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ATTORNEYS AND COUNSELORS AT LAW

Health Care, Environmental, Governmental Relations,
Zoning – Land Use, Administrative, Regulatory,
Business, Corporate & Bid Protest Law

Geoffrey D. Smith

BID PROTESTS:

KNOW YOUR RIGHTS – THE CLOCK IS TICKING



Bid protests and challenges to competitive contract procurement and awards in Florida are controlled by a myriad of unique and complex statutes, rules, policies, and law. They proceed on an extremely fast track, and important rights can be waived if not immediately

asserted. For example, challenges to final bid specifications, as well as any challenge to the final award, must be filed within only 72 hours of publication of the specifications or posting of the award. For these and other reasons, it is especially important to know your rights when your company becomes involved in any public procurement. Consideration should be given to retaining experienced Florida bid protest counsel early in the process to review bid specifications, assist in the Q&A process, analyze the proposal to assure responsiveness, and generally assure you a full and fair opportunity to prevail. At a minimum, if the need to file (or defend against) a bid protest arises, an experienced Florida bid protest counsel should be retained to fully protect your rights.

This article provides an overview as to the process, rights, and key issues involved with state agency competitive procurements in Florida. However, similar timing issues, rules, and case law typically apply to federal agency purchasing, and local government and other publicly funded competitive procurements.

**General Purpose of Competitive
Procurement Requirements**

Florida's competitive procurement process is aimed at the protection of the public against collusive contracts, fraud, bias, and favoritism. Among other things, it is designed to secure fair competition on equal terms to all bidders, to

secure the best values at the lowest possible expense, to provide an opportunity for an exact comparison of bids, and to assure that the most responsive bid is accepted. Wester v. Belote, 103 Fla. 976, 138 So. 721 (1931).

**Florida Statutory Thresholds and Types
of Procurement**

Pursuant to Section 287.017 (purchasing threshold categories) and Section 287.057 (procurement methods) when a state agency wishes to contract for commodities or contractual services that cost in excess of \$25,000, the agency must use one of several types of procurement methods. The three most common methods are: Invitation to Bid (ITB), Request for Proposal (RFP), and Invitation to Negotiate (ITN).

The ITB is used when the agency is capable of specifically defining the scope of work for which a contractual service is required or is capable of establishing the precise specifications defining the commodities sought. In an ITB process, price is king, and the lowest responsive and responsible bidder must be awarded the contract. Under Section 287.057, Florida Statutes, an ITB is the preferred method for state agencies to obtain goods and services. In order to use an RFP rather than an ITB, the agency must make a finding, in writing, that use of an ITB, where price is the deciding factor, is not practicable. If a company is concerned with a situation where an agency issues an RFP, rather than using an ITB where the lowest bidder is entitled to the contract award, then arguably a protest challenge must be filed within 72 hours of the issuance of the RFP or the ability to challenge the award is waived. This is a frequent problem in competitive procurements, as a disappointed party in responding to an RFP will argue that the state agency should have awarded the contract to the lowest price proposal.

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In contrast to an ITB, the RFP is used when the agency determines, in writing, an ITB is not practicable including when the agency is seeking competitive offers for proposed commodities or contractual services to evaluate who best meets certain specifications and qualifications of the solicitation. Unlike the ITB process, under an RFP the agency is not required to award the contract to the lowest bidder, but instead it may be awarded to the most responsible offeror considering price as well as other criteria. Section 287.057(2)(a), Florida Statutes, mandates that price must be one of the criteria for evaluation, but it is not the controlling criteria.

An ITN is a written solicitation that calls for responses to select one or more persons or entities with which to commence negotiations and can only be used when the agency determines, in writing, that use of an ITB or RFP will not result in the best value to the state based on factors such as price, quality, design, and workmanship. Again, a party who believes that use of an ITN will not result in a competitive award, must assert a challenge within 72 hours of issuance of the ITN, or the ability to argue that the state should have used an RFP or ITB will likely be waived.

Other less common procurement methods are also available to agencies under specified conditions as defined in Chapter 287, including a request for quote (RFQ), emergency purchases, and single source purchases. In addition, there are special provisions that apply to the procurement of certain commodities and services such as insurance, architectural and engineering services, and information technology.

