

STORAGE NAME: h0623s1.sa.doc
DATE: March 20, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: CS/HB 623

RELATING TO: Government Accountability

SPONSOR(S): Committee on State Administration, Representative(s) Mack and others

TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
 - (2) LOCAL GOVERNMENT & VETERANS AFFAIRS
 - (3) COUNCIL FOR SMARTER GOVERNMENT
 - (4)
 - (5)
-

I. SUMMARY:

This committee substitute, in part,

- Prohibits the placement of a lien on state property or on any monetary recovery made on the state's behalf.
- Creates a presumption that any contract executed in violation of certain ethics provisions is void with respect to former state employees or former public officials and is voidable in the respect to any private-sector third party who employs or retains such former agency employee.
- Clarifies that certain records must be disclosed unless the records are exempt from public disclosure.
- Requires an agency's general counsel to review and sign the contract for private attorney services, and requires the agency head to sign the contract and maintain custody of the contract.
- Requires that contingency fee contracts for private attorney services on behalf of the state must be commercially reasonable and that if fee disputes arise, the counsel retained by the state must participate in mandatory, binding arbitration.
- Creates a provision that injunctive relief sought by the state or a state agency must issue without bond or surety.
- Requires notices of settlement or presettlement to specify how the agency involved will address the costs in future years, within the limits of current appropriations.
- Directs the agency head to include in the legislative budget request an inventory of all litigation involving the agency.

This committee substitute does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Section 11.066, F.S., Suits seeking monetary damages against the state or its agencies; payment of judgments; appropriations required.

Section 11.066, F.S., pertains to lawsuits seeking monetary damages against the state or the state's agencies. It provides that when the state or a state agency is exercising its inherent police power to protect the public health, safety, or welfare, it is presumed to be acting to prevent a public harm. A person may "rebut this presumption in a suit seeking monetary damages from the state or a state agency only by clear and convincing evidence to the contrary."¹

Neither the state nor a state agency is required to pay monetary damages under the judgment of any court except pursuant to an appropriation made by law.² In order to enforce a judgment for monetary damages against the state or a state agency, "the sole remedy of the judgment creditor, if there has not otherwise been an appropriation made by law to pay the judgment, is to petition the Legislature in accordance with its rules to seek an appropriation to pay the judgment."³

Section 11.066(4), F.S., provides that

[n]otwithstanding s. 74.091, a judgment for monetary damages against the state or any of its agencies may not be enforced through execution or any common-law remedy against property of the state or its agencies, and a writ of execution therefor may not be issued against the state or its agencies. Moreover, it is a defense to an alternative writ of mandamus⁴ issued to enforce a judgment for monetary damages against the state or a state agency that there is not appropriation made by law to pay the judgment.

¹ Section 11.066(2), F.S.

² Section 11.066(3), F.S.; s. 11.066(2), F.S., defines "appropriation made by law" as money allocated for a specific purpose by the Legislature, by law, in a general appropriations act or a special appropriations act. This is the same meaning as defined in s. 1(c), Art. VII of the State Constitution.

³ *Id.*

⁴ Black's Law Dictionary, sixth edition (1990), at 961, defines "mandamus" as "a writ issuing from a court of competent jurisdiction, commanding an inferior tribunal, board, corporation, or person to perform a purely ministerial duty imposed by law."

Chapter 112, F.S., Public Officers and Employees: General Provisions.

Chapter 112, F.S., outlines general provisions affecting public officers and employees. Part III of chapter 112, F.S., contains the code of ethics for public officers and employees.

Section 112.3175, F.S., provides that any contract which has been executed, and that contains provisions in violation of the code of ethics for public officers and employees, is voidable:

- By any party to the contract;
- In circuit court, by any appropriate action;
- By the Ethics Commission;
- By the Attorney General; or
- By any citizen materially affected by the contract and residing in the jurisdiction represented by the officer or agency entering into such contract.

Section 112.3185, F.S., provides that no agency employee, after retirement or termination, will have or hold any employment or contractual relationship with any business entity, in which the employee participated while an officer⁵ or employee⁶ of the agency.⁷

Chapter 287, F.S., Procurement of personal property and services.

