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Procurements Under the Florida APA

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The basic tenet of public procurement is fair and open competition. § 287.001, Fla. Stat. The statutes are enacted to protect the public and allow agencies to purchase commodities at the lowest possible cost. *Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Comm'rs*, 955 So. 2d 647, 652 (Fla. 1st DCA 2007). "[T]he system of competitive bidding protects against collusion, favoritism, and fraud in the award of public contracts." *Dep't of Transp. v. Grove-Watkins Constructors*, 530 So. 2d 912, 913 (Fla. 1988).

Statutes and Rules

Chapter 287 and rules 60A-1.001 – 60A-1.048, Florida Administrative Code, govern state agency procurements of personal property and services. While sections 120.569 and 120.57, Florida Statutes,[2] generally apply to protests of agency solicitations, section 120.57(3) provides "additional procedures applicable to protests to contract solicitation or award." Chapter 28 of the Florida Administrative Code (part of the Uniform Rules of Procedure) applies generally, and rules 28-110.001-28-110.005 apply specifically to bid protests.

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[2] All references to the Florida Statutes are to the 2016 version unless otherwise specified.

Several agencies and several specific types of purchases are governed by different statutes. Chapter 337 applies to purchases of the Department of Transportation ("DOT"); chapter 24 applies to purchases by the Department of Lottery ("Lottery"); chapter 283 applies to purchases of public printing; and chapter 255 governs the sales and leasing of public buildings and property. This guide will highlight some of the major differences between these statutes.

Entities Subject to Chapter 287

All state "agencies" are subject to chapter 287. Agency is defined by section 287.012(1) as "any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. 'Agency' does not include the university and college boards of trustees or the state universities and colleges."

Local governments are not subject to chapter 287. They are, however, bound by their own rules. *Accela, Inc. v. Sarasota Cnty.*, 993 So. 2d 1035, 1039 (Fla. 2d DCA 2008). Many local governments have rules or policies for procurements that are similar to chapter 287.

Entities Subject to Section 120.57(3), Florida Statutes

Section 120.52 provides definitions under the Administrative Procedure Act ("APA"):

> (1) "Agency" means the following officers or governmental entities if acting pursuant to powers other than those derived from the constitution:
>
> (a) The Governor; each state officer and state department, and each departmental unit described in s. 20.04; the Board of Governors of the State University System; the Commission on Ethics; the Fish and Wildlife Conservation Commission; a regional water supply authority; a regional planning agency; a multicounty special district, but only if a majority of its governing board is comprised of nonelected persons; educational units; and each entity described in chapters 163, 373, 380, and 582 and s. 186.504.
>
> (b) Each officer and governmental entity in the state having statewide jurisdiction or jurisdiction in more than one county.

Historically, courts have applied two tests to determine whether an entity was a State agency governed by chapter 120: a territorial test and sometimes a functional test. *See Coastal Fuels Marketing, Inc. v. Canaveral Port Auth.*, 962 So. 2d 942 (Fla. 5th DCA 2007) (finding that the Canaveral Port Authority was not an agency because it operated only in one county); *Fla. Dep't of Ins. v. Fla. Ass'n of Ins. Agents*, 813 So. 2d 981 (Fla. 1st DCA 2002) (finding that the Florida Windstorm Underwriting Association (FWUA) was not subject to chapter 120 because only entities that performed traditional public functions would be subject to the APA, and while FWUA performed some public functions, those functions were not traditional public functions). Local governments are not subject to the APA unless expressly made subject to chapter 120; therefore, under the territorial test, which was most commonly applied, an agency was considered to be subject to chapter 120 if it operated in more than one county. *See Canaveral Port Auth.*, 962 So. 2d at 944. Under the functional test, applied sometimes, the agency was only subject to chapter 120 when it performed traditional public functions. *See Fla. Dep't of Ins.*, 813 So. 2d at 984-85.

The definition of agency in the APA was changed in 2009. The bill amending the APA states: "The amendments to subsection 120.52(1), Florida Statutes, made by this act are not intended to effect a substantive change in meaning of that subsection. The amendments are intended to clarify and simplify existing law and are intended to be consistent with judicial interpretations of that statute." Ch. 2009-187, § 1, Laws of Fla. Thus, at a minimum based on the language in the statute, the jurisdictional test is applicable.

Some quasi-governmental agencies may be considered state agencies under the APA if they step into the shoes of the agency. *See Mae Volen Senior Ctr., Inc. v. Area Agency on Aging Palm Beach/Treasure Coast, Inc.*, 978 So. 2d 191 (Fla. 4th DCA 2008) (finding that a nonprofit company that was an area agency on aging was an agency for the purposes of section 120.57(3) as

it was performing the same function as an agency and it was coordinating the Department of Elderly Affairs' programs). However, the Third District Court of Appeal reached the exact opposite result. *See First Quality Home Care, Inc. v. Alliance for Aging*, 14 So. 3d 1149 (Fla. 3d DCA 2009). The Legislature ultimately clarified that Area Agencies for Aging are not subject to the bid protest procedures under the APA.

