewed. Bid evaluations must include consideration of the total cost for each year of the contract, including renewal years, and the contract must be awarded to the responsible<sup>7</sup> and responsive<sup>8</sup> vendor who submits the lowest responsive bid.<sup>9</sup>

#### *Request for Proposals*

An agency must use a request for proposals (RFP) when the purposes and uses for the contractual service or commodity sought can be specifically defined and the agency is capable of identifying necessary deliverables. A vendor may respond with various versions of services or commodities to meet the specification of the solicitation. Before issuing an RFP, the agency must specify in writing the reasons an ITB is not practicable. An RFP must include a statement describing the commodities or contractual services sought, the relative importance of price and other evaluation criteria, and whether the agency contemplates renewal of the contract. The contract is awarded by written notice to the responsible and responsive vendor whose proposal is most advantageous to the state.<sup>10</sup>

#### *Invitation to Negotiate*

An invitation to negotiate (ITN) is a solicitation used by an agency that is intended to determine the best method for achieving a specific goal or solving a particular problem. An ITN identifies one or more responsive vendors with which the agency may negotiate in order to receive the best value. Before issuing an ITN, the agency head must specify in writing the reasons an ITB or an RFP are not practicable. An ITN must include questions being explored, the facts being sought, and the specific goals of the solicitation. The agency may select one or more vendors to begin negotiations and then

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

<sup>2</sup> S. 287.017, F.S., creates five purchasing categories and their corresponding threshold amounts: Category One: \$20,000; Category Two: \$35,000; Category Three: \$65,000; Category Four: \$195,000; Category Five: \$325,000.

<sup>3</sup> S. 287.012(6), F.S.

<sup>4</sup> S. 287.057(1)(a), F.S.

<sup>5</sup> S. 287.057(1)(b), F.S.

<sup>6</sup> S. 287.057(1)(c), F.S.

<sup>7</sup> A “responsible vendor” is a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance. S. 287.012(25), F.S.

<sup>8</sup> A “responsive vendor” is a vendor that has submitted a bid, proposal, or reply that conforms in all material aspects to the solicitation. S. 287.012(27), F.S.

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

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

award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state.<sup>11</sup>

### Contract Evaluations and Negotiations

For a contract in excess of \$195,000, the agency head must appoint at least three people to evaluate proposals and replies who collectively have experience and knowledge in the program areas and service requirements for which commodities or contractual services are sought.<sup>12</sup> In addition, the agency head must appoint three people<sup>13</sup> to conduct negotiations during an ITN procurement who collectively have experience and knowledge in negotiating contracts, contract procurement, and the program areas and service requirements for which commodities or contractual services are sought.<sup>14</sup>

### Contracts

A competitive solicitation for contractual services in excess of \$35,000<sup>15</sup> must be evidenced by a written agreement embodying all provisions and conditions of the procurement of such services. The written agreement must include, but is not limited to, provisions for the following:<sup>16</sup>

- That bills for fees or other compensation for services or expenses be submitted in detail sufficient for proper preaudit and postaudit.
- That bills for any travel expenses be submitted in accordance with the law on per diem and travel expenses of public officers, employees, or authorized persons.<sup>17</sup>
- Allowing unilateral cancellation by the agency for refusal by the contractor to allow public access to all documents, papers, letters, or other material made or received by the contractor in conjunction with the contract, unless the records are exempt from public access.
- Specifying a scope of work clearly establishing all tasks the contractor is required to perform.
- Dividing the contract into quantifiable, measurable, and verifiable units of deliverables that must be received and accepted in writing by the contract manager before payment.
- Specifying the criteria and final date by which such criteria must be met for completion of the contract.
- Specifying that the contract may be renewed for a period that may not exceed three years or the term of the original contract, whichever is longer, and that renewals are contingent upon satisfactory performance evaluations by the agency and subject to the availability of funds.
- Specifying the renewal price for the contractual service as set forth in the bid, proposal, or reply.
- Specifying that costs for the renewal may not be charged.
- Specifying the financial consequences that the agency must apply if the contractor fails to perform in accordance with the contract; however, current law does not provide mandatory minimum or maximum measures for liability under such contracts.<sup>18</sup>
- Addressing the property rights of any intellectual property related to the contract and the specific rights of the state regarding the intellectual property if the contractor fails to provide the services or is no longer providing services.