Chapter 287, F.S., discusses the procurement of personal property and services. Part I of chapter 287, F.S., addresses commodities, insurance, and contractual services.

Section 287.058(1), F.S., requires that every procurement of contractual services in excess of the threshold amount for Category Two⁸, except for the provisions for health and mental health services or drugs in the examination, diagnosis, or treatment of sick or injured state employees or other specified benefits, must be evidenced by a written agreement embodying all provisions and conditions of the procurement of such services. This section includes a number of specific conditions that must be included in the contract if applicable. These conditions include:

- A provision that bills for fees or other compensation for services or expenses be submitted in detail sufficient for a proper preaudit and post audit thereof.
- A provision that bills for any travel expenses be submitted in accordance with certain requirements.

⁵ Section 112.061(2)(c), F.S., defines "officer" as "an individual who in the performance of his or her official duties is vested by law with sovereign powers of government and who is either elected by the people, or commissioned by the Governor and has jurisdiction extending throughout the state, or any person lawfully serving instead of either of the foregoing two classes of individuals as initial designee or successor".

⁶ Section 112.061(2)(d), F.S., defines "employee" as "an individual, whether commissioned or not, other than an officer or authorized person . . . who is filling a regular or full-time authorized position and is responsible to an agency head".

⁷ Section 112.061(2)(a), F.S., defines "agency" as "any office, department, agency, division, subdivision, political subdivision, board, bureau, commission, authority, district, public body, body politic, county, city, town, village, municipality, or any other separate unit of government created pursuant to law".

⁸ Section 287.017, F.S., states that the purchasing category thresholds are as follows: (a) Category One is \$15,000; (b) *Category Two is \$25,000*; (c) Category Three is \$50,000; (d) Category Four is \$150,000; and (e) Category Five is \$250,000.

- A provision allowing unilateral cancellation by the agency for refusal by the contractor to allow public access to all documents, papers, letters, or other material subject to the provisions of chapter 119 and made or received by the contractor in conjunction with the contract.
- A provision dividing the contract into units of deliverables, including reports, findings, and drafts, that must be received and accepted in writing by the contract manager prior to payment.
- A provision specifying the criteria and the final date by which such criteria must be met for completion of the contract.
- A provision specifying that the contract may be renewed on a yearly basis for a period of up to two years after the initial contract or for a period no longer than the term of the original contract, whichever period is longer, specifying the terms under which the cost may change as determined in the invitation to bid or request for proposals, and specifying that renewals shall be contingent upon satisfactory performance evaluations by the agency and subject to the availability of funds.⁹

Section 287.059, F.S., regulates the provision of private attorney services by the state or state agencies.¹⁰ This section prohibits an agency from contracting for private attorney services without prior written approval of the Attorney General. There are, however, exceptions to obtaining prior written approval of the Attorney General. These exceptions include private attorney services

- Procured by the Executive Office of the Governor or any department under the exclusive jurisdiction of a single cabinet officer;
- Provided by legal services organizations to indigent clients;
- Necessary to represent the state in litigation involving the Florida Casualty Insurance Risk Management Trust Fund pursuant to part II of chapter 284, F.S.;
- Procured by the Board of Regents and the universities of the State University System; or
- Procured by community and junior colleges and multi-county special districts.¹¹

An agency requesting approval for the use of private attorney services must first offer to contract with the Department of Legal Affairs for attorney services at a cost pursuant to mutual agreement. The Attorney General will decide on a case-by-case basis to accept or decline to provide attorney services. If the Attorney General declines to provide the requested services, then the Attorney General must provide written approval that includes a statement that the private attorney service

⁹ See s. 287.058(1), F.S.

¹⁰ Section 287.059(1), F.S., defines "state agency" to include "state officers, departments, boards, commissions, divisions, bureaus, councils, and units of organization, however designated, of the executive branch of state government, community and junior colleges, and multicounty special districts exclusive of those created by interlocal agreement of which have elected governing boards."