An entity is considered an agency under the APA only when it is acting pursuant to powers other than those derived from the Constitution. § 120.52(1), Fla. Stat.; *Decker v. Univ. of W. Fla.*, 85 So. 3d 571, 573 (Fla. 1st DCA 2012). In *Decker*, the court held that the University was not an agency subject to the APA when it disciplined a student because the Florida Constitution provided that the state board of governors shall operate, regulate, control and be fully responsible for the state university system and each university shall be operated by a board of trustees under the powers granted by the board of governors. *Id.* The court found that disciplinary action was a part of the operations and management of the university; thus, the power was derived from the Constitution. *Id.* A university would be subject to the APA if the power for its particular actions derived from statute and not the Constitution. Review of a procurement decision by a governmental entity that is not subject to the APA is by certiorari to the circuit court. Fla. R. App. P. 9.190(b)(3) ("Review of quasi-judicial decisions of any administrative body, agency, board, or commission not subject to the Administrative Procedure Act shall be commenced by filing a petition for certiorari in accordance with rules 9.100(b) and (c), unless judicial review by appeal is provided by general law.").

The Role of the Department of Management Services ("DMS") in State Procurements

DMS is the state agency that has the authority to establish uniform procurement policies, procedures, and practices that state agencies are required to use in acquiring commodities and

contractual services. § 287.042(3), Fla. Stat. DMS's rules related to procurements are located in chapter 60A, Florida Administrative Code.

DMS has the authority to procure purchasing agreements[3] and state term contracts. § 287.042(2)(a), Fla. Stat. State term contracts are contracts that state agencies must use and eligible users may use to make purchases. § 287.056(1), Fla. Stat. Eligible Users are persons or entities "authorized by the department pursuant to rule to purchase from state term contracts or to use the online procurement system." § 287.012(11), Fla. Stat. For example, DMS currently has a state term contract for Hand Held and Hand Held Power Tools. *See* DMS State Term Contract No. 445-001-11-1, *available at* http://www.dms.myflorida.com/business_operations/state_purchasing/vendor_information/state_contracts_and_agreements/state_term_contracts/tools_hand_held_and_hand_held_power_tools. If a state agency needs to buy hand held tools as defined in the state term contract, it must purchase those tools pursuant to the terms and conditions of the state term contract from a vendor under the contract. Often, if there is more than one vendor, an agency may use a request for quote from vendors to obtain written pricing or services information. § 287.056(2), Fla. Stat. A decision to purchase using a request for quote is not subject to protest under section 120.57(3). *Id.*

DMS also maintains the Vendor Bid System ("VBS"), which is the site where state agencies electronically post solicitations. § 287.042(3)(b)2., Fla. Stat. Solicitations must be posted for at least 10 days before bids, proposals, or replies are due unless the agency determines that a

[3] While the statute permits DMS to establish purchasing agreements, purchasing agreement is not defined in the statute. It is defined in rule as "a defined quantity contract for a defined period that is competitively procured by the Department pursuant to Section 287.057, F.S., and that is used by agencies and eligible users pursuant to Section 287.056(1), F.S." Fla. Admin. Code R. 60A-1.025. Currently, the DMS web page does not have any purchasing agreements listed. http://www.dms.myflorida.com/contract_search/(contractType)/4108 (last visited February 27, 2017).

shorter time is necessary to avoid harming the interests of the state. § 287.042(3)(b)3., Fla. Stat. Notices relating to award posted pursuant to section 120.57(3) are also posted on the VBS.

DMS maintains an Office of Supplier Diversity. § 287.09451, Fla. Stat. The Office was established to assist minority business enterprises in becoming suppliers of commodities, services, and construction to the state. § 287.09451(1), Fla. Stat. Among its responsibilities is certifying a business as a minority business enterprise and adopting rules to assess whether state agencies have made good faith efforts to solicit business from minority enterprises. § 287.09451(4)(a) & (m), Fla. Stat. The statute also provides certain "spending goals" for awarding agency contracts to minorities.

The provisions in this statute relating to spending goals, however, were found to be unconstitutional in 2004.[4] *See Fla. A.G.C. Council, Inc. v. Fla.*, 303 F. Supp. 2d 1307, 1316 (N.D. Fla. 2004). Judge Mickle found that the statute's spending goals were not narrowly tailored to serve a compelling governmental interest and that they violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* This finding was based in large part on a report issued by the Florida Senate outlining the legislative history of the statute and analyzing disparity studies relating to minority business enterprises, which concluded "that there was little evidence to support the spending goals outlined in" the statute. *Id.* at 1315-16. Despite this ruling, the statute remains on the books.

Section 287.09451(5)(d) grants the Office standing to protest any contract award during a competitive solicitation for contractual services and construction contracts that fails to include minority business participation under certain circumstances. The statute permits the Office to

[4] Although the opinion focused on the spending goals, it declared that section 287.09451 *et seq.* was unconstitutional. *Fla. AG.C. Council*, 303 F. Supp. 2d at 1317.

protest any contract award for commodities "where a reasonable and economical opportunity to reserve a contract, statewide or district level, for minority participation was not executed or, an agency failed to adopt an applicable preference for minority participation." *Id.* The status of this provision is unclear given the ruling in *Florida A.G.C. Council*.

The Office also certifies businesses as minority business enterprises under section 287.0943. This statute is still in effect, and the status as a minority business affects preference for award in the event of a tie. § 287.057(11), Fla. Stat. Some local governments also rely on the Office's certification in their procurements.

