

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.)

Prepared By: The Professional Staff of the Policy and Steering Committee on Ways and Means

BILL: CS/SB 1706

INTRODUCER: Policy and Steering Committee on Ways and Means and Senator Alexander

SUBJECT: State Financial Matters

DATE: April 8, 2010 REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|-----------|
| 1. | McKay | Wilson | GO | Favorable |
| 2. | McVaney | Coburn | WPSC | Fav/CS |
| 3. | _____ | _____ | _____ | _____ |
| 4. | _____ | _____ | _____ | _____ |
| 5. | _____ | _____ | _____ | _____ |
| 6. | _____ | _____ | _____ | _____ |

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill enhances the authority of the Legislature over agency contracting that affects the state budget. The bill prohibits agencies, with exceptions, from obligating the state through certain types of contractual clauses, and requires advance notice to the Governor and Legislature before entering certain high-value or no-cost contracts. The bill specifies contractual language addressing the state's ability to terminate contracts, which must be included in all executive and judicial contracts, and creates misdemeanor penalties for agency employees who willfully violate these provisions. The bill requires that acceptance or rejection contract deliverables be in writing, and prohibits agencies from entering into lease or deferred payment purchases of greater than \$500,000 without legislative approval. The bill requires agency heads, their equivalents or designated senior management staff to sign contracts worth more than \$25,000, and to certify compliance with applicable contracting provisions for all contracts with terms of greater than 12 months.

This bill substantially amends ss. 216.011, 216.311, 287.063, 287.064, 376.3075, and 403.1837, and creates ss. 216.312 and 216.313 of the Florida Statutes.

II. Present Situation:

Planning and Budgeting

Chapter 216 of the Florida Statutes, relating to planning and budgeting, provides guidelines to the Governor, the judicial branch, and state agencies for developing and submitting legislative budget requests and administering legislative appropriations.

Pursuant to s. 216.011(1)(qq), F.S., a “state agency” or “agency” means any official, officer, commission, board, authority, council, committee, or department of the executive branch of state government. For purposes of Chapters 215 and 216, F.S., “state agency” or “agency” includes state attorneys, public defenders, criminal conflict and civil regional counsel, capital collateral regional counsel, the Justice Administrative Commission, the Florida Housing Finance Corporation, and the Florida Public Service Commission. Solely for the purposes of implementing s. 19(h), art. III of the State Constitution, the terms “state agency” or “agency” include the judicial branch.

Section 216.177, F.S., requires agencies to give the Legislature certain notice of budget actions. If the presiding officers or the chair and vice chair of the Legislative Budget Commission find that the agency action is contrary to legislative intent and policy or exceeds delegated authority, those persons may object to the action – requiring the Governor to void the action until the Commission or the Legislature addresses the issue.

Section 216.311, F.S., provides that no agency or branch of state government may contract to spend, or enter into any agreement to spend, any moneys in excess of the amount appropriated to such agency or branch unless specifically authorized by law. Any contract or agreement in violation of this provision is null and void, and anyone who willfully violates the provision is guilty of a first degree misdemeanor.

Procurement

Chapter 287, F.S., specifies the requirements for agency procurement of commodities and services.

Section 287.017, F.S., specifies the purchasing categories, which are thresholds linked to other requirements in Chapter 287, F.S., as follows:

- Category One \$15,000
- Category Two \$25,000
- Category Three \$50,000
- Category Four \$150,000
- Category Five \$250,000

Section 287.0582, F.S., denotes the annual appropriation contingency statement that must be included in any contract lasting longer than one fiscal year for the purchase of a service or tangible personal property: “The State of Florida's performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature.”

Section 287.063, F.S., specifies the preaudit review and approval process required for deferred-payment commodity contracts. The section establishes a maximum interest rate, and prohibits appropriated funds from being used to acquire equipment through a lease or deferred-payment purchase arrangement, unless it is approved by the Chief Financial Officer as economically prudent and cost-effective. The CFO is required to adopt rules relating to the approval process. For purposes of this section, deferred-payment commodity contracts for replacing the state accounting and cash management systems may include equipment, accounting software, and implementation and project management services.

