by William J. Cea and Mark J. Stempler

New Limitations on Access to Public Records and Meetings in Government Contracting

Florida's Constitution guarantees an open and transparent form of government. Laws such as the Public Records Act and the Sunshine Law provide for the public's right to obtain government records and attend government meetings. "Chapter 119 of the Florida Statutes, The Florida Public Records Act, was enacted to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people."[1] The purpose of the Sunshine Law is "to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance."[2]

Those laws, however, also have exemptions that make certain meetings and records confidential and off-limits to the public. On June 2, 2011, Florida amended the Public Records Act and the Sunshine Law to expand some of those exemptions and create others (hereinafter, the amendments).[3] There are new limitations on the public's ability to access information related to government contracting which will directly affect protests filed by bidders and proposers dissatisfied with the procurement process.[4]

These laws come at a time when public corruption across the United States, including Florida, has received significant attention.[5] In recent years, numerous public officials have been arrested or cited for improperly exercising their power. Given this political climate, transparency is becoming more important to the public and to political subdivisions across the state. Although the amendments may reduce access to information in the procurement arena, the Florida Legislature determined that they will "reduce public and private harm" and increase the "effective and efficient administration of the competitive solicitation process."[6] This article will examine the new amendments, their effect on the public contracting process, and potential unresolved issues going forward.

Government Contracting and Public Records/Sunshine Laws

Generally, government agencies, such as the state of Florida, counties, and municipalities, must administer a public solicitation process before awarding contracts for goods and services. Projects are usually publicly advertised, and offers are procured through vehicles such as invitations for bid, requests for proposals, requests for quotations, and invitations to negotiate. Under the amendments discussed in this article, these are now known as "competitive solicitations."[7] The competitive solicitations are then reviewed by vendors who may respond by providing the information requested. The government agency, often through a selection or evaluation committee, then compares the responses against the evaluation criteria and ranks the bidders or proposers. Thereafter, the agency will generally issue a notice of intended award.

Once the intended award is posted, bidders or proposers who were not top-ranked may seek to protest the agency's intended decision. The protest may be based on a number of grounds. For example, there may be mistakes or inconsistencies by the awarding agency, missing information, or other issues relating to responsiveness and responsibility in the winning bid or proposal.[8] Generally, the protestor must show that the proposed agency action in selecting the top-ranked vendor was "clearly erroneous, contrary to competition, arbitrary, or capricious."[9]

During the solicitation process (before the ranking), an agency may conduct a formal "opening" of the responses received. This means that the agency will physically open the sealed bids after the submittal deadline. It is typical for agencies to provide notice of the "opening," so that other bidders and the public may attend. The agency may announce what bids or proposals have been received, and perhaps discuss the characteristics of each, such as price. In addition to evaluating the written submissions, agencies may require bidders or proposers to make oral presentations to a selection committee. During the presentations, bidders or proposers may provide materials to the committee and may respond to questions posed by the committee members. These committees may also meet to discuss contract negotiation and strategy.

Before passage of the amendments, meetings of an agency's committee or team charged with conducting oral presentations and negotiating contract terms were required to be open to the public, including to competing bidders or proposers.[10] If these meetings were closed to the public, and an award was made, that award could be void.[11]

Further, before the amendments,

F.S. Ch. 119, the Public Records Act, mandated that bids and proposals were open to public inspection and copying at the time of a notice of a decision or intended decision, or within 10 days after the bid or proposal was opened by the procuring agency, whichever was earlier.

The 2011 Amendments

First, Florida's constitution guarantees the public's right to have access to government records and meetings. Article I, §24 states:

> Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this [c]onstitution.[12]
>
> All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public….[13]

The constitution also allows the legislature to exempt certain records and meetings, or expand those exemptions.[14] To accomplish this, both the House and the Senate must pass the exemptions with no less than a two-thirds vote, and the law must "state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."

H.B. 7223, which amends Florida's Sunshine Law and Public Records Act, passed unanimously in both houses of the legislature. The amendments became effective upon being signed into law by Governor Rick Scott on June 2, 2011. The exemptions previously existing in the statutes at issue were set to expire in October 2011 unless reenacted by the legislature.[15]

The most significant changes were made to the Sunshine Law. Specifically, F.S. §286.0113 now precludes public attendance at "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."[16]

Additionally, "[a]ny portion of a team meeting at which negotiation strategies are discussed is also exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution."[17]

The public can no longer observe oral presentations where bidders and proposers discuss their submissions, and qualifications and answer questions before the selection committee. Further, the public can no longer attend committee meetings where the public agency discusses strategies for selecting and negotiating with the top-ranked bidder or proposer. The statute, however, mandates the recording of such meetings, and no portion of the exempt meeting can be held off the record. The recordings can be obtained through a public records request, either at the time that the notice of intended award is posted or 30 days after bids or proposals are opened, whichever is earlier. The prior version of the law provided for a 20-day waiting period.