Types of Procurements Under Chapter 287

A. Competitive Solicitations

Agencies subject to chapter 287 must use a competitive solicitation process to procure commodities or contractual services in excess of $35,000. § 287.057(1) & § 287.017, Fla. Stat. An agency is not permitted to break up contracts to avoid this threshold. § 287.057(9), Fla. Stat. There are three types of competitive solicitations under section 287.057(1): an invitation to bid (ITB); (2) a request for proposals (RFP); and (3) an invitation to negotiate (ITN). All competitive solicitations must be provided simultaneously to all vendors; they must include the due date and time for the receipt of bids, proposals, or replies and the date of the public opening; and they must include all applicable contractual terms and conditions and the criteria to be used to determine the acceptability and relative merit of the bid, proposal, or reply. *Id.*

An ITB is to be used when the agency is capable of specifically defining the scope of work for which a contractual service is required or when the agency is capable of establishing precise specifications defining the actual commodity or group of commodities required. § 287.057(1), Fla. Stat. In an ITB, the agency has the contract prepared—the bidder is simply submitting a price and

information showing that it is responsible and responsive. The agency is required to award the bid to the responsible and responsive vendor who submits the lowest responsive bid. *Id.* A responsive vendor is defined by section 287.012(27) as a "vendor that has submitted a bid, proposal, or reply that conforms in all respects to the solicitation." A responsible vendor is one "who has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance." § 287.012(25), Fla. Stat.

An RFP is used "when purposes and uses for which the commodity, group of commodities, or contractual service being sought can be specifically defined and the agency is capable of identifying necessary deliverables." § 287.057(2), Fla. Stat. The agency has more flexibility in evaluating proposals submitted pursuant to an RFP. The agency must award the contract to the proposal that it deems in writing to be the "most advantageous to the state, taking into consideration the price and other criteria set forth in the contract." *Id.* While the agency has more flexibility when evaluating proposals, it must adhere to the requirements and terms included in the RFP. *See State, Dep't of Lottery v. GTech Corp.*, 816 So. 2d 648, 652 (Fla. 1st DCA 2001) ("To countenance the Lottery's entry into a contract that was materially different than AWI's proposal would encourage responders to RFPs to submit non-competitive, unrealistic proposals solely for the purpose of receiving the highest ranking for subsequent negotiations. It seems to us that such a procedure is at odds with the proscriptions of Chapter 287 and is not likely to inspire public confidence in the fairness of the process or that the Lottery has entered into the most beneficial agreement.").

The agency may use an ITN when the agency needs to determine the best method for achieving a specific goal or solving a particular problem and identifies one or more responsive

vendors with which the agency may negotiate in order to receive the best value." § 287.057(1)(c), Fla. Stat. To select the vendor who provides the best value, the agency must:

> evaluate replies against all evaluation criteria set forth in the invitation to negotiate in order to establish a competitive range of replies reasonably susceptible of award. The agency may select one or more vendors within the competitive range with which to commence negotiations. After negotiations are conducted, the agency shall award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state, based on the selection criteria.

§ 287.057(1)(c)5., Fla. Stat.

An agency cannot simply select one of these methods. An agency starts by considering whether an ITB meets its procurement need. If it does not, the agency must determine and specify in writing why using an ITB is not practicable in order to use an RFP. In order to use an ITN, the agency must determine and specify in writing why using an ITB or RFP is not practicable. § 287.057(1), Fla. Stat.

B. Other Procurement Methods

As mentioned, purchases under $35,000 are not subject to competitive solicitation, although DMS has rules related to lower dollar purchases. *See* Fla. Admin. Code R. 60A-1.002. The statute provides other procurement methods for certain purchases that exceed the threshold.

1. Exceptional Purchases

An exceptional purchase is defined as:

> any purchase of commodities or contractual services excepted by law or rule from the requirements for competitive solicitation, including, but not limited to, purchases from a single source; purchases upon receipt of less than two responsive bids, proposals, or replies; purchases made by an agency after receiving approval from the department, from a contract procured, pursuant to s. 287.057(1), or by another agency; and purchases made without advertisement in the manner required under s. 287.042(3)(b).

§ 287.012(12), Fla. Stat. Exceptional purchases are subject to protest under section 120.57(3), and the agency is required to provide electronic notice of an intended decision concerning an exceptional purchase. § 120.57(3)(a), Fla. Stat.

a. Single Source

Commodities or contractual services that are available from a single source are not subject to competitive solicitation requirements. § 287.057(3)(c), Fla. Stat. The agency must electronically post a description of the commodity or service for at least seven days, and allow vendors to provide information regarding their ability to provide the commodity or service. After reviewing such information the agency must determine in writing that the commodity or service is available only from a single source and post the decision in the manner specified in section 120.57(3). *Id.*

b. Alternate Contract Source

Although the term "alternate contract source" does not appear in chapter 287, section 287.042(16) provides DMS with the authority "to evaluate contracts let by the Federal Government, another state, or a political subdivision for the provision of commodities and contract services, and, if it is determined in writing to be cost-effective and in the best interest of the state, to enter into a written agreement authorizing an agency to make purchases under such contract." DMS refers to these contracts as alternate contract sources. Fla. Admin. Code R. 60A-1.045(5). Notably, only DMS can approve an alternate contract source. An agency must request approval from DMS if it seeks to purchase from another competitively procured government contract. *Id.*

c. Less Than Two Responsive Bids, Proposals, or Replies

If an agency receives less than two responsive bids, proposals, or replies the agency "may negotiate on the best terms and conditions." § 287.057(5), Fla. Stat. If this occurs, the agency must

document why such action is in the best interest of the state in lieu of resoliciting competitive sealed bids, proposals, or replies.