**Timing of and Rights to Protest
Specifications and Intended Awards**

Florida’s Administrative Procedure Act at Section 120.57(3), Florida Statutes, and Rules found in Chapter 28-110, Florida Administrative Code, generally govern state agency competitive bidding disputes including notice requirements, the time frames for protests, and hearing procedures.



The 72-Hour and 10-Day Protest Deadlines.

Vendors (bidders, proposers) should initially be aware of the distinction between challenges to the published bid specifications versus challenges to the ultimate award of the bid itself. As to each, a separate 72-hour deadline applies. If a bidder wishes to challenge the terms, conditions, or specifications contained in the solicitation (including any provisions governing the methods for ranking bids, awarding contracts, reserving rights for further negotiation, or modifying or amending any contract) the notice of protest must be filed within 72 hours after posting of the solicitation. This is extremely important for vendors responding to a solicitation to consider. One of the most common problems in public procurement is that a vendor fails to challenge the specifications or criteria in an ITB or RFP although the vendor believes that a particular criteria or specification is unfair, unnecessary, or one that the vendor simply cannot meet. (This is often rationalized by the vendor as an effort to remain on good terms with the contracting agency – i.e., seeking to avoid an action that would irritate the contracting agency.) The use of criteria or specifications that are biased towards an incumbent contractor, or towards a vendor preferred by the state agency in question, is illegal, but nevertheless is a historic and fairly frequent problem in the public procurement arena. If a vendor believes that any part of the RFP is suspect, they must file the required notice within 72 hours or the issue is forever waived.

If a bidder or proposer wishes to challenge any agency decision (an award) or intended decision (or intended award) a notice of

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protest must be filed with 72 hours of posting of the notice of decision or intended decision. § 120.57(3)(b), Fla. Stat. Intervening holidays and weekends are excluded in computing each of these 72-hour period. All parties who submitted a response to an ITB or RFP are entitled to a fair notice explaining their protest rights, and failure of the state agency to provide proper notice may extend the time for filing a notice of protest.

Subsequent to the filing of any protest, a formal written protest must be filed within 10 days after the notice of protest is filed. Intervening holidays and weekends are counted in computing this 10-day period. This formal written protest must state with particularity the facts and law upon which the protest is based, and is often an extensive legal document containing supporting arguments, authorities, and evidentiary exhibits. Per the statute, failure to timely file the 72-hour notice of protest or the 10-day formal written protest, will constitute a waiver of the right to protest. See also Capeletti Bros. v. DOT, 499 So. 2d 855 (Fla. 1st DCA 1986) (72-hour period); Xerox v. DPR, 489 So. 2d 1230 (Fla. 1st DCA 1986) (10-day period). Although the deadlines are not strictly “jurisdictional,” late filing will be excused only in extraordinary situations such as where the agency fails to disclose conditions in the solicitation specifications, or where agency action or inaction substantially contributed to or caused the late filing. Jacksonville Port Auth. v. Parkhill-Goodloe Co., 362 So. 2d 1009 (Fla. 1st DCA 1978).

Bid Protest Bond. Protestors must generally file a bond payable to the agency as required by Section 287.042(2)(c), Florida Statutes, and Rule 28-110.005 Florida Administrative Code, in an amount equal to 1 percent of the estimated contract amount. Failure to timely file a required bond within the time provided will also result in a waiver of the right to protest. The bond is to cover costs, since the losing party in a bid protest is responsible for paying the prevailing party’s costs and charges (but not attorney’s fees). Attorney’s fees are sometimes separately sought and awarded in cases where a protest is found to be “frivolous” or filed for “improper purposes” as defined by statutes and controlling case law.

Protest Stays the Bid Process. Filing of a timely formal protest stops the bid process and no final award of a contract may be made before entry of a final order after resolution of the protest, unless the agency head sets forth in writing particular circumstances which require the continuance of the process in order to avoid an immediate and serious danger to the public health, safety, or welfare. Fla. Stat. § 120.57(3)(c).

