



The Florida Senate

Interim Project Report 2007-129

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Committee on Governmental Operations

STATE AGENCY PROCUREMENT PROCEDURES

SUMMARY

Pursuant to s. 287.057, F.S., unless authorized by law, all agency contracts for the purchase of commodities or services in excess of \$25,000 must be awarded subsequent to an invitation to bid, a request for proposals, or an invitation to negotiate. Because ch. 287, F.S., uses purchasing categories and dollar threshold amounts as the basis for requiring competitive procurements, there is no statutory requirement that contracts which do not involve the direct outlay of funds must be competitively procured. The Legislature may wish to consider revising current procurement law to require that contracts which confer a benefit on a vendor should be competitively procured.

BACKGROUND

Chapter 287, F.S., governs the procurement of personal property and services by state agencies. The legislative intent section of ch. 287, F.S.,¹ declares that the Legislature "recognizes that fair and open competition is a basic tenant of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically...."

Pursuant to ch. 287, F.S., contracts for the purchase of most commodities and services are to be procured by competitive solicitation² when the dollar amount is above a certain thresholds established in s. 287.017, F.S. That threshold, last changed in 1999,³ is currently \$25,000.⁴ Purchases between \$2,500 and \$25,000 may be made using written quotations, written

records of telephone quotations, or informal bids to be opened upon receipt, whenever practical.⁵

Before the 2002 Regular Session, statute required the DMS to annually adjust the purchasing category amounts pursuant to rule that set forth an adjustment process and designated a nationally recognized price index.⁶ These adjustments were never made, however, and during the 2002 Regular Session, legislation requested by the DMS was enacted which retained the requirement for rule adjustment of the categories, but which repealed the requirement that the adjustment occur annually.⁷ DMS rule currently provides for the adjustment of the categories by State Purchasing within the DMS based upon the April publication of the United States Department of Commerce Survey of Current Business Table 7.11B Price Index for State and Local Government.⁸ To date, the DMS has not made the adjustment to the thresholds required by statute; accordingly, the operative category amounts for agency procurements are those currently set forth in statute, as indicated above.

Revenue-Generating Contracts: Though used infrequently, state agencies enter into contracts with vendors which do not require the direct outlay of state funds to the contractor, but generate a financial benefit to the vendor or the agency, or both.

Recently, one such contract, between the Department of Corrections (DOC) and a contractor for the operation of DOC canteens, has been the subject of intense scrutiny. DOC did not competitively procure the contract in accordance with ch. 287, F.S., presumably under the logic that since the contract was revenue generating, competitive solicitation was not required.⁹ In 2006, a former Secretary and Regional

¹ Section 287.001, F.S.

² Section 287.057(1)(a), F.S.

³ Chapter 99-399, s. 43, L.O.F.

⁴ Section 287.017(1)(b), F.S.

⁵ Rule 60A-1.002(3), F.A.C.

⁶ Subsection 287.017(2), F.S. (2000 Supp.).

⁷ Chapter 02-207 s. 10, L.O.F.

⁸ Rule 60A-1.012, F.A.C.

⁹ *Outsourcing of Canteen Operations*, Department of

Director of DOC pleaded guilty to accepting kickbacks from a subcontractor on the canteen services contract.

The Auditor General recommended in Report No. 2005-044 that the Legislature should consider revising current law to include provisions for the competitive procurement of revenue-generating contracts.

Share-in-Savings Contracts: Under share-in-savings (SIS) contracts, “government contractors bear the upfront cost and financial risk of a project, in exchange for a share of any resulting savings or revenues realized by the government.”¹⁰ Though some SIS contracts may involve an outlay of appropriated funds, others may not. (For example, a contractor building a system to collect delinquent taxes could be compensated from revenues recovered.)¹¹

The State of Florida does have at least one SIS contract which entails the payment of appropriated funds to the vendor. In 2001, the Division of Business and Professional Regulation entered into a contract with Accenture, LLP for provision of an on-line licensing system, Internet portal, and call center. The entire contract with its vendor was competitively procured, though not without concerns raised.¹² A substantial portion of the contractor’s compensation under the contract is to be derived from the SIS provisions of the contract. Potentially a state agency could enter into a SIS contract without selecting a vendor pursuant to ch. 287, F.S., if the SIS contract did not entail the outlay of appropriated funds.

The federal government has limited experience with SIS contracts, which were authorized for obtaining information technology by the E-Government Act of 2002.¹³ A recent report of the United States General Accounting Office noted that use of SIS has been hampered by the lack of implementing regulations, the

difficulty in determining baseline costs, and concerns that the return on investment may be too low to attract potential contractors.¹⁴

METHODOLOGY

Staff reviewed Auditor General and GAO reports and published materials relating to revenue-generating and share-in-savings contracts.

FINDINGS

Contracts between agencies and contractors which confer a benefit upon the contractor, but do not require the outlay of appropriated funds, are not specifically required by statute to be competitively procured pursuant to ch. 287, F.S. Such contracts, which include revenue-generating contracts and share-in-savings contracts, provide a benefit to both the agency and the contractor.

The purchasing threshold categories of s. 287.017, F.S., essentially codify a policy determination regarding how much process an agency should undertake to achieve efficient procurement decisions. Considerations of how much process should occur to achieve efficient use of taxpayer dollars in agency procurements must be balanced with the intent of the procurement statutes to inspire public confidence that contracts are awarded equitably and economically. While no procurement process at all may appear to cost an agency less up front, the potential for abuse and impropriety, and cost to public perception of how state agencies spend taxpayer dollars or confer economic benefits to contractors, suggest that contracts which confer benefits to contractors ought to be procured by competitive solicitation.

RECOMMENDATIONS

Staff recommends that contracts which do not involve the direct outlay of appropriated funds, but do confer an economic benefit to a contractor, should be procured by competitive solicitation in accordance with the provisions of ch. 287, F.S.

Corrections, Auditor General Report No. 2005-044, October 2004

¹⁰ Sandeep Kathuria, “An Overview of Share-in Savings Contracting.” *Contract Management*, vol. 45, no. 11 (2005).

¹¹ Ibid.

¹² See *On-Line Licensing System and Call Center Services Agreement*, Florida Department of Business and Professional Regulation, Auditor General Report No. 2002-112, December 2001; *On-Line Licensing System and Call Center Services Agreement*, Department of Business and Professional Regulation, Auditor General Report No. 2004-112, January 2004.

¹³ Section 210, Public Law 107-347 (Dec. 17, 2002), codified at 41 U.S.C. § 266a and 10 U.S.C. § 2332.

¹⁴ Government Accountability Office, “Share-in-Savings Initiative Not Yet Tested,” GAO-05-736 (July 2005).