2. Exemptions

Section 287.057 provides multiple exemptions from competitive solicitations, such as artistic services, health services, and legal services. § 287.057(3), Fla. Stat. Unlike exceptional purchases, if the commodity or contractual service is exempt from chapter 287, the contract is not subject to protest under section 120.57(3) by another vendor. *Univ. of S. Fla. Coll. of Nursing v. State, Dep't of Health*, 812 So. 2d 572, 574 (Fla. 2d DCA 2002) (determining that a company that submitted a quote for services that were exempt from chapter 287 did not have standing to contest the agency's decision to award the contract to another party).

3. Emergency Purchases

When an agency head determines in writing that an immediate danger to the public health, safety, or welfare exists, the agency may procure commodities or services necessitated by the immediate danger without competitive solicitations. § 287.057(3)(a), Fla. Stat. The agency is required to obtain pricing from at least two vendors and maintain this information and all other documents in the contract file. *Id.*

4. Consultant's Competitive Negotiation Act

Section 287.055 is the Consultant's Competitive Negotiation Act ("CCNA"), and it provides a different procurement process for the acquisition of professional architectural, engineering, landscape architectural, and surveying and mapping services. In short, an agency announces a proposed project, and a firm desiring to provide such services to an agency must be certified by the agency as qualified. § 287.055(3)(c), Fla. Stat. The agency must evaluate the qualified entities and select no fewer than three firms, in order of preference, deemed to be the

most highly qualified to perform the required service. § 287.055(4)(a)-(b), Fla. Stat. This evaluation is based on quality and not money. Once the most qualified firms are selected, the agency will negotiate a contract with the most qualified firm at compensation that the agency determines is fair, competitive, and reasonable. § 287.055(5)(a), Fla. Stat. If the agency is unable to negotiate a satisfactory contract with the most qualified firm, the agency must formally terminate the negotiations and undertake negotiates with the second-most qualified firm. § 287.055(5)(b), Fla. Stat. The CCNA applies to state agencies, municipalities, political subdivisions, school districts, and school boards. § 287.055(2)(b), Fla. Stat.

5. DOT

DOT's purchases are governed by chapters 283 and 287 and DMS's rules except as stated in section 337.02. § 337.02(1), Fla. Stat. DOT has its own emergency purchasing statute. § 337.02(2), Fla. Stat. The statute also requires that DOT draft specifications in such a manner that protects the state as to quality and performance, but not in a manner that precludes competitive bidding. § 337.02(2), Fla. Stat. Section 337.11 contains provisions specific to DOT as to advertising bids, bid protests, requirements and policies for design-build contracts, and contract provisions.

6. Lottery

The Lottery has the authority to perform any of the functions of DMS under chapter 287 or any rules thereunder, and it may adopt alternate procurement procedure by rule. § 24.105(13), Fla. Stat. The Lottery has promulgated emergency rule 53ER07-55, Florida Administrative Code, related to procurements of commodities and contractual services. Section 24.109 provides the Lottery with the authority to promulgate emergency rules and provides some alternatives to the requirements in section 120.57(3).

7. Public Buildings and Property

Chapter 255 relates to public property and publicly owned buildings. This chapter includes a variety of provisions for solicitations, protests, and contract awards.

Preferences in Competitive Solicitations

The statutes provide several situations in which a vendor may receive a preference in a competitive solicitation. Whenever two or more bids, proposals, or replies are equal with respect to price, quality, and service, preference is given to a business that certifies that it has a drug-free workplace program.§ 287.087, Fla. Stat. Any foreign manufacturing company with a factory in the state and employing over 200 employees working in the state shall have preference over any other foreign company when price, quality, and service are the same, regardless of where the product is manufactured. § 287.092, Fla. Stat. In a competitive bid, commodities that are manufactured, grown, or produced in state are given preference when all things in a bid are equal. § 287.082, Fla. Stat. "If two equal responses to a solicitation or a request for quote are received and one response is from a certified minority business enterprise, the agency shall enter into a contract with the certified minority business enterprise." § 287.057(11), Fla. Stat.

Historically, an agency was permitted to grant a preference to a Florida-based business in certain circumstances, but in 2012 this became mandatory in solicitations for purchases of personal property. § 287.084, Fla. Stat. This section applies to agencies, universities, colleges, school districts, or other political subdivisions. § 287.084(1), Fla. Stat. If the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is in a state or political subdivision which grants a preference to a person whose principal place of business is in that state, the agency must award a preference equal to that state's preference. If the lowest bid is submitted by a vendor whose principal place of business is located outside the state and that state

does not grant a preference in competitive solicitation to vendors having a principal place of business in that state, the preference to the lowest responsible and responsive vendor having a principal place of business in this state shall be five percent. *Id.* Out-of-state vendors are also required to include a letter from an attorney as to the preferences in their home state. § 287.084(2), Fla. Stat.