Section 287.064, F.S., specifies the requirements for consolidated financing of deferred-payment purchases. Among other provisions, the section provides that deferred-payment commodity contracts for replacing the state accounting and cash management systems may include equipment, accounting software, and implementation and project management services.

III. Effect of Proposed Changes:

Section 1 amends s. 216.011, F.S., to provide a definition of a new appropriations category “Lease or lease/purchase of equipment”.

Section 2 amends s. 216.023, F.S., to require each state agency to provide in its legislative budget request specific information regarding contracts granting concessions to other parties.

Section 3 amends s. 216.311, F.S., by providing that for ss. 216.311- 216.313, F.S., “contracts” and “agreements” include all related amendments, renewals, and extensions, and by specifying additional types of contracts that may not be entered into by an agency or branch of state government.

Pursuant to s. 216.311(1), F.S., an agency or branch of state government may not enter into a contract that:

- Requires the state to pay liquidated damages or early termination fees resulting from a breach or early termination of the contract based on a legislative action to provide less than full funding of a contract.
- Requires the state to pay interest, other than interest paid under the prompt pay law, to another party because the agency or branch has insufficient budget authority to pay the underlying obligation of the contract or agreement in the current year.
- Binds the state to make future-year payments to offset payments not made in a prior year due to the insufficiency of current-year appropriations, unless the Legislature expressly authorizes the agency or branch to enter into such contract or agreement.
- Grants any party the right to collect and retain fees or revenues from persons or entities not party to the contract, unless the agency is specifically authorized by law to enter into such contracts.

The limitations of s. 216.311(1), F.S., will not apply to:

- The Department of Transportation, when, in order to spend funds appropriated for the approved 5-year work program, it enters into contracts that require liquidated damages clauses.

- The Department of Management Services, when, in order to administer the state group insurance program, it enters into contracts that permit providers and insurers to collect premiums and copayments from participants in the group insurance program.
- The Agency for Health Care Administration, when, in order to administer the state Medicaid plan and Florida Healthy Kids program, it enters into contracts that permit providers to collect premiums and copayments.
- The Department of Environmental Protection, when, in order to administer the state parks system, it enters into contracts that require the payment of liquidated damages or early termination fees if the vendor has made significant capital improvements to state property and the costs of such improvements are amortized over no more than a 3 year period.

The bill provides that an agency may not enter into a lease or lease purchase for tangible personal property for more than \$500,000, or a term of greater than one fiscal year, unless the lease or agreement is expressly authorized by the Legislature or the Legislative Budget Commission has approved a transfer of budget authority to the lease or lease/purchase of equipment appropriations category. This provision will not apply to the State Board of Administration's investment duties.

Any contract or agreement in violation of these provisions is null and void, and a public officer or employee who willfully enters into a contract in violation of these provisions commits a first degree misdemeanor.

Section 4 creates s. 216.312, F.S., relating to the reporting of contract expenditures. The bill requires notification of the terms and conditions of a contract to the Governor, the President of the Senate, and the Speaker of the House of Representatives 30 days before an executive or judicial branch officer or employee enters into the following types of contracts:

- A contract or agreement which requires payments by the state in excess of \$10 million in any fiscal or calendar year.
- A contract or agreement which requires minimal or no payments by the state, or authorizes the other party to make expenditures in anticipation of revenues.
- A contract or agreement which requires initial expenditures by the other party and for which the other party will not receive payment from the state within 180 days after the expenditure.

The bill specifies that execution of any contract or agreement described in this section is an action or proposed action that is subject to the provisions of s. 216.177(2)(b), F.S.

Section 5 transfers s. 287.0582, F.S., to s. 216.313, F.S., and amends it to provide that an executive or judicial branch officer or employee may not enter into a contract for the purchase of services or tangible personal property unless the contract identifies the specific appropriation from which payment in the first year of the contract will be made, or unless the Legislature expressly authorizes entering into such a contract without a specific appropriation of funds.

The bill also requires that executive and judicial branch contracts contain specified statements that:

- The state's performance and obligation to pay under the contract is contingent upon an annual appropriation by the Legislature.