Settlement Period. Prior to forwarding a protest to DOAH for hearing, Florida’s APA requires that the agency must allow seven days, excluding weekends and holidays, to provide an opportunity for the parties to resolve the protest without hearing by mutual agreement of the parties. This is a prime opportunity to resolve any dispute early on and avoid the cost of continued litigation. Whether a vendor is the winning bidder, or a challenger to the proposed award of a contract, they should monitor the settlement process closely, and should demand that the state agency keep them advised of any and all meetings, discussions, correspondence, or contacts by other parties. It is probably best legal practice for an interested vendor to file a Notice of Appearance and Motion to Intervene with the state agency during the settlement period, so that there is no ambiguity as to the party asserting its rights to be part of all Settlement discussions.

Any decision of the agency to change its proposed award or to reject all bids or proposals as a result of the discussions in the settlement period must include a new Notice of rights, and opportunity for parties to file a challenge to the new agency action. Although there does not appear to be any reported cases, it is arguable that any Settlement entered by the state agency that does not include all parties who responded to the ITB or RFP is illegal – as Section 120.57(3)(c), Florida Statute, mandates that the contract award process be stopped once a bid protest is filed, unless there is a documented emergency situation – or unless there is a settlement – which implies a resolution among all interested parties.

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Standing to Protest

Section 120.57(3) provides that any person who is “adversely affected” by the agency action may file a protest. While a second ranked low bidder has standing to challenge an award to the low bidder based on non-responsiveness and other factors, a third or lower ranked bidder generally does not have standing, since even if successful in the protest of the award to the low bidder, the award would then go to the second ranked low bidder. Preston Carroll v. Florida Keys Aqueduct Auth., 400 So. 2d 524 (Fla. 3d DCA 1981). Nevertheless, the third or even fourth low bidders can sometimes have standing such as where all higher ranked bidders are also challenged, or where the procurement process was fundamentally flawed requiring a full rebidding. See, e.g., NCS Pearson, Inc. v. Dept. of Education, Case No. 04-3976, 2005 WL 310776 at ¶¶ 85-87 (DOAH Feb. 8, 2005; F.O. Feb. 22, 2005) (third-lowest bidder had standing based on challenge to fundamental fairness of procurement process). Absent special and extraordinary circumstances, non-bidders do not have standing. Fairbanks v. DOT, 635 So. 2d 59 (Fla. 1st DCA 1994) (standing found because the bid specifications effectively limited the source of materials to one specific manufacturer).

Common Grounds for Protests

The grounds for a valid bid protest tend to be fact-specific and vary broadly with the circumstances and requirements of each particular procurement. But in general, the following is a listing of some of the more common categories of grounds for protest that commonly arise in bid protest cases.

Sunshine Act Violations. Pursuant to Florida’s “sunshine law,” all meetings of any state agency at which official acts may be taken must be conducted as open, public meetings. Absent that, any action taken during such meetings is improper. The result is that the agency’s action is void and can be given no effect. See § 286.011, Fla. Stat.; Silver Express Co. v. District Board of Lower Tribunal Trustees of Miami-Dade Community College, 691 So. 2d 1099, 1100-01 (Fla. 3rd DCA 1997) (determining that a committee

which helped crystallize the ultimate decision to be made by a college as to the award of a contract must be conducted openly and publicly). Among other things, to comply with the Sunshine law, all general meetings of a procurement evaluation committee should be publically noticed, and open to the public. Discussions or communications between members of the evaluation committee with respect to the procurement should not occur in private (though there are certain exceptions as to ITNs). Thus, any situation that involves private discussions among two or more evaluation committee members about the scoring or evaluations that are held outside a properly noticed public meeting are prohibited and would be a basis to challenge a contract award. (This can include communications among the members of the evaluation committee or others involved in the ultimate contract award such as email correspondence or inter-office memoranda.)

Improper Ex Parte Communications. Per Chapter 287, Florida Statutes, communications between those responding to the solicitation and the procuring agency and staff are prohibited during a “black out” period (basically from the release of the solicitation to the end of the 72-hour protest period) from communicating with anyone at the agency other than in writing to the procurement officer. Violation of this requirement may be grounds for rejecting a response.