In the event the agency decides to reject all bids, proposals, or replies, and intends to re-issue the solicitation, the recordings of the meetings remain exempt until the agency posts notice of an intended decision regarding the reissued solicitation, or for no longer than 12 months after the rejection of all bids, proposals, or replies.[18]

The Public Records Act still provides that sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation are exempt from disclosure until an agency posts its intended decision, but increases the waiting period to 30 days after the opening of the bids, proposals, or final replies, if the intended award is not issued during that time period.[19] This change also applies to any materials handed out during oral presentations to the selection committee.

Similar to the amendment to the Sunshine Law, if the agency decides to reject all bids or proposals and re-solicit the project, the original bid or proposal submitted will be exempt from disclosure for up to 12 months after the original notice rejecting all bids or proposals is submitted. Notably, the amendments do not exempt other potentially important material from public records requests, such as bid tabulation sheets, communications among an agency's staff members, or agency analysis of the project.

Impacts on Bidders and Unresolved Issues

Public bidding statutes or ordinances are created for the protection of the public.[20]

> It is declarative of the public policy of this state that public bidding be fair and open, and that all bidders should have an equal opportunity to present bids. There should be no opportunity for favoritism or insider information that gives one bidder an advantage over the other. This boosts public confidence in the public contract bidding process and is in the public interest.[21]

The legislature, as required by the Florida constitution, provided explanations for the changes to the Sunshine Law and Public Records Act. It determined that temporarily exempting bids, proposals, and replies to a competitive solicitation is a "public necessity." It concluded that this would ensure that the process remained "fair and economical for vendors."[22] The rationale is that competitors should not be able to review each other's submittals right away or hear each other's presentations so that the information contained therein or presented is protected. A competitor will not know another bidder's pricing, qualifications, etc., immediately after a proposal is submitted.

The legislature further reasoned that it is "unfair and inequitable to compel vendors to disclose to competitors the nature and details of their proposals," both at the meetings or through the minutes or records presented at such meetings. The legislature reasoned that allowing the public to attend these meetings "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."[23]

This information, however, will ultimately become public record, so eventually it can be obtained by a competitor or the public in general. The legislature did not elaborate as to how this amendment would be "economical" for vendors. There are no direct costs to vendors associated

with the amendment, and indirect costs are not specified in the statutes or legislative history.

The legislature apparently determined that by keeping the submittals and the oral presentations exempt, no vendor could gain an advantage in the procurement process by knowing what the other vendors submitted. The true advantage of this, however, is unclear since vendors do not know what their competitors are submitting until after the submittal deadline, and vendors cannot change their bids or proposals after they are opened, except perhaps to cure minor irregularities.[24]

The legislature also determined that meetings at which negotiation strategies take place should be exempt because, "the efficient administration of the competitive solicitation process would be hindered."[25] There is no explanation or elaboration as to how it would be hindered.

The practical effect of exempting these records and meetings is that it will be more difficult for the public and the bidders to observe the evaluation process as it occurs. This also means that dissatisfied vendors will have a more difficult time deciding whether they have a viable protest.

Typically vendors could, and did, obtain the bids and proposals submitted by their competitors, then determine if they made any mistakes or other errors as described above. Now, vendors will generally have no information about any of the competing bids or proposals until 30 days have passed or the notice of intent to award is posted. Also, without observing competitor presentations and question and answer sessions, vendors will not know whether protest grounds exist until the recordings of the meetings become available. For instance, a vendor may have no way of knowing whether a competitor improperly changed its price from its proposal during the oral presentation. In other words, dissatisfied vendors will need to take immediate steps to procure the temporarily exempt records and recordings just to determine whether grounds to protest exist. This may be especially problematic for vendors and counsel because there are typically strict time deadlines in the protest process.

For example, under F.S. §120.57, in state agency solicitations, a protestor has only 72 hours from the time the intended award is posted to file a notice of intent to protest. The protestor then has 10 days from the submission of the notice of intent to file its formal written protest, and must state all grounds on which the protest is based. Any grounds not raised are deemed waived. The "temporary" exemptions could make it very difficult, if not impossible, for vendors to obtain and analyze the requisite records and recordings within such limited time frames and for counsel to assess the viability of a protest or articulate "all grounds" for the protest. In other words, the discovery process will be more difficult. One possible cure for this issue is to allow more time to file protests, or to allow protestors to supplement their protests as they obtain additional exempt records through public records requests. Such a cure would require additional legislation to amend the state protest statutes or modifications to local government ordinances and could delay the protest procedure and award of the project.

