THE FLORIDA
BAR JOURNAL

April, 2010 Volume 84, No. 4

# Fighting for Public Dollars: Procedures and Pitfalls of Protesting Government Bid Awards

**by William J. Cea and Mark J. Stempler**



With the economy mired in a recession, unemployment has soared to double digits in Florida, and to the highest levels since 1975.[1] New contracts are scarce for many businesses which previously relied on Florida's seemingly unending growth and prosperity. Businesses of all sizes are now scrambling to find good paying work, forcing many private companies to seek public sector projects. Since the $787 billion economic stimulus package was signed into law on February 17, 2009, only a small portion of those funds have been released. As more funds become available in Florida, greater opportunities will exist for contractors seeking public work projects. Recognizing that competition will be fierce, unique opportunities to capture public work may evaporate unless contractors adhere to the deadline driven procurement process. In the wake of a difficult economy, bid protests will likely multiply given the competitive fight for dollars to contractors operating in financial survival mode. Counsel for successful and unsuccessful bidders must be mindful that bid protests have a unique procedure requiring short-fused appellate style contests requiring intense submittal deadlines and split-second decision making. This article will review the procedures and pitfalls of the protest process and practices to be employed when representing bidders in competition for public work under F.S. Ch. 120, the Administrative Procedure Act (APA).

Due to the current economic climate, competition for public projects is intensifying.[2] For many small and mid-size contractors, the award of a single public contract can make or break their business. Generally, public contracts for commodities or services valued at $25,000 or greater are subject to competitive procurement.[3] Political subdivisions must also competitively award contracts for public construction projects estimated to cost greater than $300,000.[4]

**The Public Procurement Process**

Projects may be solicited through a variety of methods, such as invitations for bid or requests for proposals. In an invitation for bid, price is the primary consideration. In a request for proposal, there may be different or additional criteria upon which the proposals are evaluated.[5] Other methods may focus on nonprice criteria, such as the qualifications of an entity, which are typically solicited through a request for qualifications.[6] When cost is the primary factor, the bidder found to be the lowest, most responsive, and most responsible will be awarded the contract.[7]

Generally, bids are evaluated by agency staff and are tabulated to determine the lowest priced responsive and responsible bidder. Where price is not the only consideration, proposals may be evaluated by the procuring entity's selection committee. The bidders are then ranked according to the advertised criteria, and the top-ranked firm or firms are selected to enter into contracts with the procuring entity. Firms that are not selected, but believe they should have been, may have an opportunity to challenge the award through a protest. However, there are limitations as to who is eligible to protest and the grounds for a protest.

Procurements by state agencies are governed by Florida Statutes and the Florida Administrative Code (FAC). In addition, local governments, such as counties and municipalities, have their own rules and procedures.[8] It is of paramount importance for counsel to be knowledgeable of the applicable statutes and rules.

**Bid Protests**

The Third District Court of Appeal in *Hotel China & Glassware Co. v. Bd. of Pub. Instruction*, 130 So. 2d 78 (Fla. 1st DCA 1961), succinctly described the purpose of competitive bidding as follows:

Florida's competitive bid statutes . . . create a system by which goods or services required by public authorities may be acquired at the lowest possible cost. The system confers upon both the contractor and the public authority reciprocal benefits, and exacts from each of them reciprocal obligations. The

bidder is assured fair consideration of his offer, and is guaranteed the contract if his is the lowest and best bid received. The principal benefit flowing to the public authority is the opportunity of purchasing the goods and services required by it at the best price obtainable. Under this system, the public authority may not arbitrarily or capriciously discriminate between bidders, or make the award on the basis of personal preference.[9]

F.S. §120.57(3), sets forth the procedures that each agency is required to adopt for bid protests. First, each agency is required to electronically post all decisions or intended decisions with regard to a solicitation, contract award, or exceptional purchase.[10] The notice must contain the statutory language stating that the failure to file a protest of the decision within the time set forth in F.S. §120.57 shall constitute a waiver of the protest proceedings.