Non-Responsive Bids: Material Variances vs. Minor Irregularities. Whether a mistake, deviation, or variance in a bid will be considered material (so as to deem the bid non-responsive) or a minor irregularity (that can be waived by the agency) is a highly technical question, and depends on the facts and circumstances of each case. To be responsive, a bid or proposal must conform in all “material” respects to the solicitation. § 287.012(25), Fla. Stat. There is a large body of case law as to what constitutes a minor irregularity versus a material variance from specifications, but generally, a material variation is one which: (1) affects the price of the bid; (2) gives the bidder an advantage or benefit not enjoyed by other bidders; or (3) adversely impacts the interests of the procuring agency. Intercontinental Properties, Inc. v. HRS, 606 So. 2d 380 (Fla. 3d DCA 1992).

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Material deviations or changes include those that involve fraud or misconduct, or that provide a bidder with an unacceptable or material competitive advantage. See Liberty City v. Asphalt & Concrete, 421 So. 2d 505 (Fla. 1982). In general, the test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether it affects the amount of the bid by giving the bidder an advantage not enjoyed by other bidders. Harry Pepper and Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2d DCA 1977). In contrast, minor irregularities have included such matters as the submission of a cashier's check instead of a bid bond, the failure to submit written evidence that agent signing of the owner had authority, and the failure to include a form listing DBE subcontractors, at least where there is an allegation that the form was enclosed but later misplaced. See, e.g., Intercontinental Properties; Asphalt Pavers v. DOT, 602 So. 2d 558 (Fla. 1st DCA 1992). Often ITBs or RFPs will specifically list "Mandatory Criteria" or "Fatal Criteria" in the solicitation document. This listing is not exhaustive of required items. The bid or proposal may still be fatally defective if the bidder or proposer is otherwise not responsive to information and criteria specified anywhere in the RFP or ITB, and the omission meets the test of a material variance from the specification requirements as discussed above.



Improper "Conditional" Proposals. A proposal that is made conditional with respect to material matters such as price must be deemed non-responsive. See Sweeping Corporation of America, Inc. v. FDOT, Case No. 91-8203, 1992 WL 881039 (DOAH March 24, 1992; FDOT April 30, 1992) at ¶¶ 10-11 and 38-39 (holding that letters submitted that were conditional and equivocal with

respect to a bond requirement required that the proposal be deemed non-responsive). This problem arises where a vendor includes a response that makes its proposal contingent upon some specification that is not expressly stated in the RFP or ITB.

Non-Responsiveness as to DBE or MBE of DBE Requirements. Many RFPs contain specified requirements as to Minority Business Enterprises (MBEs) or Disadvantaged Business Enterprises (DBEs). Failure to comply with such mandatory requirements is a material error that renders a bid non-responsive. See, e.g., City of Wildwood v. Gibbs & Register, Inc., 694 So. 2d 763 (Fla. 5th DCA 1997) (after bids were announced, mathematical errors were discovered showing that low bidder had not met the required MBE/WBE percentage); Vito's Trucking and Excavating Co. v. Dept. of Transportation, No. 84-3436BID, 1984 WL 275479 at ¶¶ 6, 9, 14 (DOAH Dec. 14, 1984) (bid was non-responsive because bidder failed to meet DBE percentage requirements).

"Non-Responsible Bidder" Issues. A vendor's bid or proposal must not only be responsive, but the vendor itself must also be a "responsible" bidder. Responsible bidder requirements are typically spelled out in the ITB or RFP or by controlling statute, rule or policy. Section 287.012(24) defines a "responsible vendor" as "a vendor who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance." Generally, a bidder can be disqualified as non-responsive for a variety of reasons including such matters as: lack of required qualifications, lack of necessary resources and experience, financial inability or insolvency, submitting false statements in bids, delinquencies on prior contracts, failure to meet applicable pre-qualification requirements, failure to possess required certifications, and the like. Typically these type requirements cannot be satisfied post-bid opening. City of Opa Locka v. Trustees of Plumbing Industry Promotion Fund, 193 So. 2d 29, 32 (Fla. 3d DCA 1966).