DMS has a rule that provides an order for the application of preferences in the event of identical scoring or pricing. Fla. Admin. Code R. 60A-1.011. Under the rule, if none of the preferences determines a winner and there is a tie, then the agency must award the contract to the vendor whose response is in the best interest of the state, considering factors such as prior performance on contracts. Fla. Admin. Code R. 60A-1.011(3). If that does not resolve a tie, then the agency shall determine award by a means of random selection. Fla. Admin. Code 60A-1.011(4).

Actions that May be Protested

Section 120.57(3) requires the agency to post notice of decisions or intended decisions "concerning a solicitation, contract award, or exceptional purchase." This includes decisions to issue a competitive solicitation and the specifications that are included in the solicitation. The statute also permits a party to challenge an agency's decision to make an award or reject all bids, although the standard of review is different depending on whether the protest is challenging the specification, the award, or a decision to reject all bids. Contracts awarded pursuant to an explicit exemption are not subject to protest under section 120.57(3).

Standing to Protest

Section 120.57(3)(b) permits "[a]ny person who is adversely affected by the agency decision" concerning a solicitation to file a protest of the decision. "A party has standing to protest

the lowest bid if that party has a substantial interest to be determined by the agency." *Westinghouse Elec. Corp. v. Jacksonville Transp. Auth.*, 491 So. 2d 1238, 1240 (Fla. 1st DCA 1986). To demonstrate a substantial interest, a party must show that it will suffer injury in fact with sufficient immediacy to warrant a hearing and that the injury is of a type or nature which the proceeding is designed to protect. *Agrico Chem. Co. v. Dep't of Envtl. Reg.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). Absent exceptional circumstances, an entity does not have standing to protest a solicitation award if it does not submit a bid. *Westinghouse*, 491 So. 2d at 1241.

Similarly, a bidder generally does not have standing when there are multiple bidders, the bidder that seeks to protest is not the second lowest bidder, and there are other bidders who would receive the contract if the protesting bidder prevailed in a protest. *Preston Carroll Co., Inc. v. Fla. Keys Aqueduct Auth.*, 400 So. 2d 524, 525 (Fla. 3d DCA 1981) ("[W]e hold that Preston Carroll, as third low bidder, was unable to demonstrate that it was substantially affected; it therefore lacked standing to protest the award of the contract to another bidder."). "In order to have standing to maintain a bid protest, the vendor must demonstrate that it could be awarded a contract." *Little Havana Activities & Nutrition Centers of Dade Cnty., Inc. v. Fla., Agency for Health Care Admin.*, Case No. 13-0706BID, ¶ 115, 2013 WL 2894803, *27 (DOAH May 15, 2013; AHCA June 7, 2013). An entity "who is not and cannot potentially be a party to the contract with the state" is not entitled to an award of the contract. *Fort Howard Co., v. Dep't of Mgmt. Servs.* 624 So. 2d 783, 785 (Fla. 1st DCA 1993).

An unsuccessful bidder can seek two forms of relief in a protest: an award of the contract or the rejection of all bids and a rebid. *Id*. In some instances, if the vendor is seeking a rejection of all bids, a lower-ranked bidder who normally would not have standing to challenge an award may have standing to protest the fundamental fairness of the process and the responsiveness of other

vendors. *See NCS Pearson d/b/a Pearson Educ. Measurement v. Dep't of Educ.*, Case No. 04-3976BID, ¶ 85 (DOAH Feb. 8, 2005; DOE February 21, 2005); *Barton Protective Servs., LLC v. Dep't of Transp.*, Case No. 06-1541BID, p.4 (DOAH July 20, 2006; DOT August 21, 2006).

In order to receive a contract pursuant to a solicitation a vendor must be both "responsive" and "responsible." A vendor is not responsive if its bid, proposal, or reply materially deviates from the solicitation. *See Harry Pepper & Assocs., Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1192-93 (Fla. 2d DCA 1977). Generally, a nonresponsive bidder does not have standing to protest the award. *Sprint Payphone Servs., Inc. v. Dep't of Corrs.*, Case No. 01-0189BID, 2011 WL 361423, ¶ 36 (DOAH April 6, 2001; DOC Apr. 24, 2001) ("When a proposer would not be in a position to be awarded the contract based on its material deviation from the expectations of the RFP, it does not have a substantial interest to support the protest. Only responsive bidders have standing to protest agency contract awards."). However, as with lower-ranked vendors, several ALJs have found that a nonresponsive vendor still had standing to argue that the entire process was so fundamentally flawed that there must be a re-bid. *See CTS Am. v. Dep't of Highway Safety & Motor Vehicles*, Case No. 11-3372BID, ¶ 130 (DOAH Oct. 19, 2011; DHSMV Nov. 14, 2011); *Vertex Std. v. Dep't of Transp.*, Case No. 07-0488BID, ¶ 26, 2007 WL 1289670, *6 (DOAH Apr. 30, 2007; DOT May 30, 2007).

