

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB GVOPS 16-05 OGSR Competitive Solicitations

SPONSOR(S): Government Operations Subcommittee

TIED BILLS: **IDEN./SIM. BILLS:** SB 7030

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee		Moore	Williamson

SUMMARY ANALYSIS

The Open Government Sunset Review Act requires the Legislature to review each public record and each public meeting exemption five years after enactment. If the Legislature does not reenact the exemption, it automatically repeals on October 2nd of the fifth year after enactment.

Agency procurements of commodities or contractual services exceeding \$35,000 are governed by statute and rule and require one of the following three types of competitive solicitations to be used, unless otherwise authorized by law: invitation to bid (ITB), request for proposals (RFP), or invitation to negotiate (ITN).

Current law provides general public record and public meeting exemptions associated with competitive solicitations. Sealed bids, proposals, or replies in response to an ITB, RFP, or ITN are exempt from public record requirements until a time certain. In addition, a meeting at which a negotiation with a vendor is conducted pursuant to a competitive solicitation, at which a vendor makes an oral presentation as part of a competitive solicitation, or at which a vendor answers questions as part of a competitive solicitation is exempt from public meeting requirements. Any portion of a team meeting at which negotiation strategies are discussed is also exempt from public meeting requirements. A complete recording must be made of an exempt meeting. The recording is exempt from public record requirements until a time certain.

The bill reenacts the public record and public meeting exemptions, which will repeal on October 2, 2016, if this bill does not become law.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Open Government Sunset Review Act

The Open Government Sunset Review Act¹ sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.²

The Act provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protects trade or business secrets.³

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required.⁴ If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created⁵ then a public necessity statement and a two-thirds vote for passage are not required.

Agency Procurements

Agency⁶ procurements of commodities or contractual services exceeding \$35,000 are governed by statute and rule and require use of one of the following three types of competitive solicitations,⁷ unless otherwise authorized by law:⁸

- Invitation to bid (ITB): An agency must use an ITB when the agency is capable of specifically defining the scope of work for which a contractual service is required or when the agency is capable of establishing precise specifications defining the actual commodity or group of commodities required.⁹
- Request for proposals (RFP): An agency must use an RFP when the purposes and uses for which the commodity, group of commodities, or contractual service being sought can be specifically defined and the agency is capable of identifying necessary deliverables.¹⁰

¹ Section 119.15, F.S.

² Section 119.15(3), F.S.

³ Section 119.15(6)(b), F.S.

⁴ Section 24(c), Art. I of the State Constitution.

⁵ An example of an exception to a public record exemption would be allowing another agency access to confidential and exempt records.

⁶ Section 287.012(1), F.S., defines "agency" as 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.

⁷ Section 287.012(6), F.S., defines "competitive solicitation" as 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 the method of procurement.

⁸ See s. 287.057, F.S.

⁹ Section 287.057(1)(a), F.S.

¹⁰ Section 287.057(1)(b), F.S.

- Invitation to negotiate (ITN): An 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 and identifies one or more responsive vendors with which the agency may negotiate in order to receive the best value.¹¹

Public Record and Public Meeting Exemptions under Review

Current law provides a general public record exemption for sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation¹² and a general public meeting exemption for certain meetings conducted pursuant to a competitive solicitation.¹³ For purposes of both exemptions, a “competitive solicitation” is defined as the process of requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement.¹⁴ The exemptions have been modified over the years, with the most recent modification occurring in 2011.

Public Record Exemption for Sealed Bids, Proposals, or Replies

Current law provides that sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation are exempt¹⁵ from public record requirements until the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or replies, whichever is earlier.¹⁶ If an agency rejects all bids, proposals, or replies and concurrently provides notice of its intent to reissue the competitive solicitation, the rejected bids, proposals, or replies remain exempt until the agency provides notice of an intended decision concerning the reissued competitive solicitation or until the agency withdraws the reissued competitive solicitation.¹⁷ A bid, proposal, or reply is not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.¹⁸

According to the public necessity statement, “[t]emporarily protecting such information ensures that the process of responding to a competitive solicitation remains fair and economical for vendors, while still preserving oversight after a competitive solicitation decision is made or withdrawn.”¹⁹