Pricing and Performance Issues Showing "Non-Responsible Bidders." In unusual cases, a low bid may be "too good to be true" and various factors may indicate that the bidder can-

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not perform. A public entity is not necessarily required to accept the lowest dollar bid, but instead may bypass the “lowest bid” if that bidder or the bid itself is not “responsible.” See, e.g., City of Pensacola v. Kirby, 47 So. 2d 533, 535 (Fla. 1950) (statute requiring award to “lowest responsible” bidder does not require agency to award contract to the “lowest dollars and cents” bidder); Couch Construction Co. v. State DOT, 361 So. 2d 184 (Fla. 1st DCA 1978); Mayes Print Co. v. Flowers, 154 So. 2d 859 (Fla. 1st DCA 1963). The “responsible bidder” requirement vests discretion in the public authority to determine whether the lowest bidder is in fact also the lowest responsible bidder by considering various performance related factors including such matters as facilities available, financial resources and ability, experience, quality of previous work, reputation for performance, judgment and skill, outstanding obligations, integrity and credit, pecuniary ability, and various other matters relating to the ability of the bidder to perform the contract. See, e.g., Dubois Const. Co. v. City of South Miami, 108 Fla. 362, 146 So. 833 (1933); Engineering Contractors Assoc. of South Florida, Inc., 789 So. 2d 445, 451 (Fla. 4th DCA 2001). Analogous federal authorities likewise illustrate that a public entity may consider performance, financial, and other factors, including whether a bid is abnormally low, unrealistic, or a “low-ball” offer, or otherwise made without adequate resources so as to create risk that the contractor will abandon or short-change performance. The federal decisions have termed this a “price realism analysis” and is used to make a “responsibility” determination, a performance risk assessment, or an analysis of whether the offeror understands the work. See, e.g., Information Sciences Corp. v. United States, 73 Fed. Cl. 70, 100-103 (U.S. Ct. Fed. Claims Sept. 19, 2006).

Non-Existing or Improperly Named Bidder as “Non-Responsible” Bidder. In general, a contract cannot be awarded to a nonexistent entity, since no entity would be bound to perform the work. Oklahoma County Newspapers, Inc., Comp. Gen. Dec. B-270849, 96-1 CPD 213, 1996 WL 225730 (May 6, 1996). Similarly, if a bidder’s corpo-

rate charter has been dissolved, it lacks legal capacity to contract, and so cannot be awarded the bid. Casper Const. Co., Inc., Comp. Gen. Dec. B-253887, 93-2 CPD 247, 1993 WL 437055 (Oct. 26, 1993). If a proposal is ambiguous on the identity of the offering entity, the offer will be unacceptable, since there is uncertainty as to exactly who is bound to perform the contract. B & L Services, Inc. v. Dept. HRS, No. 85-3294BID, 1986 WL 401534 at ¶¶ 9, 34, & 37 (DOAH June 4, 1986). Such ambiguous bids are non-responsive because they do not exhibit an intent of the bidder to be bound by the terms of the contract and this directly impacts the price, quantity, quality and delivery of the solicited products. Honeywell, Inc. v. United States, 16 Cl. Ct. 173, 35 Cont. Cas. Fed. (CCH) ¶ 75,611 (U.S. Cl. Ct. 1989), rev. on other grounds, 870 F. 2d 644 (Fed. Cir. 1989); Griffin Const. Co., B-185790, 76-2 CPD ¶ 26, 1976 WL 13110 (July 9, 1976) (award of contract to an entity other than that named in the bid constitutes an improper substitution of bidders). Moreover, it is improper to substitute bidding entities after bids have been submitted. For example, in Mil-Tech Systems, Inc. v. United States, 6 Cl. Ct. 26, 28, 31-35 Cont. Cas. Fed. (CCH) 72,719 (U.S. Cl. Ct. 1984), the court held a bidder could not transfer all of its stock to another company where the only assets of the bidder’s company was the awarded bid because such transfer of stock under those circumstances was tantamount to an illegal substitution of the bidder and constitute improper “bid brokering.” Similarly, a bid is nonresponsive if the legal entity on the bid is different than the legal entity identified on the bid bond.