¹¹ See s. 287.059(2), F.S.

requested cannot be provided by their office or that the Attorney General's opinion is that private attorney services are cost-effective.¹²

The Attorney General may adopt, by rule, a form, for agencies requesting written approval for private attorney services, to provide information concerning such things as attorney services to be provided, competitive fees for similar attorney services, and the need for use of private attorneys, rather than agency staff attorneys.¹³

The Attorney General must adopt a standard fee schedule for private attorney services and shall take into consideration the following factors:

- The type of controversy involved and complexity of the legal service needed;
- The geographic area where the attorney services are to be provided;
- The novelty of the legal questions involved;
- The amount of experience desired for the particular kind of attorney services to be provided;
- Other factors deemed appropriate by the Attorney General; and
- The most cost-effective or appropriate billing methodology.¹⁴

All agencies must use the standard fee schedule when contracting for private attorney services as established by s. 287.059, F.S., unless the head of the agency or a designee, waives use of the schedule. The reasons for deviating from the schedule must be set forth in writing to the Attorney General.¹⁵

Rule 2-37.030, F.A.C., sets forth a standard fee schedule when contracting for private attorney services. The rule permits specialized attorney services¹⁶ to be billed up to \$175¹⁷ per billable hour¹⁸ and allows all other attorney services to be billed up to \$125 per billable hour.¹⁹ Costs for all other research assistants may be billed up to \$40 per billable hour.²⁰ Exhibits, transcripts, and witness fees are not considered a part of the billable hour, but are reimbursed based upon documented third party vendor charges to the contract attorney. Rule 2-37.040, F.A.C., provides the procedure for agencies seeking to exceed the standard fee schedule.

Section 45.062, F.S., Settlements, conditions, or orders when an agency of the executive branch is a party.

Section 45.062, F.S., limits the ability of counsel or a party to an action involving a state executive agency or officer to settle an action, to consent to any condition, or agree to any order in connection therewith, on behalf of the state agency or officer, if the settlement, condition, or order requires the expenditure of or the obligation to expend any state funds or other state resources, or the

¹² Section 287.059(3), F.S.

¹³ *Id.*

¹⁴ *See* s. 287.059(6), F.S.

¹⁵ Section 287.059(7), F.S.

¹⁶ Rule 2-37.030(1), F.A.C., states that "specialized attorney services" are limited to admiralty, copyright, patent, trademark, international communications, media, bond, and securities law. This includes litigation and other services normally performed by such counsel.

¹⁷ Rule 2-37.030(1), F.A.C.

¹⁸ Rule 2-37.030(4), F.A.C., defines "billable hour" as the actual time spent providing attorney services to the agency measured in six to 10 minute intervals.

¹⁹ Rule 2-37.030(2), F.A.C.

²⁰ Rule 2-37.030(3), F.A.C.

establishment of any new program, unless the expenditure is provided for by an existing appropriation or program established by law. Prior written notification must be given within 5 business days of the date the settlement or presettlement agreement or order is to be made final to the President of the Senate, the Speaker of the House of Representatives, the Senate and House minority leaders, and the Attorney General.

This section also requires the state executive branch agency or officer to negotiate a closure date as soon as possible for the civil action, and prohibits the agency or officer from pledging any current or future action of another branch of state government as a condition of settling a civil action.

Section 216.023, F.S., Legislative budget requests to be furnished to Legislature by agencies.

Section 216.023, F.S., requires the head of each state agency to submit a final legislative budget request to the Legislature and to the Governor. This section provides for the creation of budget instructions by the Executive Office of the Governor and the appropriations committees of both houses of the Legislature, and, the submission of preliminary budget requests by state agencies, as well as other guidelines on the form, content, and submission dates of budget requests.

Section 284.385, F.S., Reporting and handling of claims.

