



The Florida Senate

Issue Brief 2009-329

October 2008

Committee on Governmental Operations

AGENCY USE OF ALTERNATE CONTRACT SOURCES

Statement of the Issue

Section 287.042(16)(a), F.S., gives the Department of Management Services (DMS or department) the authority to evaluate contracts let by the federal government, other states, and political subdivisions, and, when it is cost-effective and in the best interest of the state, enter into agreements to allow agencies to use such contracts. The department approves two types of alternate contract sources: those that are identified by DMS and approved for use by all agencies, and those that are requested by an agency and approved by DMS for use by the requesting agency, for either a single transaction or multiple transactions.

This report will examine the approval of alternate contract sources by DMS and their use by state agencies, to determine whether use of alternate contract sources is an efficient method to procure commodities and services, and consider whether DMS and state agencies are making use of alternate contract sources (ACS) consistent with procurement law established by the Legislature.

Discussion

Procurement of Personal Property and Services

Chapter 287, F.S., sets forth processes for the procurement of commodities and contractual services by executive agencies,¹ including requirements for fair and open competition among vendors, agency maintenance of written documentation that supports procurement decisions, and implementation of monitoring mechanisms. Legislative intent language for the chapter explains that such processes are necessary in order to:

- Reduce improprieties and opportunities for favoritism;
- Insure the equitable and economical award of public contracts; and
- Inspire public confidence in state procurement.²

The Department of Management Services is statutorily tasked with effecting coordination in the purchase of commodities and contractual services in the state,³ and its responsibilities include: overseeing agency implementation of the ch. 287, F.S., competitive procurement process;⁴ creating uniform agency procurement rules;⁵ implementing the online procurement program;⁶ and establishing state term contracts.⁷ The agency procurement process is also partly decentralized in that agencies, except in the case of state term contracts, may procure goods and services themselves in accordance with requirements set forth in statute and rule, rather than placing orders through the DMS.

¹ Section 287.012(1), F.S., provides that the term “agency” for purposes of ch. 287, F.S., “. . . 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.”

² Section 287.001, F.S.

³ Section 287.032(1), F.S.

⁴ Sections 287.032 and 287.042, F.S.

⁵ Sections 287.032(2) and 287.042(3), (4), and (12), F.S.

⁶ Section 287.057(23), F.S.

⁷ Sections 287.042(2), 287.056, and 287.1345, F.S.

For agencies, when the purchase price of commodities or contractual services exceeds \$25,000, no purchase of commodities or contractual services may be made without receiving competitive sealed bids, competitive sealed proposals, or competitive sealed replies, with certain specific exceptions:

Emergency purchases: If the agency head determines in writing that emergency action is required due to an immediate danger to the public health, safety or welfare, or other substantial loss to the state, the agency may procure goods or services without using a competitive solicitation. However, the agency must obtain quotes from at least two prospective vendors, unless it determines in writing that the time required to obtain pricing information will increase the immediate danger to the public health, safety, or welfare or other substantial loss to the state. A copy of the written statement of emergency need must be filed with the Chief Financial Officer and DMS.⁸

State term and agency contracts: In the following two circumstances, agencies may purchase from contracts established by DMS or other agencies:

- Agencies may purchase from a state term contract procured by DMS.
- With prior approval from DMS, an agency may purchase from another agency's competitively-solicited contract.⁹

Single source purchases: If an agency believes that commodities or contractual services are only available from a single source, the agency may electronically post¹⁰ a description of the desired purchase for a period of seven days. If, after reviewing any information received in response to the posting, the agency determines that only a single source is available, the agency may provide notice of its intended decision to enter into a single source purchase contract, if the amount of the contract does not exceed \$150,000.¹¹ If the cost of the single source purchase exceeds \$150,000, prior approval for the purchase must be sought from the DMS.¹²