Not all bidders have standing to protest. Under F.S. §120.57(3), a protesting party must demonstrate that its substantial interests will be affected by the proposed agency action,[11] and will result in an injury to the protesting party of sufficient immediacy to justify a hearing. Additionally, it must be shown that the injury is of the type that the statute under which the agency is acting is designed to protect.[12] A second-ranked bidder has standing to protest.[13] It has been held that the third-ranked bidder, or below, does not have standing to file a bid protest where the second-ranked bid was not improper, because even if the award to the top-ranked firm was made in error, the next ranked firm would be the awardee.[14] A bidder ranked third or lower, however, may have standing to intervene to protect its position or examine the evaluation process,[15] or protest if its substantial interests will be affected.

Time deadlines are critical to the protest procedure. Failure to comply with the deadlines are fatal to the protest. Under F.S. §120.57(3)(b), anyone who seeks to protest an agency decision or intended decision must first file a written notice of protest within 72-hours after either is posted. This means that the notice of protest must be actually received by an agency clerk or other person otherwise designated. Sending the notice by mail does not extend the 72-hour period. The 72-hour period does not include Saturdays, Sundays, or holidays. The notice of protest is generally a short and plain statement identifying the solicitation by number and title, and it must state that the protestor plans to protest the agency decision.

Once the notice of protest is filed, the protestor has 10 days to file the formal written protest. If a protestor wants to file the formal written protest within the initial 72-hour window, the formal written protest will also constitute the notice of protest.[16] These procedures also apply to bid specification challenges, and the 72-hour window begins running after the posting of the solicitation. Counsel must be mindful that a protestor cannot wait to challenge the specifications until after the award.[17]

Aside from the stringent time deadlines that could be fatal to a protest, the failure to post a required protest bond, or failure to post it in the appropriate form, could result in the dismissal of the protest. Consequently, it is essential to recognize those circumstances when bonds are required. For example, bonds are required for commodities, contractual and professional services, insurance, and for certain contracts involving school boards and the Department of Transportation. The practitioner should confirm whether the particular agency has a requirement for a protest bond. Before a bid protest is dismissed solely due to a deficiency in a bond, the protestor must be afforded notice of the deficiency and an opportunity to cure.[18]

Some agencies allow for mediation of bid disputes. If an agency has a mediation provision in its code, the parties can agree to mediate. Such an agreement must take place within 10 days of filing the notice of protest. All other time limits are then tolled. The mediation must take place within 60 days of the agreement to mediate, unless otherwise extended by the parties. If the mediation results in a settlement, the agency shall enter a final order that incorporates the agreement of the parties. If no settlement is reached, the case proceeds pursuant to F.S. §§120.569 and 120.57.

Minimum contents for what must be alleged in the formal written protest, or "petition," are set forth in Fla. Admin. Code R. 28-106.201. This rule should be used like a "checklist" by counsel drafting the petition. In sum, the protestor must set forth a statement of all disputed issues of material fact, how the agency's action affects the petitioner's substantial interests, a concise statement of ultimate facts alleged, a list of the specific rules or statutes the protestor alleges require the reversal or modification of the agency's proposed action, and a statement of the relief sought.[19] Failure to strictly adhere to the filing deadlines and content required by the FAC will subject the protest to dismissal by the agency.

**Prehearing Procedure**

Two things happen once the formal written protest is received by the agency. First, the agency is required to stop the solicitation or contract award process until the protest is resolved by final agency action. The process can continue only if necessary to avoid immediate and serious danger to the public health, safety, or welfare. Second, within seven days of receipt of the protest, the agency shall provide an opportunity to resolve the protest by mutual agreement of the parties. This requirement is typically fulfilled by way of an informal meeting.

If the parties resolve the protest, the matter is closed and the contract award process continues. If no resolution is reached during that seven-day period, an informal proceeding is conducted if there are no issues of material fact in dispute.[20] If disputed facts exist, the protest is referred to the Division of Administrative Hearings (DOAH) for formal proceedings.

**Bid Protest Hearings**

Once referred, the director of DOAH will assign an administrative law judge (ALJ). Within 30 days of the agency's receipt of the protest, the ALJ shall commence a hearing. The top ranked firm, or even lower ranked firms, may then intervene in the protest.[21] Petitions for leave to intervene must be filed at least 20 days before the final hearing, unless otherwise provided by law.[22]

Parties may obtain discovery in this administrative process based upon Fla. R. Civ. P. 1.280 through 1.390.[23] Due to the fast pace of bid protests, the practitioner may want to serve discovery requests simultaneously with the protest, or shortly thereafter. Parties may also engage in motion practice.[24] After a motion is served, the opposing party has seven days to file a response. The ALJ shall then conduct proceedings on the motion and the response, and enter orders as necessary.

