

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB GVOPS 11-12 OGSR Competitive Solicitations

**SPONSOR(S):** Government Operations Subcommittee

**TIED BILLS:** **IDEN./SIM. BILLS:** SPB 7228

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Government Operations Subcommittee	12 Y, 0 N	Williamson	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 records requirements until a time certain. In addition, a meeting at which a negotiation with a vendor is conducted pursuant to an ITN is exempt from public meetings requirements. A complete recording must be made of the exempt meeting. The recording is exempt from public records requirements until a time certain.

The bill reenacts the public record and public meeting exemptions, which will repeal on October 2, 2011, if this bill does not become law.

The bill expands the public record exemption by extending the exemption for sealed bids and replies from 10 days to 30 days, and by extending the public record exemption for sealed responses from 20 days to 30 days. The change also makes the timeframes consistent.

The bill expands the public meeting exemption to include any portion of a meeting at which a vendor makes an oral presentation or a vendor answers questions as part of a competitive solicitation. It is further expanded to include any portion of a team meeting at which negotiation strategies are discussed.

The bill expands the public record exemption for recordings of exempt meetings to comport with the public record exemption for sealed bids, proposals, or replies. It extends the public record exemption from 20 days to 30 days. It also expands the public record exemption by including those records presented by a vendor at a closed meeting.

The bill extends the repeal date from October 2, 2011, to October 2, 2016. It also provides a public necessity statement as required by the State Constitution.

The bill may have an insignificant fiscal impact on state and local governments.

**Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill expands the current exemptions under review; thus, it requires a two-thirds vote for final passage.**

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>1</sup> 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.

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.

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.<sup>2</sup> 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 created<sup>3</sup> then a public necessity statement and a two-thirds vote for passage are not required.

#### **Agency Procurement**

Agency 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,<sup>4</sup> unless otherwise authorized by law:<sup>5</sup>

- 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.<sup>6</sup>
- 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.<sup>7</sup>
- 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.<sup>8</sup>

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> Section 24(c), Art. I of the State Constitution.

<sup>3</sup> An example of an exception to a public record exemption would be allowing another agency access to confidential or exempt records.

<sup>4</sup> Section 287.012(6), F.S., defines "competitive solicitation" to mean 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.

<sup>5</sup> See s. 287.057, F.S.

<sup>6</sup> Section 287.057(1)(a), F.S.

<sup>7</sup> Section 287.057(1)(b), F.S.

<sup>8</sup> Section 287.057(1)(c), F.S.

## Staff Review of the Exemptions

As part of the Open Government Sunset Review process, 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. This bill is a result of those meetings.

### Public Record Exemptions under Review

#### Background

Current law provides a general public record exemption for sealed bids or proposals received by an agency pursuant to an ITB or RFP. The sealed bids or proposals are exempt<sup>9</sup> from public records requirements until the agency provides notice of a decision or intended decision or within 10 days after bid or proposal opening, whichever is earlier.<sup>10</sup>

In 2006, the Legislature expanded the public record exemption to provide that, if an agency rejects all bids or proposals submitted in response to an ITB or RFP, and concurrently provides notice of its intent to reissue the ITB or RFP, then the rejected bids or proposals remain exempt from public records requirements until the agency:

- Provides notice of a decision or intended decision concerning the reissued ITB or RFP; or
- Withdraws the reissued ITB or RFP.<sup>11</sup>

The Legislature further expanded the public record exemption to provide that a competitive sealed reply in response to an ITN is exempt from public records requirements until the agency provides notice of a decision or intended decision or until 20 days after the final competitive sealed reply is opened, whichever occurs earlier.<sup>12</sup> The rejected sealed replies remain exempt from public records requirements if the agency:

- Rejects all competitive sealed replies;
- Concurrently provides notice of its intent to reissue the ITN; and
- Reissues the ITN within 90 days after the notice of intent to reissue.

The exemption expires when the agency provides notice of a decision or intended decision concerning the reissued ITN or, until the agency withdraws the reissued ITN. A competitive sealed reply is not exempt for longer than 12 months after the initial agency notice rejecting all replies.<sup>13</sup>

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2011, unless reenacted by the Legislature.<sup>14</sup>

#### Effect of Bill

The bill reenacts, expands, and reorganizes the public record exemption for competitive solicitations.

First, the bill removes reference to ITBs, RFPs, and ITNs, by creating a definition for competitive solicitation. It is defined to mean “the process of requesting and receiving sealed bids, proposals, or replies submitted by responsive vendors in accordance with the terms of a competitive process, regardless of the method of procurement.” By creating a definition of competitive solicitation and

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<sup>9</sup> 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 the statutory exemption. (*See* Attorney General Opinion 85-62, August 1, 1985).

<sup>10</sup> Section 119.071(1)(b)1.a., F.S.

<sup>11</sup> Chapter 2006-284, L.O.F.; codified as s. 119.071(1)(b)1.b., F.S.