Filing a Protest

In order to preserve the right to protest an agency's decision or intended decision regarding a solicitation, contract award, or exceptional purchase, a person who is substantially affected by the decision must file a notice of intent to protest in writing with the agency that issued the solicitation within 72 hours after the posting of the notice of decision. § 120.57(3)(b), Fla. Stat. The 72-hour period is measured by the hour. Fla. Admin. Code R. 28-106.103. If a notice is posted

electronically at 10:30 a.m. on a Monday, then the deadline to file the notice of intent to protest would be 10:30 a.m. on Thursday. It is not the close of the business day. After the notice of intent to protest is filed, the protester has 10 days from the filing of the notice to file a formal written petition with the agency. § 120.57(3)(b), Fla. Stat. This deadline is the close of business day—not a particular hour. Saturdays, Sundays, and holidays are not included in the 72-hour period, but they are included in the 10-day period. These deadlines apply to any action related to a solicitation, so it includes challenges to the solicitation specifications and to exceptional purchases.

There are two significant exceptions to these deadlines. In a procurement by the DMS State Group Insurance Program and in a procurement by the Department of Lottery, a formal written protest must be filed within 72 hours after the receipt of notice of the decision or intended decision. §§ 110.123(3)(d)4.a. & § 24.109(2)(a), Fla. Stat.

A party waives its right to challenge if it does not adhere to these deadlines. § 120.57(3)(a), Fla. Stat. For example, a party has 72 hours after a solicitation is posted to protest the specifications of the solicitation. If the party does not challenge the specifications during that window, the party may not raise issues regarding the specifications in a later protest of the award. *Optiplan, Inc. v. Sch. Bd. of Broward Cnty.*, 710 So. 2d 569, 572 (Fla. 4th DCA 1998) ("[W]ith respect to the constitutional challenge to the RFP's specifications . . . , we agree with the hearing officer that Optiplan waived its right to contest the School Board's use of the criteria by failing to formally challenge the criteria within 72 hours of the publication of the specifications in a bid solicitation protest.").

There are other times when an agency may post a notice of rights, such as when it determines who to negotiate with in an ITN. An agency may post a short-list or scores at this point or a notice of intent to negotiate and provide a notice of rights. Agencies have asserted that if a

vendor did not protest at this point, the party waived protesting. *See AT&T Corp. v. Dep't of Mgmt. Servs.*, Case No. 15-5002BID, (DOAH Nov. 25, 2015; DMS Jan. 4, 2006) ("AT&T did not protest the Notice of Intent to Negotiate, and, accordingly, has waived any arguments as to Harris' responsibility or the responsiveness of the initial Reply submitted by Harris."). The First District Court of Appeal recently weighed in on this issue and found that regardless of other points of entry, the agency was obligated to offer a point of entry at the time of the Notice of Intent to award and that the responsiveness of the winning vendor was an integral part of the decision to award. *AT&T Corp. v. State, Dep't of Mgmt. Servs.*, 201 So. 3d 852, 859 (Fla. 1st DCA 2016). The court found that AT&T had not waived this argument by failing to challenge the Notice of Intent to negotiate and found that construing the point of entry so narrowly contravened the plain language of the statute. *Id.* at 858-59.

Requirements of a Notice and Petition

The notice must identify the solicitation by number and title and must state that the person intends to protest the decision. Fla. Admin. Code R. 28-110.003(1). A petition must state with particularity the facts and law upon which the protest is based. § 120.57(3)(b), Fla. Stat. Rule 28-110.004 includes the requirements for a formal written protest. A petition must include all of the information specified in section 120.54(5)(b)4. and rule 28-106.201, Florida Administrative Code. *Id.* The rule includes a simplified form of the petition.

Bond

Most procurement statutes require the filing of a written protest bond. Bonds are required under chapter 287, chapter 337, chapter 110, chapter 24, and some parts of chapter 255. Most bonds are required to be filed with the agency, along with the formal written protest or within the 10 days allowed for the formal written protest. Fla. Admin. Code R. 28-110.005; § 287.042(2)(c),

Fla. Stat. For bonds required by section 337.11(5)(a), however, the bond must be filed with the notice of protest. Fla. Admin. Code R. 28-110.005(2). It should be remembered that under chapter 110 for State Group Insurance and under section 24.109(2)(a) related to the Lottery, the formal written protest is due 72 hours after the notice of intended decision and the bond must be posted with the petition. *See United Health Care of Fla., Inc. v. Dep't of Mgmt. Servs.*, Case No. 11-3998BID (DOAH Order Relinquishing Jurisdiction Sept. 9, 2011); Fla. Admin. Code R. 28-110.005(2).

The amount of the bond depends on the statute underlying the procurement. For a procurement under chapter 287, the amount is 1% of the estimated contract amount. § 287.042(2)(c), Fla. Stat. The contract amount is based on the contract price submitted by the protestor or, if there was not a contract price, the agency shall estimate the contract amount based on factors such as the price of previous contracts for similar services, the amount appropriated by the Legislature or fair market value. *Id.* The agency must provide the contract amount to the protestor within 72 hours of the filing of the notice of protest. *Id.* The estimated bond amount is not subject to protest under section 120.57(3). § 287.042(2)(c), Fla. Stat. The agency may accept a cashier's check in lieu of a bond. If the agency prevails in the protest, it shall recover all costs and charges, which must be included in the final order or judgment, excluding attorney's fees. *Id.* After the costs are paid, the bond is returned to the protestor. If the protestor prevails, it also recovers costs and charges, provided that the costs and charges are included in the final order or judgment. *Id.*