Bias, Improper Conduct, or Ethical Violations of Evaluation Committee. Bias, favoritism, or unethical conduct on the part of the evaluation committee is a frequent successful ground for protests. Even the potential appearance of a conflict of interest can qualify. See, e.g., Compass Environmental, Inc. v. Department of Environmental Protection, Case No. 05-0007, 2005 WL 678870 at ¶¶ 46-55, 77 (DOAH March 21, 2005) (holding evaluators properly removed due to potential appearance of conflict, and holding that it was unnecessary to show “hard fact” evi-

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dence of actual bias or favoritism) (DEP Apr. 19, 2005 reversing on other grounds); Transportation Management Servs. of Broward, Inc. v. Commission for the Transportation Disadvantaged, Case No. 05-0920, 2005 WL 1210021 (DOAH, May 20, 2005) (appearance of impropriety); Medco Behavioral Care Corporation v. State of Iowa Department of Human Services, 553 N.W. 2d 556 (Iowa 1996) (holding appearance of conflict of interest sufficient to nullify proposed contract award). There are also numerous Attorney General opinions and Ethics Commission opinions interpreting state ethics laws in procurement settings. See, e.g., Op. Att’y Gen. Fla. 74-159 (1974) (members of county aviation authority were public officers prohibited from being interested in public contracts in which they are party to the letting); Commission on Ethics Opinion (CEO) 01-4 (Mar. 20, 2001) (prohibited conflict of interest for City Commissioner to remain employee of tax-exempt community development corporation that contracts with the City).

Arbitrary Scoring and Evaluation Errors and Methodologies. So long as acting in good faith, public agencies have broad discretion in procurement matters. This is especially true when it comes to scoring and evaluation issues. Thus it is especially difficult to convince a court to re-score or re-evaluate. Nevertheless, some common examples of such challenges to consider include clear mathematical errors made by scorers, evidence that the scoring system itself is illogical or arbitrary, a clear statistical bias in a particular evaluator’s scoring when compared with other evaluators, failure of evaluator to sign conflict of interest forms, improper ex parte communications between evaluators as to scores, unqualified or inexperienced evaluators, and an evaluator’s failure to follow agency or bid document procedures. For example, if there are no weights assigned for the various criteria of an RFP, or the weights are applied inconsistently or irrationally, this can be a basis for challenge including on the basis that it prevents “an opportunity for an exact comparison of bids” as required by Wester v. Belote, 138 So. 721, 723-24 (Fla. 1938).

Consideration or Weighing of Criteria Beyond the Four Corners of the RFP. Evaluators are generally not to look outside the RFP criteria, or outside the proposals submitted, or base scoring on external information outside of the RFP and evaluation process when conducting their reviews of the submitted proposals. Aurora Pump v. Gould Pumps, Inc., 424 So. 2d 70 (Fla. 1st DCA 1982) (agency must evaluate the bids or proposals received solely on the criteria stated in the RFP); R.N. Expertise, Inc. v. Miami-Dade County School Board, et al., Case No. 01-2663, 2002 WL 185217 (DOAH: Feb. 4, 2002; F.O. Mar. 14, 2002).

Improper POST-Bid Submissions. No submissions made after the bid or proposal opening that amend or supplement are to be considered by the agency. Thus a bidder cannot change a bid after the bid has been opened, except to cure “minor” irregularities. Harry Pepper & Assoc. v. Cape Coral, 352 So. 2d 778 (Fla. 1st DCA 1981).



Post-Award Changes: Improper Bid Shopping. Solicitation documents often require that subcontractors be listed and identified at the time of proposal submission. Failure to identify all subcontractors as required by an RFP is grounds for challenging a proposal as invalid. See, e.g., E.M. Watkins & Company, Inc. v. Board of Regents, 414 So. 2d 583, 587 (Fla. 1st DCA 1982) (“dangers” of bid shopping); D. E. Wallace Construction Corp. v. Florida Board of Regents, No. 89-6844BID, 1990 WL 749710 at ¶¶ 24-29 (DOAH Feb. 26, 1990; F.O. March 30, 1990) (bidder failed to use correct list of subcontractors form and did not submit its proposed MBE participation plan until seven days after bid opening, thus bid was non-responsive). An RFP or ITB that allows a party to submit a bid or proposal for

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work that will be substantially conducted by subcontractors, without a requirement to identify the subcontractors, and provide proof of ability to perform at the bid price is certainly a situation making the RFP or ITB subject to a timely challenge. Again, the challenge must be brought within 72 hours of the issuance of such an RFP or ITB or the issue will likely be waived.

