

Purchasing in the Sunshine: How Florida's Open Government Laws Apply to Public Procurement

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This public policy is to ensure the Florida Constitution and Florida Statutes provide for open government. The public an opportunity to observe the decision making process.

As it applies to public procurement, Florida law affords members of the public as well as the proposers the opportunity to attend meetings and inspect and/or copy records relative to the solicitation process and award decisions. The key concept is that the public is entitled to know the entire decision making process and not simply observe a ceremonial final decision.

Access to meetings and records also provides an opportunity for legal counsel to evaluate award decisions and determine whether grounds to protest or challenge exist. The following is an overview of the open government laws in the State of Florida in the context of public procurement. Substantive grounds for challenges or bid protests is a separate discussion. Federal procurements are subject to different laws and regulations that are also beyond the scope of this article.

The Sunshine Law

Article I, s. 24 of the Florida Constitution requires meetings of collegial bodies of the executive branch of state government or of a county, municipality, school district, or special district at which official acts are to be taken or discussed be open to the public. Section 286.011, Florida Statutes also known as the "Sunshine Law" further provides that actions taken outside of a public meeting are not binding. The Sunshine Law requires reasonable public notice of meetings and that minutes of all meetings be taken.

Accordingly, it is important that proper procedure be followed so as to not jeopardize an award or commencement of a project. In fact, Florida courts have

held that actions taken in violation of the Sunshine law are void ab initio. *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla. 1974). This means that if a contract award was made in violation of the Sunshine Law, a court can enter an injunction prohibiting performance. Additionally, the Sunshine Law also applies to advisory committees that may be charged with the responsibility of proposal evaluation and award recommendations. *Silver Express Company v. District Board of Lower Tribunal Trustees*, 691 So.2d 1099 (Fla.3d DCA 1997).

Interestingly, the Florida Attorney General has also opined that “committees of one” can be subject to the Sunshine Law. AGO 95-06. For example, if a board member has been delegated the authority to negotiate a contract, and decide whether certain provisions will or will not be brought back to the full board, that is part of the decision making process. On the other hand if the individual(s) do not have any actual authority and their role is purely fact finding, then the Sunshine Law does not apply. Bid openings are generally not considered open meetings, however, opening of sealed bids for construction projects must be in compliance with the Sunshine Law.

In addition to the open meeting requirements, the Florida Legislature enacted Section 286.0114, Florida Statutes in 2013. Section 286.0114 provides that members of the public shall be given a reasonable opportunity to be heard before final action is taken by a board or commission.

The opportunity to be heard need not be at the same meeting that final action is taken and the agency is permitted to adopt reasonable procedures for public comment, such as limiting the amount of time that an individual has to comment. Just like the Sunshine Law, Section 286.0114 provides the courts with jurisdiction to issue injunctions for violations.

As is oftentimes the case in law, there are exceptions to the Sunshine Law relative to competitive solicitations. The exceptions were expanded in 2011 by amendment to Florida Statutes, Section 286.0113. The way the exceptions work is that certain “portions” of the meetings may be closed so long as they are recorded. The recordings of the closed portion of the meetings become public at the time the agency provides notice of an intended decision or 30 days after the opening of bids, proposals or final replies, whichever occurs earlier.

The portions of the meetings that may be closed to the public and competitors are as follows: (a) at which a vendor answers questions; (b) at which a vendor makes an oral presentation; (c) at which a negotiation with a vendor is conducted; or (d) at which negotiation strategies are discussed by the persons appointed by the agency to conduct negotiations. The reason these exemptions were adopted by the Legislature was to afford the agency and the participants with a fair opportunity to participate in the evaluation, selection and negotiation process without anyone obtaining an unfair advantage. Of course, a dissatisfied bidder may want to review the recordings to determine if anything happened during a closed portion which would be a ground for a bid protest. The recordings can be obtained by making a public records request.

The Public Record Act

Much like meetings, the Florida Constitution and Florida Statutes mandate that the public has access to public records. Florida Statutes, Chapter 119 is also known as the Public Records Act. Section 119.07 requires public agencies to permit inspection and copying of public records “to any person desiring to do so”. The agency has the right to have the inspection conducted during normal business hours and under the supervision of a custodian of the public records. While there is no prescribed deadline for a public agency to respond to a request, the custodian must promptly acknowledge the request and respond in good faith.

Florida courts have held that there can be no unjustified delay in production of the records. *Lilker v. Suwannee Valley Transit Authority*, 133 So.3d 654 (Fla. 1st DCA 2014). On the other hand, the Public Records Act also provides a litany of exemptions. The burden is on the public agency to state the basis of the exemption.

As it relates to public procurement, the records that may be subject of a request cover the full ambit of the solicitation process. For example, public records may include the solicitation documents, requests for clarification and addenda, pre-bid meeting minutes, the bids received, communications to and from the proposers, notices of meetings, memoranda or other staff reports commenting on the bids, tabulation sheets, or recordings of portions of meetings that are exempt under the Sunshine Law. By making a records request and reviewing the pertinent documents the public as well as the proposers can get a firsthand look at the agency’s evaluation. For dissatisfied proposers, a public records request is one of the best means to investigate whether there are grounds to protest the award.

Florida Statutes, Section 119.071 provides for certain exemptions applicable to competitive solicitations. For example, there are temporary exemptions for sealed bids, proposals, or replies received by an agency. These materials are exempt from public inspection and copying until such time as the agency provides notice of an intended decision or until 30 days after opening of the bids, proposals or final replies, whichever is earlier. Further, an agency may extend this exemption if it decides to reject all bids and readvertise. In that case, the exemption can be extended for up to 12 months after the agency provides notice of its intent to reject all bids, proposals or replies.

Conclusion

Public agencies and the bidders are rightfully focused on the project specifications, bidding deadlines and the making sure that proposals are full and complete. As reflected by the above discussion, however, there are open government requirements in Florida that all parties should bear in mind. The agency wants to avoid a procedural challenge under the Sunshine Law and the proposers make use of the open government laws to discover the facts and

evaluate the process.