For protests of contract awards relating to educational facilities or public buildings solicited by school districts, universities, and community colleges, the bond is not mandatory, but the educational board may require an amount of $25,000 or 2% of the lowest accepted bid, whichever

is greater, for projects valued at more than $500,000 and 5% of the lowest accepted bid for all other purchases. § 255.0516, Fla. Stat. (The agency or the protestor can recover costs and attorney's fees under this statute.) Protests pertaining to a competitive solicitation for space to be leased by an agency require a bond in the amount of 1% of the estimated total rental of the basic lease period or $5,000, whichever is greater. § 255.25(3)(d), Fla. Stat. Finally, DOT purchases that relate to the State Highway and State Park Road Systems have three different categories of protest bonds: 1) $5,000 for solicitation challenges where bidders must be qualified; 2) $5,000 or 1 %, whichever is greater, for contract awards or bid rejections when the bidders must be qualified; and 3) $2,500 for all other challenges when a bidder is not required to be qualified. § 337.l 1(5)(a), Fla. Stat.

Under previous versions of section 120.57(3), a protest bond was not jurisdictional, and an agency was required to give the protester notice and a reasonable opportunity to post the bond before dismissing the protest for failure to file a bond. *ABI Walton Inc. v. State, Dep't of Mgmt. Servs.*, 641 So. 2d 967, 968 (Fla. 1st DCA 1994) (reversing the agency' dismissal of a protest for failure to file a bond). Section 120.57(3)(a) was amended in 2006 and added that a notice of decision must include, in addition to failure to timely file a protest, that the failure to post a bond within the time allowed for filing the bond constitutes a waiver of the proceedings. Ch. 2006-82, § 7, Laws of Fla. The Uniform Rules of Procedure provide that if an agency provides notice that "advises of the bond requirement but a bond or statutorily authorized alternate is not posted when required, the agency shall summarily dismiss the petition." Fla. Admin. Code R. 28-110.005(3). Thus, the bond is now jurisdictional and failure to timely post a bond will result in the protest being dismissed. *See United Health Care*, Case No. 11-3998BID (dismissing protest because the protestor did not file a bond until seven days after it filed its formal written petition). The

requirement of a protest bond does not violate due process because a party has no constitutionally protected property interest in a contract that was not awarded to it. *P'ship for Cmty. Health, Inc. v. Dep't of Children & Families*, 93 So. 3d 1191, 1193 (Fla. 1st DCA 2012). The bond requirement does not violate the access to justice provisions in the Florida Constitution because the Constitution only protects rights that existed at common law or by statute prior to the enactment of the Declaration of Rights and the right to administratively challenge an award of a contract did not exist until the adoption of the APA in 1974. *Id.*

Stay of the Award

Once a formal written protest has been timely filed with the agency, the agency must stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head, in writing, sets forth particular facts and circumstances that require the continuance of the process in order to avoid an immediate and serious danger to the public health, safety, or welfare. § 120.57(3)(c), Fla. Stat. Agencies can only override the stay in "the most compelling circumstances." *Avmed, Inc. v. State, Sch. Bd. of Broward Cnty.*, 790 So. 2d 571, 572 (Fla. 4th DCA 2001). The statute requires a stay to prevent the agency from wrongly awarding a contract, to resolve disputes over a contract before the contract begins, to preserve the rights of the protesting parties, to preserve the public treasure by insuring the contract is awarded to the lowest bidder, and to provide for orderly resolution of protests. *Id.* at 573. In *Avmed*, the court upheld the agency's override of the stay when the insurance company for the school board employees refused to continue to provide insurance, the other insurance company under contract was insolvent, and the contract process had to continue or else the school board employees would lose health insurance coverage. *Id.*

Several agencies have alternate stay provisions. DMS may proceed with the solicitation or contract award process of a term contract when the Secretary or designee sets forth in writing particular facts and circumstances that demonstrate that the delay incident to staying the process would be "detrimental to the interests of the state." § 287.042(2)(b), Fla. Stat. In addition, for the State Group Insurance solicitations, DMS may proceed with the process if the director of the department sets forth, in writing, particular facts and circumstances that "demonstrate the necessity of continuing the procurement process or the contract award process in order to avoid a substantial disruption to the provision of any scheduled insurance services." § 110.123(3)(d)4.b., Fla. Stat. Despite this language, which appears to provide a lesser standard for overriding a stay, the appellate court has applied a strict standard of review. In *EyeMed Vision Care, LLC v. State, Dep't of Mgmt. Servs.*, 964 So. 2d 201, 205 (Fla. 1st DCA 2007), the court focused on the word "necessity" and found that the agency had to show that continuing with the process was the only reasonable alternative to assure that the provision of insurance services would not be substantially disrupted. *Id.* The court found that DMS did not sufficiently explain why it adopted a procurement schedule that did not allow time to resolve a protest and thus the statement failed to explain why the issue could not have reasonably been prevented or that other less drastic measures might suffice. *Id.*

The Lottery also has an alternate provision. It may continue with the process when the secretary sets forth in writing particular facts and circumstances that require the continuance of the process to avoid "a substantial loss of funding to the state or to avoid substantial disruption of the timetable for any scheduled lottery game." § 24.109(2)(c), Fla. Stat. DOT also has its own stay provision in section 337.11(5)(c), and it can proceed with the solicitation or contract award process

when the head of the department sets forth in writing particular facts and circumstances that require the continuance of the process "in order to avoid a substantial loss of funding to the state."