Pursuant to the Open Government Sunset Review Act, the exemption will repeal on October 2, 2016, unless reenacted by the Legislature.²⁰

Public Meeting Exemption for Certain Vendor Discussions and Team Meeting Negotiations, and Associated Public Record Exemption

The public meeting exemption provides that any portion of a meeting at which a negotiation with a vendor is conducted pursuant to a competitive solicitation, at which a vendor makes an oral presentation as part of a competitive solicitation, or at which a vendor answers questions as part of a competitive solicitation is exempt from public meetings requirements.²¹ In addition, any portion of a team meeting at which negotiation strategies are discussed is exempt from public meeting

¹¹ Section 287.057(1)(c), F.S.

¹² Section 119.071(1)(b), F.S.

¹³ Section 286.0113(2), F.S.

¹⁴ Sections 119.071(1)(b)1. and 286.0113(2)(a)1., F.S.

¹⁵ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

¹⁶ Section 119.071(1)(b)2., F.S.

¹⁷ Section 119.071(1)(b)3., F.S.

¹⁸ *Id.*

¹⁹ Section 3, ch. 2011-140, L.O.F.

²⁰ Section 119.071(1)(b)4., F.S.

²¹ Section 286.0113(2)(b)1., F.S.

requirements.²² A “team” is defined as a group of members established by an agency for the purpose of conducting negotiations as part of a competitive solicitation.²³

A complete recording must be made of any portion of an exempt meeting.²⁴ The recording of, and any records presented at, the exempt meeting are exempt from public record requirements until the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever occurs earlier.²⁵ If the agency rejects all bids, proposals, or replies and concurrently provides notice of its intent to reissue a competitive solicitation, the recording and any records presented at the meeting remain exempt until the agency provides notice of an intended decision concerning the reissued competitive solicitation or until the agency withdraws the reissued competitive solicitation.²⁶ A recording and any records presented at an exempt meeting are not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.²⁷

The 2011 public necessity statement for the exemptions provided that:

Protecting such meetings and temporarily protecting the recording and any records presented by a vendor at such meetings, ensures that the process of responding to a competitive solicitation remains fair and economical for vendors, while still preserving oversight after a competitive solicitation decision is made or withdrawn. It is unfair and inequitable to compel vendors to disclose to competitors the nature and details of their proposals during such meetings or through the minutes or records presented at such meetings. Such disclosure impedes full and frank discussion of the strengths, weaknesses, and value of a bid, proposal, or response, thereby limiting the ability of the agency to obtain the best value for the public.²⁸

The public necessity statement further provided that:

Team members often meet to strategize about competitive solicitations and the approach to take as part of the evaluation process. Without the public meeting exemption and the limited public record exemption, the effective and efficient administration of the competitive solicitation process would be hindered.²⁹

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2016, unless reenacted by the Legislature.³⁰

Staff Review of the Exemptions

During the 2015 interim, subcommittee staff held meetings with affected persons tasked with implementing the public record and public meeting exemptions, as well as vendors who participate in the competitive solicitation process. These parties recommended reenactment of the public record and public meeting exemptions under review.

Effect of the Bill

The bill removes the scheduled repeal of the public record and public meeting exemptions, thereby reenacting:

- The public record exemption for sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation;

²² Section 286.0113(2)(b)2., F.S.

²³ Section 286.0113(2)(a)2., F.S.

²⁴ Section 286.0113(2)(c)1., F.S.

²⁵ Section 286.0113(2)(c)2., F.S.

²⁶ Section 286.0113(2)(c)3., F.S.

²⁷ *Id.*

²⁸ Section 3, ch. 2011-140, L.O.F.

²⁹ *Id.*

³⁰ Section 286.0113(2)(d), F.S.

- The public meeting exemption for any portion of a meeting at which a vendor participates in a negotiation, makes an oral presentation, or answers questions as part of a competitive solicitation or at which negotiation strategies are discussed; and
- The public record exemption for the recording of, and any records presented at, exempt meetings.

B. SECTION DIRECTORY:

Section 1 amends s. 119.071, F.S., to reenact the public record exemption for competitive solicitations.

Section 2 amends s. 286.0113, F.S., to reenact the public record and public meeting exemptions for competitive solicitations.

Section 3 provides an effective date of October 1, 2016.

II. 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.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.