The legislative intent of the amendments may better suit invitations to negotiate. That is a solicitation for competitive sealed replies to select one or more vendors with which to commence negotiations for the procurement of commodities or contractual services.[26] In these types of solicitations, the written submittals may not have included price and other material terms. In that scenario, it would seem unfair to allow competitors to attend each other's negotiation sessions. In contrast, in other types of solicitations, such as invitations to bid and requests for proposals, vendors have already submitted price and other material terms at the time their submittals are opened. Since pricing and terms are generally fixed at that stage, it is unclear how the public would benefit by imposition of the temporary exemptions.

Although some may argue that the underlying intent of the amendments was to make it more difficult to protest agency awards, others may point out that the practical effect of the amendments could result in more protests. For example, potential protestors who believe the evaluation process was unfair or inadequate will not be armed with enough knowledge to determine whether there are grounds for a successful protest. Therefore, in an abundance of caution, it might be wise to file a notice of intent to protest to gather the requisite information. Stated another way, the strategy might be: When in doubt, protest. Otherwise, a vendor's right to protest or challenge the award in any capacity will likely be waived. This may result in an increase of time and expense for both the vendors and agencies to navigate the protest process.

Another issue raised is whether the public records exemptions will have any spill-over effect into historically public proceedings; for example, will there be any impact on publicly conducted "openings" or portions of team or selection committee meetings during which proposals are evaluated? The Florida Supreme Court has stated that "specified boards and commissions . . . should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made."[27] However, during these meetings, the team members may discuss specifics of the proposals so they can be compared and contrasted. Under the amendments, such discussions would otherwise be exempt.

Although such portions of the meetings are not specifically excluded under the amendments, if meetings were to occur within 30 days of bid opening, allowing attendance would seemingly defeat the purpose of keeping certain information about the proposals confidential. Similarly, during public bid openings, agencies have routinely announced the identities of the bidders and pricing. Here, too, such practices may no longer be permitted. It remains unclear how these issues will be addressed.

Further, the agencies are now responsible for keeping certain records and meetings exempt that have historically been open. Before the amendments, agencies were accustomed to providing bids or proposals pursuant to public records requests, sometimes

even publishing the responses on the agency's website. Agencies also routinely noticed negotiation and oral presentation meetings to ensure compliance with the Sunshine Law. Agencies which are not aware of or mistakenly post or make available the newly exempt records or meetings, may invite protests of intended agency awards due to lack of compliance.

In *Capeletti Brothers, Inc. v. Department of Transportation*, 499 So. 2d 855 (Fla.1st DCA 1987), for example, a protesting bidder claimed the Department of Transportation violated the Sunshine Law when it closed to the public a bid review committee meeting. The DOT did so because it believed some documents exempt from the Public Records Act under DOT specific statutes, such as cost estimates and bid analyses, were going to be discussed. The First District Court of Appeal agreed and upheld the closed-door meeting.

In addition, the amendments do not address the ramifications of conducting a meeting in the sunshine that is now exempt, such as an oral presentation. Although several cases hold that violations of the Sunshine Law can void an award, those cases generally involved closed meetings that should have been open to the public.[28]

Further, the language in the amendments is in contradiction to language in certain public procurement statutes. For example, procurements of professional services pursuant to F.S. §287.055 and auditor services pursuant to F.S. §218.391 state that the public must not be excluded from the proceedings under those sections.[29] It is unclear how the statutes will be reconciled going forward. In all likelihood, the amendments will lead to requests for advisory opinions from the attorney general's office.

Conclusion

The 2011 amendments to Florida's Sunshine Law and Public Records Act could have a profound effect on government contracting and protests. The extent of the ramifications is unclear. There will be instances when the amendments have little to no effect. Evaluating competitive solicitations can be a lengthy process. For example, if oral presentations are not conducted sooner than 30 days after bids and proposals are submitted, vendors will be able to obtain the competing submittals before the oral presentations, just like they could before the amendments. Further, if the notice of intended award is not posted within 30 days of the oral presentations, vendors will be able to obtain recordings and records before the notice is posted.

In situations when the new time periods have not lapsed, the effect of the amendments on the public's access to the decision-making process and the filing of protests remains to be seen. While the amendments may make it more difficult for a protestor to file a protest due to lack of information, a potential exists that vendors may be more likely to protest in an abundance of caution. State agencies and local governments may need to consider adjustments to their codes or protest rules, for instance, by giving more time for vendors to protest, or by allowing protestors to amend and

update their protests as they receive additional information through public records requests, though that could delay the protest process. One way or another, since the amendments are contrary to long-standing practices and requirements applicable to the competitive solicitation process, it will undoubtedly take some time for bidders, public agencies, and their respective counsel, to become acclimated to the new procedures.❑

[1] *Forsberg v. Housing Authority of the City of Miami Beach,* 455 So. 2d 373, 378 (Fla. 1984).

[2] *See Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 860 (Fla. 3d D.C.A. 1994); *quoting Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla.1974).