The Formal Hearing Process

Generally. Once the protest is filed, and assuming there are disputed issues of fact, the agency refers the matter to Florida’s Division of Administrative Hearings (DOAH) for an expedited formal hearing before an administrative law judge (ALJ) pursuant to the detailed provisions of Section 120.569 (decisions affecting substantial interests), Section 120.57 (additional procedures), and Section 120.57(3) (additional requirements as to hearings involving bid protests).

Right to a Hearing: Issues can sometimes arise as to whether a fair hearing under Section 120.57(1), Florida Statutes, is required. Examples would include solicitations by a local government that involve expenditure of state funds; solicitations by a state contractor for subcontractors that will be funded with state funds; or solicitations by other organizations or bodies that have accepted state or federal funding or grants, and have made themselves subject to the public procurement processes. Even in situations where a Section 120.57 hearing is not required, fundamental due process would demand that a hearing be made available that includes adequate notice and a right to be heard. The sufficiency of the process being offered by a local government agency is often the subject of legal challenge. An aggrieved party can always seek relief in circuit court if being denied the opportunity for a full and fair hearing.

Expedited Nature. Section 120.57 hearings are de novo and are expedited in the sense that: a final hearing must be conducted within 30 days of DOAH’s receipt of the formal protest; a recommended order is to be issued by the ALJ within 30 days after receipt of the hearing transcript; and a final

order is to be issued by the agency within 30 days of the recommended order. However, these time periods can be waived by agreement of the parties and in complex cases this is often the case, although the prevailing vendor may insist on the statutory time periods.

Pre-Hearing Discovery and Other Procedures. Pre-hearing procedures and rights are similar to civil non-jury trials. The rules are found in Chapter 128-106 Fla. Admin. Code. Among other things, these rules incorporate the discovery rules and procedures from the Florida Rules of Civil Procedure. Accordingly, the broad arsenal of discovery including written discovery (interrogatories, requests for production, requests to admit) and depositions are commonly utilized.

Burden and Standard of Proof. In bid protests where an award has been made, the administrative law judge (ALJ) is required to conduct a de novo proceeding to determine whether the agency’s proposed action is clearly erroneous, contrary to competition, arbitrary or capricious, or contrary to the agency’s rules or policies, or the bid or proposal specifications. The standard of proof in these proceedings is whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. However, a lower standard of review applies where the agency has rejected all bids – such a decision will be overturned only if the agency’s action is illegal, arbitrary, dishonest, or fraudulent. § 120.57(3)(f), Fla. Stat.

Hearing and Post-Hearing Process. The hearings are full evidentiary hearings that will typically take 1-3 days. In highly complex procurements the hearings can sometimes last for a week or more. Following the hearing, proposed recommended orders are submitted generally within 30 days. These PROs are lengthy detailed documents that outline proposed findings of fact based upon the evidence presented in the hearing, as well as proposed conclusions of law, and a recommendation. The ALJ then considers the PRO submitted by each party and issues a recommended order to the agency. The recommended order will include the ALJ’s findings of fact and conclusions of law and an ultimate recommendation on whether to award the

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contract to a particular vendor, to return all bids and proposals to the agency to be re-evaluated, or to reject all bids and proposals.

The parties then have 15 days to file exceptions to the recommended order with the agency. The agency is bound by the findings of fact, unless there is no competent substantial evidence in the record to support the ALJ's findings. The agency can only change a conclusion of law if it is on a matter that is within the agency's specialized knowledge or expertise, and the agency's conclusion is as reasonable or more reasonable than the conclusions of the ALJ. The agency issues its final order either accepting in whole or part the ALJ's recommended order. The agency's FO is subject to judicial review via appeal to the District Court of Appeal.

Geoffrey D. Smith is a shareholder in the law firm of Smith & Associates, and has practiced in the area of government bid protests for over 20 years.