

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 379 Pub. Rec./Financial Information Regarding Competitive Bidding

SPONSOR(S): Transportation & Modals Subcommittee, Truenow

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 320

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Transportation & Modals Subcommittee	17 Y, 0 N, As CS	Walker	Hinshelwood
2) Ethics, Elections & Open Government Subcommittee	15 Y, 0 N	Rando	Toliver
3) Infrastructure Strategies Committee		Walker	Harrington

SUMMARY ANALYSIS

To prequalify for bidding on any Florida Department of Transportation (FDOT) construction contract in excess of \$250,000, a contractor must obtain a certificate of qualification from FDOT. In general, each application for a certificate of qualification must be accompanied by the contractor's financial statements. Upon written request from FDOT, the applying contractor must provide any additional financial information necessary for the FDOT to verify the financial adequacy of the applicant as presented in their financial statements. Additionally, FDOT has discretion to make inquiries in order to verify and evaluate whether an applicant is competent, is responsible, and possesses the necessary financial resources to perform the requested work.

Florida law currently provides public record exemptions which cover the financial statements provided by a contractor applying for prequalification, but Florida law does not exempt from public disclosure any additional financial information submitted to FDOT that is necessary to verify the financial adequacy of a prospective bidder of a FDOT construction, road, or public works project.

The bill provides that any other financial information necessary to verify the financial adequacy of a prospective bidder which an agency requires a prospective bidder to submit in order to prequalify for bidding or for responding to a solicitation for a road or any other public works project is exempt from public disclosure.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2029, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.

The bill may have an indeterminate fiscal impact on state government and the private sector.

The bill provides an effective date of July 1, 2024.

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record exemption. The bill expands an existing public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records

The Florida Constitution sets forth the state's public policy regarding access to government records, guaranteeing every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.¹ The Legislature, however, may provide by general law an exemption² from public record requirements provided that the exemption passes by a two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption, and is no broader than necessary to meet its public purpose.³

Current law also addresses the public policy regarding access to government records by guaranteeing every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt.⁴ Furthermore, the Open Government Sunset Review (OGSR) Act⁵ provides that a public record exemption may be created, revised, or maintained only if it serves an identifiable public purpose and the "Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption."⁶ An identifiable public purpose is served if the exemption meets one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protect 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; or
- Protect trade or business secrets.⁷

Pursuant to the OGSR Act, a new public record exemption, or the substantial amendment of an existing public record exemption, is repealed on October 2nd of the fifth year following enactment, unless the Legislature reenacts the exemption.⁸

Florida Department of Transportation (FDOT) Contractor Prequalification for Bidding

Contractor Certificate of Qualification

To prequalify for bidding on any FDOT construction contract in excess of \$250,000, a contractor must obtain a certificate of qualification from FDOT.⁹ Each application for a certificate of qualification must be accompanied by the contractor's latest audited annual financial statements. If the application or the annual financial statement shows the contractor's financial condition more than four months prior to the date when FDOT receives the application, the contractor must also submit audited interim financial statements and an updated application.¹⁰

¹ Art. I, s. 24(a), FLA. CONST.

² A "public record exemption" means a provision of general law which provides that a specified record, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., or s. 24, Art. I of the Florida Constitution. See s. 119.011(8), F.S.

³ Art. I, s. 24(c), FLA. CONST.

⁴ See s. 119.01, F.S.

⁵ S. 119.15, F.S.

⁶ S. 119.15(6)(b), F.S.

⁷ *Id.*

⁸ S. 119.15(3), F.S.

⁹ S. 337.14, F.S.; R. 14-22, F.A.C.

¹⁰ The interim financial statements must cover the period from the end date of the annual statement and must show the financial condition of the applying contractor no more than four months prior to the date FDOT receives the interim statement; but, upon request of the applicant, an application and accompanying annual or interim financial statement received by the FDOT within 15 days after either four-month period is considered timely. S. 337.14(1), F.S.