[3] Open Government Sunset Review Act, Ch. 2011-140.

[4] For an overview of the protest process, *see* William J. Cea & Mark J. Stempler, *Fighting for Public Dollars: Procedures and Pitfalls of Protesting Government Bid Awards*, 84 Fla. B. J. 45 (April 2010).

[5] U.S. Dep't of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2008*, *available at* http://www.justice.gov/criminal/pin/docs/arpt-2009.pdf; *See also* Howard Troxler, *How to Fix Florida's Weak Laws on Public Corruption*, St. Petersburg Times, January 8, 2011, *available at* http://www.tampabay.com/news/politics/stateroundup/how-to-fix-floridas-weak-laws-on-public-corruption/1144371.

[6] Open Government Sunset Review Act, Ch. 2011-140 at 4 (2011), *available at* http://laws.flrules.org/2011/140.

[7] *Id*.

[8] A proposal is considered responsible if the proposer has the ability to perform the contract requirements, and the integrity and reliability that will assure good faith performance. Fla. Stat. §287.012(24) (2010). A proposal is considered responsive if it conforms in all material respects to the specifications. Fla. Stat. §287.012(25) (2010).

[9] Fla. Stat. §120.57(3)(f) (2009) ("A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic."). *Agrico Chem. Co. v. Dep't of Envir. Reg.*, 365 So. 2d 759, 763 (Fla. 1st D.C.A. 1978). Arbitrary and capricious has also been defined to include acts taken with improper motive, without reason, or for a reason which is merely pretextual. *City of Sweetwater v. Solo Const. Corp.*, 823 So. 2d at 798, 802 (Fla. 3d D.C.A. 2002); *citing Decarion v. Monroe County*, 853 F.Supp. 1415 (S.D. Fla. 1994).

[10] Open Government Sunset Review Act, Ch. 2011-140, Fla. Stat. §286.0113(2)(a)(2) (2011). "Team" is now defined as a group of members established by an agency for the purpose of conducting negotiations as part of a competitive solicitation.

[11] *Port Everglades Auth. v. Int'l. Longshoremen's Ass'n, Local 1922-1*, 652 So. 2d 1169, 1170 (Fla. 4th D.C.A. 1995) (Closed vendor presentations to an agency selection committee were voided as Sunshine Law violations); *see also Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857 (Fla. 3d D.C.A. 1995) (Sunshine Law applied to meetings of a committee which negotiated a lease with the top-ranked proposer. The proposed lease was later presented to the county commission for approval.).

[12] Fla. Const. art. I, §24(a).

[13] Fla. Const. art. I, §24(b).

[14] Fla. Const. art. I, §24(c). To accomplish this, the legislature must pass the exemptions with no less than a two-thirds vote of each house, and the law must, "state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." *Id.*

[15] The expiration of the exemptions prompted the amendments. The exemptions in the amended law are now set to expire in October 2016.

[16] Open Government Sunset Review Act, Ch. 2011-140, Fla. Stat. §286.0113(2)(b)(1).

[17] Open Government Sunset Review Act, Ch. 2011-140, Fla. Stat. §286.0113(2)(b)(2) (2011).

[18] Open Government Sunset Review Act, Ch. 2011-140, Fla. Stat. §286.0113(2)(c)(3) (2011).

[19] Open Government Sunset Review Act, Ch. 2011-140, Fla. Stat. §119.071(1)(b)(2) (2011).

[20] *Hotel China & Glassware Co. v. Bd. of Pub. Instruction of Alachua County*, 130 So. 2d 78, 81 (Fla. 1st D.C.A. 1961).

[21] *Sutron Corp. v. Lake County Water Auth.*, 870 So. 2d 930, 933 (Fla. 5th D.C.A. 2004). *See also Wester v. Belote*, 138 So. 721 (1931) (Public procurement laws "should receive a construction always which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded, or defeated.").

[22] Open Government Sunset Review Act, Ch. 2011-140 at 4 (2011), *available at* http://laws.flrules.org/2011/140.

[23] *Id*.

[24] *Harry Pepper & Associates, Inc. v. City of Cape Coral*, 352 So. 2d 1190 (Fla. 2d D.C.A. 1977).

[25] Open Government Sunset Review Act, Ch. 2011-140 at 4 (2011), *available at* http://laws.flrules.org/2011/140.

[26] Fla. Stat. §287.012(16) (2010).

[27] *Zorc v. City of Vero Beach*, 722 So. 2d 891, 902 (Fla. 4th D.C.A. 1998); *see also Board of Pub. Instruction of Broward County v. Doran,* 224 So.2d 693, 699 (Fla. 1969).

[28] *See* note 10.

[29] Fla. Stat. §287.055(3)(e) (2009); Fla. Stat. §218.391(2) (2009).

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