Documents and other evidence, such as recordings of the selection committee meetings, can be obtained from the procuring agency through public records requests. The retention and distribution of public records is generally governed by F.S. Ch. 119. The ability to obtain public records is subject to limited exceptions. Notably, sealed bids or proposals received by a public agency are exempt from disclosure until the agency posts its decision or intended decision, or within 10 days after the bids or proposals are opened.[25] The public records laws provide a useful tool to obtain and examine competitor's submittals prior to an agency's notice of intended award.

Although administrative hearings are considered less formal than court proceedings, the proceedings closely resemble a bench trial in circuit court. The APA provides for a limited de novo proceeding. Under F.S. §120.57, de novo has been interpreted to mean the process by which an agency action is "evaluated, or a hybrid proceeding in which evidence is received, factual disputes are settled, legal conclusions made, and prior agency action is reviewed for correctness."[26] The protesting party maintains the burden of proof to be sustained by a preponderance of the evidence.[27] In other words, even though an evidentiary proceeding is afforded, the purpose is to review the agency's decision, not for the ALJ to substitute his or her own evaluation of the bids.

F.S. §120.57(1)(b) allows parties the opportunity to present evidence, argue and rebut all issues, conduct cross-examination, and submit proposed findings of fact and orders. When protesting an invitation to bid or request for proposal, submissions made after the proposal or bid opening will not be considered.[28] The Florida Evidence Code is not expressly applicable in these hearings.[29] However, the ALJs rely on the rules of evidence, and counsel should be prepared to offer proofs accordingly. Hearsay evidence may be presented; however, it may not be used by itself to support a finding unless it would be considered admissible in a civil action.

**Protest Standards**

The ALJ must determine whether the agency's proposed action is "contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications."[30] The legal standard employed in these hearings is whether the proposed agency action was, "clearly erroneous, contrary to competition, arbitrary, or capricious."[31] Generally, agencies also have the ability to reject all bids, proposals, or replies. In a proceeding challenging an agency's decision to issue a blanket rejection, the judge must determine whether the agency's intended action is "illegal, arbitrary, dishonest, or fraudulent."[32]

An arbitrary decision is one that is not supported by facts or logic, or is despotic.[33] A decision is capricious if it is adopted without thought or reason or is irrational.[34] The standard is used to determine whether the agency

operated with only a rudimentary command of rationality.[35] Deference is afforded to the agency which made the underlying decision. The agency is afforded wide discretion in its interpretation of its own rules, and those statutes which the agency is responsible for administrating.[36] Such discretion, however, must be exercised based on clearly defined criteria in the bid specifications, rules, or statutes.[37]

An agency is likely, however, to be found to have acted arbitrarily if it does not comply with the criteria in its own proposals.[38] In *City of Sweetwater v. Solo Const. Corp.*, 823 So. 2d 798 (Fla. 3d DCA 2002), the city issued an invitation to bid that stated the contract for a stormwater improvement project would be awarded to, "the responsive, responsible [b]idder which submitted the lowest acceptable [p]roposal." The city instead awarded the contract to the most responsible bidder, as opposed to the lowest responsible bidder, based on criteria not advertised in the specifications. The Third District Court of Appeal held that the city's award was arbitrary and capricious because it was based on criteria not found in the bid documents, nor clearly defined elsewhere.

**Post-hearing Procedure**

Following the hearing, the ALJ has 30 days in which to enter a recommended order that contains findings of fact, conclusions of law, and actions which the ALJ recommends to the agency. Once the recommended order is issued, the parties have 10 days to submit written exceptions to the agency. The agency has 30 days from receipt of the recommended order to enter a final order. The agency can accept or reject the judge's findings of fact and conclusions of law. As a practical matter, the ALJ's findings of fact are seldom disturbed because for an agency to reject a finding of fact, it must state with particularity that the findings were not based upon, "competent substantial evidence." [39]

At the end of this process, the losing party may seek judicial review. Review can be sought in the district court of appeal where the agency maintains its headquarters, where a party resides, or as otherwise provided by law. A notice of appeal or petition for review under the Florida Rules of Appellate Procedure is required within 30 days after the agency's final order. An appeal, however, does not automatically stay enforcement of the agency decision. However, the agency may grant a stay upon appropriate terms.