An applying contractor desiring to bid exclusively for the performance of construction contracts with proposed budget estimates of less than \$2 million may submit reviewed annual or reviewed interim financial statements prepared by a certified public accountant, instead of audited, certified financial statements. FDOT may waive these requirements for projects having a contract price of \$500,000 or less if FDOT determines that the project is of a noncritical nature and the waiver will not endanger public health, safety, or property.¹¹

FDOT's rules provide that financial statements submitted in the qualification to bid process must include the following:

- A balance sheet;
- An income statement, including separate totals for construction revenues, and all revenues earned during the period covered;
- A statement of retained earnings or changes in stockholders' equity;
- A statement of cash flows;
- A consolidating or combining balance sheet, when required;
- Notes to financial statements;
- For projects over \$1 million with the exception of Emergency Debris Removal only contracts, the opinion of a Certified Public Accountant;¹²
- For projects over \$250,000 but under \$1 million, a review report prepared by a Certified Public Accountant;¹³ and
- Upon written request, any additional financial information necessary for the Department to verify the financial adequacy of the applicant as presented in their financial statements.¹⁴

FDOT's rules also include requirements with respect to the equipment, past record, experience, financial resources, and organizational personnel of the applying contractor, which are necessary to perform the specific class of work for which the contractor seeks certification.¹⁵ FDOT has discretion to make inquiries in order to verify and evaluate whether an applicant is competent, is responsible, and possesses the necessary financial resources to perform the requested work.¹⁶

If an applicant for a certificate of qualification is found to possess the prescribed qualifications, FDOT must issue the applicant a certificate, which, unless revoked by FDOT for good cause, is valid for a period of 18 months after the date of the applicant's financial statement, or such shorter period as FDOT prescribes.¹⁷

Public Record Exemptions

Currently, Florida law provides that any financial statement that an agency requires a prospective bidder to submit in order to prequalify for bidding or for responding to a proposal for a road or any other public works project is exempt from public record requirements.¹⁸

¹¹ *Id.*

¹² However, s. 337.14, F.S., allows an applying contractor to submit reviewed financial statements, rather than audited financial statements, if the contractor desires to bid exclusively for the performance of construction contracts with proposed budget estimates of less than \$2 million.

¹³ See *supra* note 12.

¹⁴ R. 14-22.002(2), F.A.C.

¹⁵ S. 337.14(1), F.S.

¹⁶ R. 14-22.003(1), F.A.C.

¹⁷ S. 337.14(4), F.S.

¹⁸ S. 119.071(1)(c), F.S.

Florida law further provides that the following documents, required when a contractor applies to qualify to bid on a FDOT construction contract in excess of \$250,000, are confidential and exempt¹⁹ from public record requirements:²⁰

- Audited, certified financial statements prepared in accordance with generally accepted accounting principles and auditing standards by a licensed certified public accountant;
- Interim audited certified financial statements;
- Reviewed annual financial statements; or
- Reviewed interim financial statements.²¹

Current law does not exempt from public disclosure any additional financial information submitted to FDOT that is necessary to verify the financial adequacy of a prospective bidder of a FDOT construction, road, or public works project.

Effect of the Bill

The bill provides that any other financial information necessary to verify the financial adequacy of a prospective bidder which an agency requires a prospective bidder to submit in order to prequalify for bidding or for responding to a solicitation for a road or any other public works project is exempt from public disclosure.

As required by the Florida Constitution, the bill contains a statement of public necessity for the public record exemption. The public necessity statement includes the following reasons for the exemption of the additional financial information:

- Such financial information often contains sensitive information.
- The risk of potential disclosure of sensitive financial information defeats the purpose of protections already afforded to financial statements and may have a chilling effect on persons desiring to prequalify or maintain prequalification for bidding or for responding to a solicitation for road or public works projects.
- The chilling effect may result in a limited pool of potential bidders and, thus, negatively impact the state's ability to receive the best value for road and other public works projects.
- Protecting this financial information from disclosure will prevent such information from being used by competitors to gain an unfair advantage against other bidders on road and other public works projects.
- Protecting this financial information from disclosure promotes the free provision of such information to the requesting agency by removing a prospective bidder's concern for attendant risks in doing so.
- As a result, this exemption promotes the state's interest in ensuring that prospective bidders on road and other public works projects possess the necessary financial resources to complete such projects, many of which involve immense costs and may be complex and of long duration.

The bill is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2029, unless reviewed and saved from repeal through reenactment by the Legislature.

B. SECTION DIRECTORY:

Section 1 Amends s. 119.071, F.S., relating to general exemptions from inspection or copying of public records.

Section 2 Provides a public necessity statement.

¹⁹ There is a difference between records the Legislature designates *exempt* from public record requirements and those the Legislature designates *confidential and exempt*. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So.2d 1015 (Fla. 2004); *State v. Wooten*, 260 So. 3d 1060, 1070 (Fla. 4th DCA 2018); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 683, 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 Op. Att'y Gen. Fla. 04-09 (2004).

²⁰ S. 337.14(1), F.S.

²¹ *Id.*

Section 3 Provides an effective date of July 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Indeterminate. See "Fiscal Comments" section below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. See "Fiscal Comments" section below.

D. FISCAL COMMENTS:

The bill may have a negative, but likely insignificant impact on state agencies, such as FDOT, that oversee road or public works projects because agency staff responsible for complying with public record requests may require training related to the expansion of the public record exemption. Additionally, agency staff will expend time determining which documents, or portions thereof, are subject to a request for public records covered by the exemption provided in the bill. The costs, however, can likely be absorbed within current agency resources.

The bill may increase the pool of potential bidders on any road or public works project to the extent that the public record exemption reduces a chilling effect on persons desiring to prequalify or maintain prequalification by protecting any sensitive financial information required by a state agency to verify the financial adequacy of a prospective bidder.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Vote Requirement

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

Public Necessity Statement

Article I, section 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record exemption. The bill expands an existing public record exemption; thus, it includes a public necessity statement. The public necessity statement provides the following reasons for exempting from public disclosure financial information necessary to verify the financial

adequacy of a prospective bidder which an agency requires a prospective bidder to submit in order to prequalify for bidding or for responding to a solicitation for a road or any other public works project:

- Such financial information often contains sensitive information.
- The risk of potential disclosure of sensitive financial information defeats the purpose of protections already afforded to financial statements and may have a chilling effect on persons desiring to prequalify or maintain prequalification for bidding or for responding to a solicitation for road or public works projects.
- The chilling effect may result in a limited pool of potential bidders and, thus, negatively impact the state's ability to receive the best value for road and other public works projects.
- Protecting this financial information from disclosure will prevent such information from being used by competitors to gain an unfair advantage against other bidders on road and other public works projects.
- Protecting this financial information from disclosure promotes the free provision of such information to the requesting agency by removing a prospective bidder's concern for attendant risks in doing so.
- As a result, this exemption promotes the state's interest in ensuring that prospective bidders on road and other public works projects possess the necessary financial resources to complete such projects, many of which involve immense costs and may be complex and of long duration.

Breadth of Exemption

Article I, section 24(c) of the State Constitution requires a newly created or expanded public record exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands a current public record exemption in order to exempt, in addition to financial statements, any other financial information necessary to verify the financial adequacy of a prospective bidder which an agency requires a prospective bidder to submit in order to prequalify for bidding or for responding to a solicitation for a road or any other public works project. The purpose of the current exemption is to protect sensitive financial information that an agency receives in conjunction with its duties to review specific types of applications. Therefore, the expanded exemption appears to be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

The bill neither provides rulemaking authority nor requires rulemaking by executive branch agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 10, 2024, the Transportation & Modals Subcommittee adopted a Proposed Committee Substitute (PCS) and reported the bill favorably as a committee substitute. The PCS:

- Removes proposed changes to s. 337.14, F.S.
- Makes clarifying changes to s. 119.071(1)(c), F.S.
- Amends the public necessity statement.

This analysis is drafted to the committee substitute as approved by the Transportation & Modals Subcommittee.