

1989

Session Law 89-377

Florida Senate & House of Representatives

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**H 1734 GENERAL BILL/1ST ENG by Governmental Operations;
Martin (Compare H 1652, S 229)**

State Procurement/Contract Services: (OPEN GOVERNMENT SUNSET REVIEW) authorizes state agencies to enter contracts for services with certain educational institutions; amends provisions which provide for promulgation of rules re award & payment of pollution response action contracts by D.E.R.; removes limitation of such provisions to construction contracts; exempts certain contracts from such provisions, etc. Amends 287.057,.0595; reenacts 287.0595. Effective Date: 10/01/89.

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04/18/89 HOUSE Filed; Introduced, placed on Calendar -HJ 228
04/25/89 HOUSE Placed on Special Order Calendar
04/27/89 HOUSE Read second time -HJ 290
04/28/89 HOUSE Read third time; Passed; YEAS 111 NAYS 0 -HJ 303
05/02/89 SENATE In Messages
05/16/89 SENATE Received, referred to Natural Resources and Conservation
-SJ 364
05/26/89 SENATE Extension of time granted Committee Natural Resources
and Conservation
05/29/89 SENATE Withdrawn from Natural Resources and Conservation
-SJ 495; Placed on Calendar
05/31/89 SENATE Placed on Special Order Calendar -SJ 618; Amendment
pending -SJ 659; Passed as amended; YEAS 34 NAYS 0
-SJ 680
05/31/89 HOUSE In Messages
06/01/89 HOUSE Refused to concur, requested Senate to recede -HJ 1048
06/01/89 SENATE In Messages; Refused to recede and insisted House concur
-SJ 780
06/01/89 HOUSE In Messages
06/03/89 HOUSE Concurred; Passed as amended; YEAS 103 NAYS 6
-HJ 1515
06/03/89 Ordered engrossed, then enrolled
06/20/89 Signed by Officers and presented to Governor
07/06/89 Became Law without Governor's Signature; Chapter No.
89-377

NOTES: Above bill history from Division of Legislative Information's *FINAL LEGISLATIVE BILL INFORMATION, 1989 SESSIONS*. Staff Analyses for bills amended beyond final committee action may not be in accordance with the enacted law. Journal page numbers (HJ & SJ) refer to daily Journals and may not be the same as final bound Journals.

STORAGE NAME: h1734-f.go
DATE: July 6, 1989

**HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENTAL OPERATIONS
FINAL STAFF ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 1734 (PCB GO 89-23) (HB 1652 was amended onto this bill)

RELATING TO: Confidentiality of Price Proposals for Pollution Response
Action Construction Contracts

SPONSOR(S): Committee on Governmental Operations and Martin

EFFECTIVE DATE: October 1, 1989

DATE BECAME LAW: July 6, 1989

CHAPTER #: 89-377, Laws of Florida (without Governor's signature)

COMPANION BILL(S):

OTHER COMMITTEES OF REFERENCE: (1)

(2)

I. SHORT SUMMARY:

Section 287.0595(3), Florida Statutes, provides that any price proposal submitted to the Department of Environmental Regulation (DER) in connection with a pollution response action construction contract--a contract to clean up hazardous wastes or other incidents of contamination--is exempt from the public records law until a contract is signed or the proposal is no longer under active consideration. The current exemption prevents a construction contractor from accessing price proposals submitted by other contractors and adjusting his proposal to reflect a figure that is less than his competitors'.

This bill reenacts and modifies the exemption in s. 287.0595(3), Florida Statutes, so that bids for response action contracts, whether for construction or cleanup, are exempt from the public records law until a contract is signed or bids are no longer under consideration. Price proposals for contracts which must be negotiated under the "Consultants' Competitive Negotiation Act," s. 287.055, Florida Statutes, are expressly excluded from the language of the exemption.

A. INTRODUCTION:

Public policy in Florida has greatly favored public access to governmental records and meetings. In fact, the "Sunshine State" has been a national leader in the area of open government. The law embodying the public's right of access to records is codified at s. 119.01, Florida Statutes:

It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person.