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

<sup>12</sup> S. 287.057(17)(a)1., F.S.

<sup>13</sup> If the value of the contract is in excess of \$1 million in any fiscal year, then at least one person conducting negotiations must be certified as a contract negotiator. If the value of the contract is in excess of \$10 million in any fiscal year, then at least one person conducting negotiations must be a Project Management Professional certified by the Project Management Institute. S. 287.057(17)(b), F.S.

<sup>14</sup> S. 287.057(17)(a)2., F.S.

<sup>15</sup> S. 287.058(1), F.S., provides an exception for the written agreement for contractual services that provide health and mental health services or drugs in the examination, diagnosis, or treatment of sick or injured state employees or provide other benefits as required by ch. 440, F.S.

<sup>16</sup> S. 287.058(1), F.S.

<sup>17</sup> See s. 112.061, F.S.

<sup>18</sup> S. 287.058(1)(h), F.S.

By rule, the Department of Management Services (DMS) adopted specific terms and conditions pertaining to liabilities arising under contracts for procuring commodities and services.<sup>19</sup> Under the DMS contract requirements, a contractor's liability is limited to the greater of \$100,000, the dollar amount of the contract or purchase order, or two times the charges rendered by the contractor under the purchase order. The DMS contract term excludes liability special, indirect, punitive, or consequential damages for breach of the contract.

The written agreement must be signed by the agency head or designee and the contractor before the rendering of any contractual service in excess of \$35,000.<sup>20</sup> Unless otherwise provided in the General Appropriations Act (GAA) or the substantive bill implementing the GAA, the Chief Financial Officer may waive these requirements for services that are included in law for procurement of commodities or contractual services.<sup>21</sup> A contract may not prohibit a contractor from lobbying the executive or legislative branch concerning the scope of services, performance, term, or compensation regarding any contract to which the contractor and a state agency are parties, after contract execution and during the contract term.<sup>22</sup>

Each public agency contract for services must authorize the public agency to inspect:<sup>23</sup>

- Financial records, papers, and documents of the contractor that are directly related to the performance of the contract or the expenditure of state funds.
- Programmatic records, papers, and documents of the contractor that the public agency determines are necessary to monitor the performance of the contract or to ensure that the terms of the contract are being met.

The contract must require the contractor to provide the records, papers, and documents requested by the public agency within 10 business days after the request is made.<sup>24</sup>

### **Effect of Proposed Changes**

The bill requires the written agreement for an agency procurement of contractual services in excess of \$35,000 to include a contract provision limiting the contractor's liability for direct damages to the greater of \$100,000, the dollar amount of the contract or purchase order, or two times the charges rendered by the contractor under the purchase order. The contract provision must provide that the limitation of liability does not apply to claims arising under an indemnity section of the agreement relating to insurance coverage for the provision of professional services,<sup>25</sup> unless otherwise agreed to by the parties to the contract. The bill also requires the contract provision to provide that, unless specified in the contract or purchase order, no party will be held liable to another for special, indirect, punitive, or consequential damages, and that no party will be liable for lost profits, lost revenue, or lost institutional operating savings. Finally, the contract provision must provide that the State may set off any liability or other obligation of the contractor or its affiliates to the state against any payments due to the contractor.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

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<sup>19</sup> Rule 60A-1.002, F.A.C.; PUR 1000, "General Contract Conditions," s. 20 (Oct. 2006).

<sup>20</sup> S. 287.058(2), F.S. There is an exception in the case of a valid emergency as certified by the agency head.

<sup>21</sup> S. 287.058(5), F.S.

<sup>22</sup> S. 287.058(6), F.S.

<sup>23</sup> S. 216.1366(1), F.S.

<sup>24</sup> S. 216.1366(2), F.S.

<sup>25</sup> The bill defines "professional services" to mean those services 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. S. 287.055(2)(a), F.S.

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:

The provisions contained in the bill may provide the private sector with more stability relating to limitation of liability when entering into a contract with a state agency.

D. FISCAL COMMENTS:

None.