Section 284.385, F.S., requires all departments covered by the Florida Casualty Insurance Risk Management Trust Fund to report all known or potential claims to the Department of Insurance for handling, except employment complaints which have not been filed with the Florida Human Relations Commission, Equal Employment Opportunity Commission, or similar agency. Counsel assigned to such claims by the Department of Insurance are to report regularly to the department on the status of such claims or litigation as required by the department. No claims may be compromised or settled for monetary compensation without the prior approval of the department. Payments for the settlement of any claim covered or reported under this section shall be made from the Florida Casualty Insurance Risk Management Trust Fund.

C. EFFECT OF PROPOSED CHANGES:

This committee substitute is designed to protect the property of the state in lawsuits; facilitate injunctions against certain criminal conduct; heighten notification requirements of state agencies regarding claims and lawsuits against an agency and settlements thereof; enhance certain requirements of contracts for private attorney services; and tightens restrictions on contracts in violation of ethics laws.

Section 11.066, F.S., Suits seeking monetary damages against the state or its agencies; payment of judgments; appropriations required.

This committee substitute amends s. 11.066, F.S., to include a provision that prohibits the placement of a lien upon a state property or monetary recovery made on the state's behalf, unless authorized by law.

Chapter 112, F.S. Public Officers and Employees: General Provisions

This committee substitute amends s. 112.3175, F.S., to add a new subsection, which requires that any contract executed in violation of the code of ethics is to be presumed void with respect to any former employee of the state or former public official. The contract is voidable with respect to any private-sector third party who employs or retains, in any capacity, any such former agency

employee or former public official. A person can be “retained” but not employed, for example, independent contractors, outside consultants, or lobbyists.

Chapter 287, F.S., Procurement of personal property and services.

Section 287.058, F.S., gives the state the ability to unilaterally cancel contracts when the contractor has refused to allow access to public records relating to the contract; this committee substitute adds: “unless the records are exempt.”

Section 287.059, F.S., is amended to require an agency’s general counsel to review and approve, by signing the contract, all proposed contracts by the agency for private attorney services. The agency head must then sign the contract in order to effectuate same. The agency head must maintain custody of the contract.

This committee substitute creates a new subsection, which relates to contingency fee²¹ contracts for attorney services. This new subsection provides that contingency fee contracts for private attorney services on behalf of the state must be “commercially reasonable” as defined by Florida Bar Rule 4-1.5. Florida Bar Rule 4-1.5 defines the term “commercially reasonable” to mean a reasonable fee that does not exceed:

- Thirty percent of any recovery of an amount less than \$2 million.
- Twenty percent of any recovery of an amount equal to \$2 million but less than \$10 million.
- Ten percent of any recovery of an amount equal to \$10 million or greater.

This committee substitute provides that if the amount of the fee is in dispute, the counsel retained by the state is required to participate in mandatory, binding arbitration. Payment of all attorney’s fees is subject to appropriation. It also provides that attorney’s fees must be forfeited if, during the pendency of the case, the counsel retained by the state takes a public position that is adverse to the state’s litigation or settlement posture.

Further, this committee substitute amends the provision relating to the standard addendum to every contract for attorney services that the Attorney General has adopted for use by all agencies. The addendum is now required to address the internal system of governance if multiple law firms are parties to a contract. The addendum requires that, at a minimum, each law firm identify one member who is authorized to legally bind the firm.

This committee substitute also creates a new subsection that requires each private attorney, who is under contract to provide attorney services for the state, to maintain detailed current records. These records include documentation of all expenses, disbursements, charges, credits, underlying receipts and invoices, and other financial transactions that concern the provision of such attorney services. These records are made subject to chapter 119, F.S., regarding public access to records.

²¹ Section 112.3217(1), F.S., defines “contingency fee” as a fee, bonus, commission, or nonmonetary benefit as compensation which is dependent or in any way contingent on the enactment, defeat, modification, or other outcome of any specific executive branch action.

Chapter 60, F.S., Injunctions.

This committee substitute creates s. 60.08, F.S. It states that an action for injunctive relief sought by the state or a state agency must be issued without bond or surety²² and no bond or surety will be required during the term of the injunction.

Section 86.091, F.S., Parties.