- The contract may be terminated by the state upon 10 days' written notice if funding for the contract is specifically eliminated pursuant to:
 - A deficit reduction plan implemented by the Governor or the Chief Justice or by an act of the Legislature after certification pursuant to section 216.221, F.S., that a deficit will occur in the General Revenue Fund; or
 - A deficit reduction plan implemented by the Governor or Chief Justice pursuant to section 216.221(10), F.S., or by an act of the Legislature, after a determination by the Chief Financial Officer that a deficit will occur with respect to the appropriations from a specific trust fund in the current fiscal year.

The bill provides that a contract that exceeds \$25,000¹ must be signed by the agency head, executive director, or chief judge, as appropriate, or a designated senior management employee, and a contract that exceeds 12 months may not be executed unless an agency head, executive director, or chief judge or a designated senior management employee determines that the contract is in compliance with Chapter 216, F.S., and certifies such compliance in writing in the contract. A contract that exceeds \$250,000² must require the written acceptance or rejection of contract deliverables.

Contracts in violation of s. 216.313, F.S., are null and void, and any officer or employee who willfully enters into a contract in violation of this section commits a first degree misdemeanor.

Sections 6 and 7 amend ss. 287.063 and 287.064, F.S., to prohibit an agency from entering into a lease or deferred payment purchase for the acquisition of equipment, or a master equipment financing agreement, costing greater than \$500,000, unless the Legislature has expressly authorized such an agreement in the General Appropriations Act or the Legislative Budget Commission has approved a transfer of budget authority to the appropriations category for deferred payment commodity contracts. The bill also deletes provisions that allow deferred payment commodity contracts for replacing the state accounting and cash management systems to include equipment, accounting software, and implementation and project management services.

Sections 8 and 9 amend ss. 376.3075 and 376.1837, F.S., to correct cross references and make technical changes.

Section 10 provides that the law takes effect on July 1, 2010, and applies to all initial contracts, amendments to contracts, and extensions or renewals of contracts which are executed on or after July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹ Category Two from the purchasing categories in s. 287.017(1), F.S.

² Category Five from the purchasing categories in s. 287.017(1), F.S.

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:

None.

C. Government Sector Impact:

It is unclear whether prohibiting contracts with liquidated damages clauses may act to discourage vendors from doing business with the state, or cause vendors to increase their pricing in order to account for any perceived increases in their risk.

Though the bill creates new misdemeanor offenses, it is not expected to have a prison bed impact. The bill has not been reviewed by the Criminal Justice Impact Conference.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 255.25(3)(e), F.S., allows an agency to reimburse a landlord for tenant improvements, if the agency terminates the lease before expiration. The new section 216.311(2)(b), F.S., appears to prohibit this kind of payment, and it is unclear whether the “specifically authorized by law” language in s. 216.311(2)(a), F.S., would permit it.

Section 216.312(2), F.S., does not define “minimal” payments, which could lead to differing interpretations.

Section 216.313(3)(a), F.S., is also partially duplicative of a requirement contained in s. 287.058(2), F.S., that agency heads sign contracts with value of greater than \$25,000. Read broadly, this provision may require an agency head to sign purchase orders.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

The CS by Policy and Steering Committee on Ways and Means, April 8, 2010 includes the following major changes:

- Requires each state agency to report in its legislative budget request any contract that grants a concession to another party. The intent is to collect information regarding amounts that the vendors are paid by third parties and how much the vendors pay in commissions to the agency.
 - Allows the Department of Environmental Protection to enter into contracts that require the state to pay liquidated damages but only if the vendor makes a significant capital improvement to state property and amortizes such capital improvement over no more than 3 years.
 - Grants some flexibility in the statute regarding any lease and lease\purchase of tangible personal property in excess of \$500,000 by allowing the Legislative Budget Commission to approve a transfer of budget authority to an appropriate budget category rather than requiring the full Legislature to authorize the lease.
 - Clarifies that under the contract notice provisions of the bill, the agency must provide the actual terms and conditions of the contract rather than providing mere notice of the agency's intent to contract.
 - Reduces the amount of time that agencies must provide notice to a vendor when the funding of the contract has been reduced pursuant to a formal budget reduction plan or an act of the legislature
 - Grants more flexibility on the deferred payment commodity contracts by allowing the Legislative Budget Commission to approve a transfer of budget authority to the appropriate budget category.
- B. **Amendments:**
- None.