

Practice Update

Florida Procurement Law: Competitive Solicitations and Bid Protests

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The basis for Florida's competitive procurement of commodities or contractual services may be found in Section 287.017 (purchasing thresholds) and Section 287.057 (procurement methods) Florida Statutes. These procedures apply to all state agency procurements. Local governments may adopt their own procedures. Three common procurement methods are: the Invitation to Bid (ITB), Request for Proposal (RFP), and Invitation to Negotiate. (ITN). An ITB is where the Agency tells the bidder the goods or services it wants and asks for a price bid. An RFP is where the Agency asks for both a proposal and price bid. The ITN calls for a written response to established criteria under which formal negotiations may be held. Other less common procurement processes may also be available to an Agency as set forth in Chapter 287 Florida Statutes.

Protests

Florida's Administrative Procedures Act, Section 120.57(3), Florida Statutes, and Chapter 28-110, Florida Administrative Code govern competitive bid disputes of State procurements. Avenues of protest that may be used in a bid dispute include a challenge to the specifications (Spec Challenge) or a challenge to a decision or intended decision (the award) made by an Agency. Notice for either of these challenges must be made to the Agency within 72 hours of the Agency's posting of the information.

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1. Issues for Protests

Any party that wishes to challenge the terms, conditions, criteria, or specifications of the procurement as unfair, biased, not necessary, impossible to meet, or other substantive objection, must file a notice of intent to challenge within 72 hours of posting of the information or the issue is forever waived. A protest bond and formal protest must also be filed within 10 days of the filing of the notice of protest. Any party adversely affected by an award decision or intended decision shall file with the Agency a notice of intent to protest in writing within 72 hours after the posting of the bid tabulation or after receipt of the notice of the Agency decision or intended decision. Section 120.57(3), FS.

2. Filing of the Protest

Within 10 calendar days after the notice of intent to protest is filed, a party shall file a formal written notice of protest with the contact person listed in the bid solicitation; and post a bond payable to the Agency. In lieu of a bond, a cashier's check or money order may be submitted to the contact person. Upon receipt of a timely filed formal written notice of protest, and accompanying bond the review and/or award process usually is stopped until the protest is resolved. Exception may be made where stoppage may affect health safety, welfare of residents in the state.

3. Posting of Protest Bond per Sections 287.042(2)(c) and 120.57(3)(b), Florida Statutes

Parties intending to protest, shall post with the Agency at the time of filing the formal written protest, a bond payable to the Agency in an amount equal to one percent of the Agency's estimate of the total volume of the contract. The bond should be submitted using a Procurement Protest Bond Form, PUR 7062 obtained from the Department of Management Services, Division of Purchasing. Upon completion of the administrative hearing process and any appellate court proceedings, the prevailing party shall

recover all costs and charges excluding attorney's fees.

4. Required Content of a Formal Written Notice of Protest

The formal written notice must include: the name and address of the appropriate office with which the protest will be filed; the name and address of the party filing the protest and an explanation of how its substantial interests have been affected; a statement of how and when the party filing the protest received notice of the bid solicitation or notice of the Agency's intended or actual contract award; with particularity, the facts and law upon which the protest is based; a statement of all issues of disputed material facts; a concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the party filing the protest to relief; a demand for relief to which the party deems itself entitled; and any other information which the party contends is material.

5. Resolution of the Protest

Upon receipt of the formal written notice of protest and accompanying bond, the contract manager must attempt to resolve the protest informally. The contract manager will have seven working days after receipt of the formal written notice of protest to resolve it through mutual agreement. Any decision by the Agency to change an intended award, or to reject all bids or proposals as a result of discussions during the settlement period must include a new notice of rights that affords affected parties an opportunity to file a challenge to the new action. If the protest is not resolved by mutual agreement within seven working days of receipt of the formal written protest, and if there is no disputed issue of material fact, an informal proceeding pursuant to Section 120.57(2), F.S. shall be held. If the protest is not resolved by mutual agreement within seven working days of receipt of the formal written protest, and if there is a disputed issue of material fact, the formal written protest shall be referred to the Division of Administrative Hearings (DOAH)

for further proceedings pursuant to Sections 120.569 and 120.57(1), F.S.

6. Hearing

A formal proceeding, or formal Section 120.57(1), FS hearing at DOAH before an Administrative Law Judge (ALJ) is held within 30 days of receipt of the formal written protest unless all parties agree to a waiver of the statutory timeframe. The DOAH proceeding is de novo. A protestor has the burden of proof and must prove the agency's action was contrary to the agency's governing statutes, rules or policies, or the procurement specifications. Section 120.57(3)(f), F.S. A protestor must also show that the agency's decision was clearly erroneous, contrary to competition, arbitrary, or capricious.

7. Order (Formal 120.57 Hearing)

Within 10 days after the transcript is prepared, each party may file a proposed recommended order with the ALJ, outlining proposed findings of fact and conclusions of law. After reviewing the record and the proposed recommended orders, the ALJ enters a recommended order within 30 days. Parties can file exceptions with the agency within 10 days of the recommended order being issued. The Agency should enter a final order within 30 days after receipt of the ALJ's recommended order. The Agency's final order is subject to judicial review via appeal to the District Court of Appeal. There is no stay during an appeal of the final order.

Summary

The procurement process is designed to ensure fair competition and to secure the best possible value at the lowest cost to the Agency. Because of the expedited nature of the procurement process, and its inherent complexities, applicants need be both well informed and well represented. Consideration should be given to retaining knowledgeable counsel early in the process so as to assist in the review and analysis of the proposal and defense of the applicant's position. The foregoing is presented as a

general summary of Florida law and it should not be relied upon as legal advice or recommendation without further consultation as to the specific facts and circumstances that may be present with a particular procurement.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.