This provision is mandatory and any public official with custody of a nonexempt public record is required to disclose it to any member of the public. Records are exempt from public disclosure pursuant to chapter 119, Florida Statutes, only if it is provided by law that the public records are confidential or are expressly exempted from disclosure by general or special law. Exemptions are found in s. 119.07(3), Florida Statutes, and in various special acts. The provision requiring meetings to be public does not identify specific exemptions within that section, but various exemptions are included throughout the statutes.

In 1984, the Legislature enacted the Open Government Sunset Review Act to prevent the erosion of Florida's open government policy caused by unjustified exemptions to the Act. As amended by chapter 85-301, Laws of Florida, the Act provides specific criteria for the evaluation of exemptions subject to repeal. The law provides for a two-pronged test. First, it requires consideration of four factors:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Second, the law requires that the exemption will be maintained only if it serves an identifiable purpose. An identifiable public purpose is served when the exemption meets one of the following purposes and such purpose is considered significant enough to override the strong public policy of open government. To qualify as meeting a public purpose, an exemption must:

- allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; or
- protect information of a sensitive personal nature concerning individuals if its release would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals, or its release would

jeopardize the safety of such individuals; or

- protect information of a confidential nature concerning entities which include formulas, patterns, devices, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it if its disclosure would injure the affected entity in the marketplace.

The review included in this report examines the following exemption(s):

s. 287.0595(3), Florida Statutes

B. PRESENT SITUATION:

The 1987 Legislature enacted s. 287.0595(3), Florida Statutes, to provide DER with specific statutory authority to promulgate administrative rules to govern the letting of pollution response action construction contracts under chapters 376 and 403, Florida Statutes, (chapters, 87-337, 374, Laws of Florida). Pollution response actions as defined in s. 376.301(14), Florida Statutes, means "any activity, including evaluation, planning, design, engineering, construction, and ancillary services, which is carried out in response to any discharge, release, or threatened release of a hazardous substance, pollutant, or other contaminant from a facility or site identified by the department under the provisions of ss. 376.30-376.319, Florida Statutes". The exemption under review, s. 287.0595(3), Florida Statutes, was enacted in 1987 and provides that any price proposal submitted to DER in connection with a pollution response action construction contract is confidential and exempt from the public records law until a contract is signed or the proposal is no longer under active consideration.

To determine if the exemption should be retained, DER was asked to respond to a questionnaire regarding the necessity for the exemption. DER explained that its rulemaking authority under s. 287.0595(3), Florida Statutes, covers only construction contracts, not remediation or recovery contracts. It is currently engaged in a number of remediation projects under ss. 376.3071, .3073, Florida Statutes, involving contamination incidents related to the storage of petroleum and petroleum products. DER does not rely on the exemption when letting contracts for remediation because project construction is not called for. It procures the professional services needed to complete these projects pursuant to the "Consultants' Competitive Negotiation Act," s. 287.055, Florida Statutes. DER does, however, intend to rely on the exemption when it undertakes construction projects. DER added that, because the rules governing construction contracts are in their final phase of adoption, it should begin to accept bids for pollution response action construction contracts sometime in 1989.

DER added that the exemption should be modified so that projects which must be bid, but which do not result in the actual construction of a structure or facility, may also be covered by the exemption. DER further explained that this modification of the existing exemption is needed because it anticipates letting bids on projects which will require the services of contractors and subcontractors, which would not be proper subjects for negotiation under the "Consultants' Competitive Negotiation Act." If the exemption is not modified, bids submitted in contracts which cannot properly be termed construction contracts may be accessed by competitors.