In addition to challenging an agency's proposed award, a party may also challenge the propriety of the bid specifications. A challenge to the specifications, however, generally must be raised at the time of the issuance of specifications, not after bids are ranked. For example, in *Capeletti Bros. Inc. v. Dep't of Transp.*, 499 So. 2d 855 (Fla. 1st DCA 1986), the court held a challenge to the specifications must be made before the submittal of the bids to save expense to the bidders, and to assure fair competition. In *Consultech of Jacksonville, Inc. v. Dep't of Health*, 876 So. 2d 731 (Fla. 1st DCA 2004), the court rejected a protest based on a cost element in the RFP because it was raised only after the award of the bid.[40]

A recent challenge of bid specifications reflects the competitive fight for money flowing from the Recovery Act. In *Elmwood Terrace Ltd. P'ship v. Fla. Hous. Fin. Corp.*, 2009 WL3826164 (Fla. Div. Admin. Hearings 2009), provisions of a request for proposal for an affordable housing project, funded by the government stimulus package, were deemed contrary to Florida's governing housing statutes due to occupancy restrictions and income requirements.

A recommended award may not end the legal process. Once a contract is awarded, a protest may be successful if it is shown that the terms of a contract between the successful bidder and the agency cannot be materially different from the bid specifications. In *Fla. Dep't of Lottery v. Gtech Corp.*, 822 So. 2d 1243 (Fla. 2002), the second highest bidder successfully challenged an award by the agency after the agency's contract with the successful bidder contained terms not contemplated in the request for proposal. The court held that it was impermissible to allow the successful bidder to negotiate terms not contemplated in the specifications because it would encourage proposers to submit unrealistic proposals for the sole purpose of achieving the top ranking.

Another potential ground for protest may arise if the public entity does not comply with Florida's Government in the Sunshine Act.[41] Under the Sunshine Act, all public meetings at which official acts are to be taken must be open to the public. This means that selection committee meetings used to evaluate bids submitted for an advertised project must be open. Further, the Sunshine Act requires that minutes of all such meetings must be recorded. Many meetings are now electronically recorded. In those cases, a public records request can be made for the recordings, and the parties to the protest can incorporate and cite to comments made during those meetings.

**Conclusion**

As public agencies in Florida receive an influx of money from the Recovery Act, spending on public projects should increase, generating fierce competition for the contracts. Given the recent economic climate, these agencies cannot afford to waste time or money. Losing bidders who think their bid is the best have a defined process to challenge the result, pursuant to Florida Statutes, the Florida Administrative Code, and local ordinances, and sometimes pursuant to the bid or proposal specifications. Only those bidders and counsel who know how to navigate that process will stand any chance of success in their protest.

[1] Florida Agency for Workforce Innovation, *Florida's October Unemployment Figures Released* (Nov. 20, 2009), *available at* http://floridajobs.org/publications/news_rel/LMS%20Release%2012-18-09.pdf.

[2] Bidders are already aggressively challenging awards and specifications in projects funded with federal stimulus money. *Elmwood Terrace Ltd. P'ship v. Fla. Hous. Fin. Corp.*, 2009 WL3826164 (Fla. Div. Admin. Hrgs. 2009).

[3] Fla. Stat. §287.057(1)(a) (2009); *see generally* Fla. Stat. §287.057 (2009).

[4] Fla. Stat. §255.20(1) (2009).

[5] For example, criteria may include the experience of the bidder's personnel, the bidder's experience with similar contracts or projects, or methods of delivery of the goods or services sought. *See* Fla. Stat. §287.055(4)(b) (2009).

[6] For example, for the procurement of professional services, including design professionals, prices are not submitted at the qualifications phase. *See* Fla. Stat. §287.055(3) (2009).

[7] *See* Fla. Stat. §§287.012(24) and (25) (2009). A responsive bid, proposal, or reply is one that "conforms in all material respects to the solicitation."

[8] Such rules and procedures are generally found in the county or municipal codes; however, the rules may also be in the bid or request specifications.

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

[10] Fla. Stat. §120.57(3)(a) (2009).

[11] Fla. Stat. §120.57(3)(b) (2009). *See also Preston Carroll Co. v. Fla. Keys Aqueduct Auth.*, 400 So. 2d 524, 525 (Fla. 3d D.C.A. 1981).