<sup>12</sup> Chapter 2006-284, L.O.F.; codified as s. 119.071(1)(b)2.a., F.S.

<sup>13</sup> Section 119.071(1)(b)2.b., F.S.

<sup>14</sup> Sections 119.071(1)(b)1.b. and 2.c., F.S.

removing references to chapter 287, F.S., local governments are able to use the public record exemption associated with ITNs.

Current law protects sealed bids or proposals until a decision or intended decision is made or within 10 days after bid or proposal opening. In addition, sealed replies are protected until a decision or intended decision is made or until 20 days after the final competitive sealed reply is opened. Based upon discussions with impacted parties, the bill creates consistency by providing that all sealed bids, proposals, or replies are exempt until notice of an intended decision or until 30 days after opening the bids, proposals, or replies. Also, the bill provides that all bids, proposals, or replies may not remain exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies. Current law only applies to responses to an ITN.

Because the bill expands the current public record exemptions, it extends the repeal date for the exemptions from October 2, 2011, to October 2, 2016. It also provides a public necessity statement as required by the State Constitution.<sup>15</sup>

## **Public Meeting Exemption under Review**

### Background

Current law also provides a general public meeting exemption for those meetings at which a negotiation with a vendor is conducted pursuant to an ITN.<sup>16</sup> A complete recording must be made of the exempt meeting. In addition, the recording is exempt from public records requirements until the agency provides notice of a decision or intended decision or until 20 days after the final competitive sealed reply is opened, whichever occurs earlier. If the agency rejects all sealed replies, the recording remains exempt until the agency provides notice of a decision or intended decision concerning the reissued ITN or until the agency withdraws the reissued ITN. A recording is not exempt from public records requirements for longer than 12 months after the initial agency notice rejecting all replies.<sup>17</sup>

Pursuant to the Open Government Sunset Review Act, the exemptions will repeal on October 2, 2011, unless reenacted by the Legislature.<sup>18</sup>

### Effect of Bill

The bill reenacts, expands, and reorganizes the public meeting exemption for competitive solicitations.

The bill creates a definition for “competitive solicitation” identical to the one provided for the public record exemption. Creating a definition of competitive solicitation and removing references to chapter 287, F.S., allows local governments to use the public meeting exemption associated with ITNs.

The public meeting exemption is expanded to include any portion of a meeting at which a vendor makes an oral presentation or a vendor answers questions as part of a competitive solicitation. It is further expanded to include any portion of a team<sup>19</sup> meeting at which negotiation strategies are discussed.

The bill expands the public record exemption for recordings of exempt meetings to comport with the public record exemption for sealed bids, proposals, or replies. It extends the public record exemption from 20 days to 30 days. It also expands the public record exemption by including those records presented by a vendor at a closed meeting.

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<sup>15</sup> Section 24(c), Art. I of the State Constitution.

<sup>16</sup> Chapter 2006-284, L.O.F.; codified as s. 286.0113(2)(a), F.S.

<sup>17</sup> Section 286.0113(2)(b), F.S.

<sup>18</sup> Sections 286.0113(2)(c), F.S.

<sup>19</sup> The bill defines “team” to mean a group of members established by a governmental entity for the purpose of conducting negotiations as part of a competitive solicitation.

Because the bill expands the current exemptions, it extends the repeal date for those exemptions from October 2, 2011, to October 2, 2016. It also provides a public necessity statement as required by the State Constitution.<sup>20</sup>

**B. SECTION DIRECTORY:**

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

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

Section 3 provides a public necessity statement.

Section 4 provides an effective date of upon becoming a law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

See Fiscal Comments section.

2. Expenditures:

See Fiscal Comments section.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

See Fiscal Comments section.

2. Expenditures:

See Fiscal Comments section.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The exemptions could improve the ability of state and local governments to obtain the best pricing, which could increase state and local government revenues. The bill likely could create an insignificant fiscal impact on state and local governments due to costs associated with the requirement to make a complete recording of an exempt meeting.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax

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<sup>20</sup> Section 24(c), Art. I of the State Constitution.

shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill expands the current exemptions under review; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands the current exemptions under review; thus, it includes a public necessity statement.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

An amendment might be necessary to clarify that the public record exemption for recordings of closed meetings also applies to those records submitted by the vendor during such meetings. In addition, interested persons have expressed concern with use of the term "agency" as part of the public meeting exemption. Those persons have raised concerns that use of the term "agency" would exclude local governments from using the public meeting exemption. However, s. 286.011, F.S., which provides public meetings requirements, uses the term agency as follows:

... any state agency or authority or ... any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution ...

As such, it appears that use of the term "agency" as part of the public meeting exemption would indicate application to state and local entities.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 29, 2011, the Government Operations Subcommittee adopted an amendment and reported PCB GVOPS 11-12 favorably with amendment. The amendment clarifies that the public record exemption for the recording of a closed meeting also applies to records submitted during that meeting.