As further justification for the modification of the exemption, DER indicated that the exemption will allow it to more effectively let pollution response action contracts. Contractors will be more willing to submit a bid when they know that it may not be accessed by a competitor who may then adjust his bid to reflect a lesser price, even when he does not reasonably believe he can complete the project for that price. As DER explained, the public record exemption for sealed bids or proposals in s. 119.07(3)(p), Florida Statutes, 1988 Supplement--which provides that proposals are exempt until an agency provides notice of its decision, or within 10 days after a bid or proposal is opened, whichever is earlier--does not afford the protection it needs to effectively let response action contracts. DER argued that cost-effective letting of contracts is best governed by an exemption which prevents disclosure until after bids are no longer under consideration. In the absence of such an exemption, the lowest bidder, who knows the spread between his bid and the next highest, may file a bid protest claiming mistake in the bid documents or misunderstanding of the bid specifications as an excuse to raise his bid. As long as his bid does not exceed that of the next highest bidder, he is awarded the contract, and DER is forced to pay more for his services. The modified exemption would thus allow DER to rely on bids submitted by response action contractors as accurate assessments of the price at which a project can be completed. Staff therefore recommends that the exemption in s. 287.0595(3), Florida Statutes, be reenacted and modified so that bids for response action contracts, whether for construction or cleanup, are exempt from the public records law until a contract is signed or bids are no longer under active consideration.

C. EFFECT OF PROPOSED CHANGES:

This bill would revive, readopt, and modify the public records exemption provided by s. 287.0595, Florida Statutes, effective October 1, 1989, providing that bids submitted to DER in connection with a pollution response action construction contract are exempt from the public records law until a contract is signed or the bid is no longer under active consideration; the exemption would not be limited to construction contracts, and any bids submitted in connection with a contract not subject to negotiation would be covered by the exemption. This modification

would leave DER free to rely on the exemption when it accepts bids for contracts involving the cleanup of petroleum and hazardous waste, which do not require the construction of a facility or structure. This bill also makes the exemptions subject to further review under the Open Government Sunset Review Act.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring or First Year Start-Up Effects:

Not applicable.

2. Recurring or Annualized Continuation Effects:

Not applicable.

3. Long Run Effects Other Than Normal Growth:

Not applicable.

4. Appropriations Consequences:

Not applicable.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring or First Year Start-Up Effects:

Not applicable.

2. Recurring or Annualized Continuation Effects:

Not applicable.

3. Long Run Effects Other Than Normal Growth:

Not applicable.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Not applicable.

2. Direct Private Sector Benefits:

Not applicable.

3. Effects on Competition, Private Enterprise, and Employment Markets:

Not applicable.

D. FISCAL COMMENTS:

Not applicable.

III. LONG RANGE CONSEQUENCES:

This bill relates to the following portion(s) of the State Comprehensive Plan:

(13) HAZARDOUS AND NONHAZARDOUS MATERIALS AND WASTE.--

(a) Goal.--All solid waste, including hazardous waste, wastewater, and all hazardous materials, shall be properly managed, and the use of landfills shall be eventually eliminated.

(b) Policies.--

2. Encourage and expedite the development of environmentally safe hazardous waste treatment, storage, and disposal facilities.
3. Identify and clean up hazardous waste sites.
5. Establish a system for identifying the location, type, and quantity of hazardous materials.

IV. COMMENTS:

This bill is consistent with the Governmental Operations Committee's mission statement, which directs the Committee to "[r]eview exemptions to the public record and public meeting laws pursuant to the Open Government Sunset Review Act to determine whether the continued existence of each exemption is compelled by justifications strong enough to override Florida's strong public policy of open government."

V. END-OF-SESSION UPDATE:

The text of HB 1652, which relates to state agency contracts with nonprofit universities, was amended onto HB 1734 on the Senate Floor. The House refused to concur with the Senate amendment and sent HB 1734 back to the Senate. When the Senate refused to recede from its amendment and sent HB 1734 back to the House, the House concurred in the amendment and HB 1734 became law. See staff analysis of HB 1652 for details of that bill.

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VI. SIGNATURES:

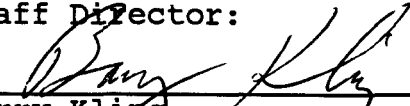
SUBSTANTIVE COMMITTEE:

Prepared by:



Diane Carr

Staff Director:



Barry Kling

SECOND COMMITTEE OF REFERENCE:

Prepared by:

Staff Director:

APPROPRIATIONS:

Prepared by:

Staff Director:
