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BILL ANALYSIS



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Senate Bill 69 (as enrolled)
Sponsor: Senator Rick Jones
Senate Committee: Government Operations
House Committee: Michigan Competitiveness

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RATIONALE

The Management and Budget Act makes the Department of Technology, Management, and Budget (DTMB) responsible for purchasing supplies and contracting for services needed by State agencies. Unless a specific exception applies, the Department is required to use competitive bidding for all purchases authorized under the Act. Two concerns regarding this process have been raised. Apparently, many potential vendors submit requests for information under the Freedom of Information Act (FOIA), in order to learn about competitors' bids, or to determine the maximum amount of State funding available for a project. Under FOIA, a bid or proposal to enter into a contract may be exempt from disclosure only until the time for the public opening of bids or proposals or, if there will be no public opening, until the deadline for bids or proposals to be submitted has expired. In practice, bids are submitted electronically and there is no public opening. Evidently, companies submit bids just before the deadline arrives and then information in the proposals is disclosed immediately after the deadline passes--before DTMB procurement staff have seen or evaluated the bids. As a result, since the bidders have each other's proposals and know the Department's budget, the DTMB has diminished leverage during contract negotiations. In addition, the public disclosure of bids can continue to be problematic if the Department decides to conduct a second round of bidding.

The other concern involves the potential disclosure of trade secrets or financial or proprietary information. Although FOIA contains an exemption for this type of information if it is given to an agency under certain circumstances, the exemption does not apply to information submitted as a condition of receiving a governmental contract. Therefore, some companies are unwilling to bid on State contracts because they do not want to risk the disclosure of private information.

In order to enable the DTMB to enter into contracts that are in the State's best interests, it has been suggested that the Management and Budget Act should provide FOIA exemptions that would address these concerns.

CONTENT

The bill would amend the Management and Budget Act to provide that certain records related to purchasing and contracting by the Department of Technology, Management, and Budget would be exempt from the Freedom of Information Act.

Section 261 of the Management and Budget Act requires the Department to provide for the purchase of, the contracting for, and the provision of supplies, materials, services, insurance, utilities, third party financing, equipment, printing, and all other items needed by State agencies for which the Legislature has not expressly provided otherwise. Section 261 also requires the DTMB to use competitive solicitation for all purchases authorized under the Act unless specific conditions apply. The Department may delegate its procurement authority to other State agencies within dollar limitations and for designated types of procurements.

The bill would exempt the following records from disclosure under the Freedom of Information Act:

- A bid, quote, or proposal submitted in connection with the authority granted under Section 261, and records created in the preparation for and evaluation of the bid, quote, or proposal until the time of final notification of award of the contract.
- Records containing a trade secret as defined in the Uniform Trade Secrets Act, or financial or proprietary information submitted in connection with the authority granted under Section 261.

The bill would define "financial or proprietary information" as information that has not been publicly disseminated or that is unavailable from other sources, the release of which might cause the submitter of the information competitive harm.

(The Uniform Trade Secrets Act defines "trade secret" as information, including a formula, pattern, compilation, program, device, method, technique, or process, that satisfies both of the following:

- Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other people who can obtain economic value from its disclosure or use.
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.)

MCL 18.1261

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

According to representatives of the DTMB, it is common practice for vendors to submit Freedom of Information Act requests for all of the bids received on a project. This would not have been a problem when FOIA was enacted a half-century ago, when bids were received in sealed envelopes, all of the envelopes were publicly opened with the interested parties present, and a decision was made at that time based on the lowest price. Today, however, bids are submitted online and there is no public opening. Although FOIA allows an exemption from disclosure until the deadline for submission has expired, the current technology means that bids are submitted, the deadline arrives, and the information is disclosed within a matter of minutes. This occurs before DTMB staff have even seen the bids. The evaluation process is much more complex than it used to be, and the DTMB must negotiate contracts with bidders who know exactly what their competitors have proposed. This undermines the DTMB's leverage in obtaining contract terms favorable to the State. Also, when the State decides to seek a second round of bids, vendors are armed with information about all of their competitors' previous bids, as well as the DTMB's negotiations with the top bidder in the first round. In addition to putting that bidder at a disadvantage, the disclosure again weakens the Department's negotiating power. Furthermore, although there apparently is no evidence of bidders colluding, the current process could create an environment conducive to collusion.

According to the DTMB, 22 other states have laws that prohibit the disclosure of bids until a contract has been entered into. Although the bill would allow disclosure at an earlier stage, upon final notification of the award of a contract, bidders' information would remain private during the Department's negotiations with vendors and until a decision was made. This would strengthen the DTMB's ability to obtain contract terms that are as advantageous to the residents of the State as possible.

Supporting Argument

The DTMB's inability to protect trade secrets and financial or proprietary information causes the Department to miss out on contracting with highly qualified companies, which might be able to provide necessary goods and services at a competitive price. Apparently, some firms' representatives actually have told the DTMB that they will not submit bids because of the risk that confidential information will be disclosed. The exemption in FOIA for trade secrets or commercial or financial information applies only to information voluntarily provided to an agency for use in

developing governmental policy, and does not apply to information submitted "as required by law or as a condition of receiving a governmental contract, license, or other benefit". While the DTMB might need a company's confidential information in order to evaluate a proposal or the financial stability of a firm, the Department should not be required to disclose this information if it is requested under FOIA. In fact, this issue was raised in a 2006 audit by the Auditor General, in the context of information technology contracts. The audit report pointed out, "State law does not protect vendor proprietary financial information from Freedom of Information (FOIA) requests... DMB [the former Department of Management and Budget] informed us that its inability to protect this information puts the State at a disadvantage when negotiating with vendors. Protecting vendors' proprietary financial information from FOIA disclosure would enable DMB to more effectively negotiate a fair and reasonable price for the State."

These statements are equally true today and are relevant to virtually any potential contract with a private vendor that has trade secrets or other information that it does not want revealed to competitors. According to the DTMB, 41 other states and the Federal government protect the privacy of trade secrets and proprietary or financial information. The bill would bring Michigan into line with these jurisdictions, and would reduce the State's competitive disadvantage when it is seeking proposals for products or services. Also, by increasing the pool of qualified firms willing to submit bids, the bill would improve the DTMB's ability to get the best deal for the State.

Opposing Argument

There already are too many exemptions from Michigan's Freedom of Information Act. According to a 2015 study of state government transparency and accountability by the Center for Public Integrity, a nonprofit, nonpartisan investigative news agency, based on 13 different categories, Michigan received a grade of "F" and ranked last among the 50 states, with an overall score of 51 out of 100. In the category of procurement, Michigan's score was 54. The State needs greater public disclosure, not less.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Joe Carrasco