[12] *Agrico Chemical Co. v. Fla. Dep't of Envtl. Regulation*, 406 So. 2d 478, 482 (Fla. 2d D.C.A. 1981).

[13] *Preston Carroll*, 400 So. 2d at 525.

[14] *Silver Express Co. v. Dist. Bd. of Lower Tribunal Trs. of Miami-Dade Cmty. Coll.*, 691 So. 2d 1099, 1100 (Fla. 3d D.C.A. 1997).

[15] *Bozell, Inc. v. Fla. Dep't of Lottery*, 1991 WL 833833 (Fla. Div. Admin. Hrgs. 1991).

[16] *See* Fla. Admin. Code R. 28-110.004(1).

[17] *See Capeletti Bros., Inc. v. Dep't of Transp.*, 499 So. 2d 855, 857 (Fla. 1st D.C.A. 1986).

[18] *General Elec. Co. v. Dep't of Transp.*, 869 So. 2d 1273, 1274 (Fla. 1st D.C.A. 2004) (reversed ALJ's recommended dismissal where party was not provided notice that bond was deficient).

[19] *See also* Fla. Admin. Code R. 28-110.004 (providing a proposed form for formal written protests).

[20] If there are no facts in dispute, the parties are given the opportunity, at a mutually convenient time and place, to present to the agency or hearing officer evidence in opposition to the action or inaction of the agency, or to submit a written statement challenging the agency's grounds at issue. If the protesting parties' objections to the agency's actions are overruled, the agency must provide a written explanation within seven days. Fla. Stat. §120.57(3)(d) (2009).

[21] *See* Fla. Admin. Code R. 28-106.205 regarding the ability to intervene and requirements and procedure for intervention.

[22] *Id.*

[23] *See* Fla. Admin. Code R. 28-106.206.

[24] *See* Fla. Admin. Code R. 28-106.204.

[25] Fla. Stat. §119.071(1)(b) (2009).

[26] *Syslogic Tech. Servs., Inc. v. S. Fla. Water Mgmt. Dist.*, (Recommended Order) 2002 WL 76312 (Fla. Div. Admin. Hrgs. 2002).

[27] *Id.*; *see also Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 787 (Fla. 1st D.C.A. 1981).

[28] Fla. Stat. §120.57(3)(f) (2009).

[29] Fla. Stat. §90.101, *et. seq.*

[30] Fla. Stat. §120.57(3)(f) (2009).

[31] *Id.*

[32] *Id.*

[33] Fla. Stat. §120.57(1)(e)(2)(d) (2009); *Agrico Chemical Co. v. Fla. Dep't of Envtl. Regulation*, 365 So. 2d 759, 763 (Fla. 1st D.C.A. 1978).

[34] Fla. Stat. §120.57(1)(e)(2)(d) (2009).

[35] *Syslogic Tech. Servs., Inc. v. S. Fla. Water Mgmt. Dist.*, (Recommended Order) 2002 WL 76312 (Fla. Div. Admin. Hrgs. 2002).

[36] *State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 610 (Fla. 1st D.C.A. 1998).

[37] *See Liberty County v. Baxter's Asphalt and Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982).

[38] *Emerald Corr. Mgmt. v. Bay County Bd. of Comm'rs*, 955 So. 2d 647, 653 (Fla. 1st D.C.A. 2007).

[39] Fla. Stat. §120.57(1)(l) (2009).

[40] *Consultech of Jacksonville*, 876 So. 2d at 734.

[41] Fla. Stat. §286.011 (2009). *See Silver Express Co. v. District Bd. of Lower Tribunal Trustees of Miami-Dade Community College*, 691 So. 2d 1099, 1100 (Fla. 3d D.C.A. 1997).

***William J. Cea*** *is a shareholder at Becker & Poliakoff, P.A., in West Palm Beach. He is board certified by The Florida Bar in construction law, and his practice focuses on construction litigation and government bid protests. He obtained his bachelor degree from the State University of New York at Albany, with honors, and his law degree from the University of Miami, with honors.*

***Mark J. Stempler*** *is an associate at Becker & Poliakoff, P.A., in West Palm Beach, where his practice focuses on government bid protests, construction litigation, and community association litigation. He obtained his bachelor degree from the University of Miami and his law degree from Florida International University, with honors.*

*This column is submitted on behalf of the Administrative Law Section, Seann Michael Frazier, chair, and Paul Amundsen, editor.*