Further, statute specifies numerous exceptions to the types of commodities and contractual services that are subject to ch. 287, F.S., requirements. Notwithstanding cost, the following commodities or contractual services need not be competitively solicited with an ITB, RFP, or ITN: prescriptive assistive devices for medical, developmental, or vocational clients; artistic services; academic program reviews; lectures by individuals; auditing services; legal services; specified health services; services for the mentally or physically handicapped provided by certain not-for-profit corporations; specified Medicaid services; family placement services; prevention services related to mental health; specified training and education services for injured employees; Department of Transportation contracts for construction and maintenance of state roads;¹³ services or commodities provided by governmental agencies; specified voter education activities; specified continuing education events; and contracts for which state or federal law prescribes with whom the agency must contract or the rate of payment.¹⁴

Alternate Contract Sources

Another exception to competitive solicitation requirements is authorized by s. 287.042(16)(a), F.S., which permits DMS to evaluate contracts let by the Federal Government, another state, or a political subdivision for the provision of commodities and contract services, and, when it is determined in writing to be cost-effective and in the best interest of the state, to enter into a written agreement authorizing an agency to make purchases under such a contract approved by the department. The phrase "alternate contract source" does not appear in the Florida Statutes. DMS has called the contracts permitted by s. 287.042(16)(a), F.S., "alternate contract sources" in its administrative rule, but because the phrase is not used in statute, state agencies consider their use optional, as will be discussed in detail below.

⁸ Section 287.057(5)(a), F.S.

⁹ Section 287.057(5)(b), F.S. This paragraph could use some editing to clarify what appear to be the two different exceptions contained therein.

¹⁰ "Electronically post" means the posting of solicitations, agency decisions or intended decisions, or other matters relating to procurement on a centralized Internet website designated by the department [DMS] for this purpose." Section 287.012(11), F.S.

¹¹ Section 287.057(5)(c)1., F.S.

¹² Section 287.057(5)(c)(2), F.S.

¹³ Chapter 337, F.S., provides competitive requirements for road contracts.

¹⁴ Sections 287.057(5)(f) and (11), F.S.

Alternate contract sources are the least process intensive of the three types of contract vehicles that the Division of State Purchasing utilizes. State term contracts must be procured pursuant to a formal competitive process,¹⁵ in which a person adversely affected by an agency decision or intended decision relating to procurement and contract award is entitled to file a protest in accordance with the Administrative Procedure Act.¹⁶ Allowing such protests, while potentially burdensome to agencies, ensures that agency contracts are awarded in compliance with Chapter 287, F.S. DMS also establishes purchasing agreements pursuant to s. 287.042(2)(a), F.S., which are intended for use for purchases under \$25,000. DMS establishes state purchasing agreements upon request by an agency¹⁷ by obtaining quotes from vendors registered in the state's web-based procurement system- MyFloridaMarketPlace; all agencies can use the resulting agreement.

Alternate contract sources are not procured pursuant to competitive solicitation requirements, and no administrative rights are implicated in DMS's decision to approve them, so there is potentially great value to an agency using one, because the costs involved in the public procurement resulting in the contract have been borne by a different entity.

In practice, there are two types of alternate contract sources approved by DMS, those requested by an agency for a specific transaction, and those initiated by DMS and approved for use by all agencies.

Requested by an Agency

The department has adopted an administrative rule¹⁸ and associated incorporated form¹⁹ by which agencies may request approval for use of alternate contract sources. The form requires basic information relating to the contract and items to be purchased. The review by DMS includes determining whether the ACS is a term requirements contract, whether the proposed purchase is within the contract's scope, and whether the contract would be cost effective and in the best interests of the state. Whether the proposed contract is within the original contract's scope is a critical inquiry. The underlying contract ought not be used merely as a starting point for negotiations.²⁰ To avoid the problem of piggybacked contracts expanding beyond the scope of the underlying contract, the types of contracts DMS generally deems appropriate for use as alternate contract sources are indefinite delivery, indefinite quantity (IDIQ) contracts. Such contracts allow for the open-ended delivery of goods or services over a time period. DMS must also determine whether the source contract allows for such cooperative purchasing, or if the source contract jurisdiction provides for cooperative purchasing in its statutes or regulations.