This committee substitute provides that the State of Florida, the Governor, any state department, agency, officer, or employee shall not be made a party in certain proceedings.

Section 16.01, F.S., Residence, office, and duties of Attorney General.

This committee substitute clarifies that this section is not intended to authorize the joinder of the Attorney General as a party to a lawsuit.

Section 48.121, F.S., Service on the state.

This committee substitute clarifies that this section is not intended to authorize the joinder of the Attorney General or a state attorney as a party to a lawsuit.

Section 45.062, F.S., Settlements, conditions, or orders when an agency of the executive branch is a party.

This committee substitute amends s. 45.062, F.S. It requires notices of settlement or presettlement to specify how the agency involved will address the costs in future years, within the limits of current appropriations. It provides that settlements that commit the state to spending in excess of current appropriations or to policy changes inconsistent with current state law will be contingent upon and subject to legislative appropriation or statutory amendment. State agencies or officers may agree to use all efforts to procure legislative funding or statutory amendments.

Section 216.023, F.S., Legislative budget requests to be furnished to Legislature by agencies.

This committee substitute amends s. 216.023, F.S. It directs the head of each state agency to include in its legislative budget request an inventory of all litigation, in which the agency is involved, that may require additional appropriations to the agency or amendments to the law under which the agency operates.

Section 284.385, F.S., Reporting and handling of claims.

This committee substitute amends s. 284.385, F.S. It requires the Division of Risk Management's assigned counsel to report regularly to the covered department in addition to the Department of Insurance. The assigned counsel must also notify the covered department if a claim shall be compromised or settled for monetary compensation.

²² Black's Law Dictionary, sixth edition (1990), at 1441, defines "surety" as a person who is primarily liable for payment of debt or performance of obligation of another.

Severability Clause

This committee substitute provides a severability clause. A severability clause is similar to a severability statute. Black's Law Dictionary (1990, page 1374) defines severability statute as:

A statute if after an invalid portion of it has been stricken out, that which remains is self-sustaining and capable of separate enforcement without regard to the stricken portion, in which case that which remains should be sustained.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes".

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

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:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This committee substitute does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This committee substitute does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This committee substitute does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On March 20, 2001, the Committee on State Administration passed HB 623 and adopted a strike-everything amendment. HB 623 was reported out favorably as a committee substitute.

The committee substitute creates a presumption that any contract executed in violation of certain ethics provisions is void with respect to former state employees or former public officials, and is voidable in the respect to any private-sector third party who employs or retains such former agency employee. The bill creates the presumption and considered it void only with respect to a former state employee.

The bill provides that no agency employee "shall, after retirement, termination, or resignation, have or hold any employment or contractual relationship with any business entity other than an agency in connection with any contract in which the agency employee participated personally and substantially." The committee substitute removes "resignation" from the bill. "Termination" includes resignation.

The bill requires that an agency's general counsel approve and sign a contract for private attorney services, but failed to consistently reference both requirements. The committee substitute adds language to reference both requirements.

The committee substitute provides a different definition for "commercially reasonable."

The committee substitute provides that the State of Florida, the Governor, any state department, agency, officer, or employee shall not be made a party in certain proceedings.

The committee substitute clarifies that certain provisions are not intended to authorize the joinder of the Attorney General as defendant. It also clarifies that certain provisions are not intended to authorize the joinder of the Attorney General or a state attorney as a defendant.

STORAGE NAME: h0623s1.sa.doc

DATE: March 20, 2001

PAGE: 11

The committee substitute removes from the bill a provision stating that “when a state agency or officer settles an action in which the state will receive moneys, the funds will be placed unobligated in the General Revenue Fund or in the trust fund that is associated with the agency’s or official’s authority to pursue the legal action.”

Finally, the committee substitute removes the specific list of items that were to be included in the inventory the agency is required to submit along with the legislative budget request. Instead, the committee substitute states that “[s]uch inventory shall include those items specified annually in the legislative budget instructions.”

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Staff Director:

Heather A. Williamson, M.S.W.

J. Marleen Ahearn, Ph.D., J.D.