Absent documentation delays from the requestor, DMS usually completes its review process in two to three days.²¹ DMS approval is contingent upon execution by the contractor of Alternate Contract Source Terms and Conditions, which incorporate some terms found in other state contracts.²² Though typically the source contract will have been entered into by a singular governmental entity- a Florida state agency, another state, or the Federal government- the

¹⁵ Section 287.057, F.S.

¹⁶ Section 120.057(3), F.S.

¹⁷ Agencies request that DMS establish a state purchasing agreement by submitting Form PUR 7721, incorporated into Rule 60A-1.025, F.A.C.

¹⁸ Rule 60A-1.047, F.A.C.

¹⁹ PUR 7102, Agency Request for Review of Alternate Contract Source

²⁰ See *Accela, Inc. v. Sarasota County*, ---So.2d ---, 2008 WL 508397, 33Fla. L. Weekly D601 (Fla. 2d DCA, Feb. 27, 2008), an unpublished decision holding that a county's attempt to piggyback another state's contract violated the county's procurement code. The court looked at the terms and conditions of the underlying contract and held that the county's code required that the piggybacked contract must be "substantially the same" as the underlying contract. The court found that the new agreements were a "significant expansion beyond" the underlying contract, and therefore violated the county's procurement code.

²¹ Information provided in email from DMS dated September 4, 2008, on file with the committee.

²² The terms from Form PUR 7102 include provisions that the vendor must register in MyFloridaMarketPlace (MFMP), and the transaction is subject to the MFMP 1% transaction fee. Bills must be in detail sufficient for proper audit. The agency may unilaterally cancel the agreement if the vendor refuses access to public records. The State's obligation to pay is contingent upon appropriations.

contract may be with a contracting alliance, consisting of multiple state governments that band together, such as the Western States Contracting Alliance.²³

Information related to alternate contract sources requested by agencies is contained in the table below:

Fiscal Year	Requested	Withdrawn	Denied	Approved	Estimated Agency Spend
2007-08	29	2	4	23	\$ 14,347,561
2006-07	36	7	3	26	\$ 10,436,415
2005-06	59	14	13	32	\$ 11,612,571
2004-05	19	1	4	14	\$ 2,439,898

Initiated by DMS

The department may also independently identify term contracts or requirements contracts awarded by other governmental entities, and approve such alternate contract sources for use by agencies. As of July 28, 2008, DMS designated eleven alternate contract sources available for use by agencies,²⁴ through which agencies spent approximately \$305 million in Fiscal Year 2007-08.²⁵

Mandatory or Optional Use

The section of the Florida Statutes giving DMS the authority to approve an alternate contract source²⁶ is silent as to whether, once approved, the ACS must be used by agencies. However, s. 287.056(1), F.S., provides that “[a]gencies shall, and eligible users may, purchase commodities and contractual services from purchasing agreements established and state term contracts procured, pursuant to s. 287.057, by the department.” Every noun in this subsection is defined in s. 287.012, F.S., *except* “purchasing agreements.” If an alternate contract source is considered a “purchasing agreement,” a plain reading of the statute would appear to require their use by agencies, without exception.²⁷

In the administrative rule on alternate contract sources, DMS does not address whether the use of DMS- initiated alternate contract sources is mandatory or optional.²⁸ DMS appears to believe it has the authority to deem use of an ACS as either mandatory or optional.²⁹

²³ Though s. 287.042(16)(a), F.S., does not specifically name public contracting alliances as potential suppliers of alternate contract sources, if such alliances consist of governmental entities otherwise named in the statute, using their contracts is probably within the authority granted in the statute.

²⁴ The contracts include: Vehicle Lifts and Related Garage Equipment; WSCA: Sprint-Nextel; US Communities: GTSI and Tech Depot; BMC Software Distribution, Inc.; IBM Software; Data at Rest Encryption; GSA Schedule 70; Defibrillators, Related Equipment and Supplies; Office and Classroom Supplies; IT Research and Advisory Services; and Hazardous Incident Response Equipment.

²⁵ Email from DMS dated September 23, 2008. Most of this spend went through two contracts: the US Communities Office Depot alternate contract source has a spend of about \$40 million per year, and the Pharmaceutical Purchasing Program through the Minnesota Multi-state Contracting Alliance for Pharmacy (MMCAP) has a spend of about \$235 million per year. As of September 23, 2008, the MMCAP contract was designated by State Purchasing as a state term contract, though it is unclear what statutory authority DMS relied on to do so. DMS has subsequently indicated that the MMCAP contract is an alternate contract source, not a state term contract.

²⁶ Section 287.042(16)(a), F.S.

²⁷ Section 287.056(2), F.S., does give agencies the option to use *state term contracts*, if a STC contains a user surcharge pursuant to s. 287.1345, F.S. In practice this exception has been nullified, and subsection (2) is obsolete, because DMS no longer utilizes the user surcharge, which has been replaced in operation by the MyFloridaMarketPlace transaction fee authorized by s. 287.057(23), F.S.

²⁸ See Rule 60A-1.047, F.A.C., which largely addresses the process by which an ACS is approved by the department.

²⁹ DMS’ draft white paper on use of state term contracts, state purchasing agreements, and alternate contract sources, provided by DMS on August 25, 2008.

Presumably, DMS would rely on Rule 60A-1.044, F.A.C., for the proposition that DMS can deem use of an ACS as optional. Because DMS appears to believe it has authority to make its contracts optional use, a discussion of this rule is in order. The rule purports to provide circumstances under which use of a state term contract is not mandatory:

- When the purchase amount is less than \$250 or any threshold amount established in the STC.
- When the agency determines that the contract will not meet its need.
- When the contract expressly designates that it is a non-exclusive contract.³⁰

DMS's statutory authority for these exceptions is unclear, though the rule cites s. 287.042(12), F.S., as authority. That subsection provides that DMS may, *except as otherwise provided herein*, adopt rules necessary to carry out the purposes of s. 287.042, F.S., including the authority to delegate to any agency any and all of the responsibility conferred by the section, retaining to the department any and all authority for supervision thereof. [Emphasis added.]

Not only does s. 287.042(12), F.S., appear to lack any specific authority giving DMS the power to authorize exceptions to mandatory use of state term contracts, the rule appears to directly contradict the plain language in s. 287.056(1), F.S., which requires agencies to purchase from state term contracts procured by DMS. The Joint Administrative Procedures Committee, by letter to DMS dated September 5, 2008, requested that DMS provide the specific section of the Florida Statutes that authorizes DMS to create the exceptions in Rule 60A-1.044, F.A.C.³¹

State agency purchasing directors who responded to a brief survey opined almost unanimously that use of an alternate contract source established by DMS is always optional, and never mandatory.

Conclusion

Alternate contract sources can be a practical tool when used appropriately by state agencies. Such cooperative purchasing arrangements involve relatively minimal time and resources for DMS to put into place, and because the time and expense inherent to the public procurement process has been borne by another entity, an ACS can provide good value to an agency. DMS must continue to ensure that only contracts appropriate for use as alternate contract sources are considered for approval, so that an ACS is substantially the same as the existing contract, and not a significant expansion beyond the existing contract.³²

State statutes can be neither ignored nor overwritten by agency policies. DMS and state agencies should review their policies and procedures in reference to s. 287.056(1), F.S., to ensure they are complying with statutory procurement law. If current statutes do not provide the flexibility DMS and state agencies need to use approved contracting methods to achieve best value for the state, the Legislature can consider and enact changes to Chapter 287, F.S.

³⁰ Rule 60A-1.044(3), F.A.C.

³¹ DMS also issued State Purchasing Memorandum No.2 (2003-04), describing the use of state purchasing agreements, which declares that "state agencies are not required to use the State Purchasing Agreement." This statement appears to meet the definition of a rule in s. 120.052(12), F.S., ("rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency..."). Not only does this appear to be a rule not adopted pursuant to the Administrative Procedure Act, but it also appears to directly contradict the plain language of s. 287.056(1), F.S. ("agencies shall...purchase from purchasing agreements established...by the department."), assuming "purchasing agreement" in s. 287.056(1), F.S., includes a "state purchasing agreement" established by DMS.

³² These standards are suggested by the court in *Accela v. Sarasota County*, at 6.