Once a final order is entered by the agency, the stay is lifted. If a party appeals the final order, it will have to seek a stay from the agency, and if the agency refuses, then seek a stay with the appellate court. *See* Fla. App. Pro. R. 9.190(e)(2)(A) ("A party seeking to stay administrative action may file a motion either with the lower tribunal or, for good cause shown, with the court in which the notice or petition has been filed."). While it is not entirely clear what the standard for a stay is during appeal, the First District Court of Appeal has likened a stay on appeal of a final order in a protest to a temporary injunction. *See Baxter's Asphalt & Concrete, Inc. v. Liberty Cnty.*, 406 So. 2d 461, 465 (Fla. 1st DCA 1981) (on petition for rehearing) *quashed on other grounds Liberty County v. Baxter's Asphalt Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982) ("Another panel of this court had earlier denied appellant's request to stay the construction of the contract until the appeal was decided on the merits. . . . Such a stay would have been equivalent to the granting of a temporary injunction. Temporary injunctions are granted sparingly and only if eventual success on the merits is probable.") Thus, in order for a court on appeal to grant a stay of the final order in a protest, the movant must likely show:

> (1) the movant has a clear legal right to the requested relief or, in other words, it has a substantial likelihood of success on the merits; (2) the movant will suffer irreparable harm if the trial court refuses to grant the injunction; (3) the movant does not have available another adequate remedy at law; and (4) a public interest will be served by the imposition of the injunction.

Charlotte Cnty. v. Grant Med. Transp., Inc., 68 So. 3d 920, 922 (Fla. 2d DCA 2011). *See also Provident Mgmt. Corp. v. City of Treasure Island*, 796 So. 2d 481, 485 n.9 (Fla. 2001) ("In order to obtain a temporary injunction, the party seeking injunction must establish that (1) irreparable injury will result if the injunction is not granted; (2) there is no adequate remedy at law; (3) the

party has a clear legal right to the requested relief; and (4) the public interest will be served by the temporary injunction."). The issuance of a temporary injunction is an extraordinary remedy that is granted sparingly. *Hadi v. Liberty Behavioral Health Corp.*, 927 So. 2d 34, 38 (Fla. 1st DCA 2006).

Dispute Proceedings

Within seven days of a formal written protest, the agency must provide an opportunity to resolve the protest by mutual agreement. § 120.57(3)(d)1., Fla. Stat. If the protest is not resolved, an informal proceeding shall be conducted pursuant to section 120.57(2) if there are no disputed issues of material fact. § 120.57(3)(d)2., Fla. Stat. If there are disputed issues of material fact, the agency shall refer the protest to the Division of Administrative Hearings ("DOAH"). § 120.57(3)(d)3.

DOAH will expedite the hearing and assign and administrative law judge ("ALJ") who must begin a hearing within 30 days after receipt of the formal written petition. § 120.57(3)(e), Fla. Stat. The ALJ is required to enter a recommended order within 30 days of the hearing or within 30 days of receipt of the hearing transcript, whichever is later. *Id.* Each party can submit exceptions to the recommended order within 10 days (instead of the typical 15 days under section 120.57(1)(k)) of the recommended order and the agency is required to enter a final order within 30 days of the recommended order rather than the typical 90 days for general proceedings under section 120.569(2)(*l*). These timelines can be waived only by agreement of all of the parties. *Id.*

Common Issues in Protests

A. Bid, Proposal, or Reply is Not Responsive

An agency cannot award a contract to a vendor whose bid, proposal, or reply materially deviates from the solicitation. *See Harry Pepper & Assocs., Inc. v. City of Cape Coral*, 352 So. 2d

1190, 1192-93 (Fla. 2d DCA 1977). A response that materially deviates from the solicitation would be non-responsive. § 287.012(26), Fla. Stat. Not every deviation, however, is a material deviation. *Robinson Elec. Co., Inc. v. Dade Cnty.*, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982). An agency may waive minor irregularities. *Id.*

"The test for measuring whether a deviation . . . is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders." *Harry Pepper*, 352 So. 2d at 1193. A deviation "is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." *Tropabest Foods, Inc. v. State, Dep't of Gen. Servs.*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986). There is a large body of case law that addresses whether a deviation is a material deviation or a minor irregularity.

B. Nonresponsible bidders

An agency cannot award to a vendor who is not responsible. Thus, a vendor must show that it is capable of performing the requirements of the contract and that it has the integrity and reliability that assures good faith performance. § 287.012(25), Fla. Stat. Often, solicitations have minimum requirements a vendor must meet in order to be responsible. This is another avenue by which a protestor will attack the winning vendor's bid, proposal, or reply.

C. Financial Statements

Solicitations often require vendors to submit some form of financial statements to show that the vendor is financially capable of performing the contract. Exactly what is required and how it is used by the agency can vary greatly, but failing to submit the information or submitting the wrong information may be a material deviation from the solicitation. *See Emergency Commc'ns Network, LLC v. Div. of Emergency Mgmt.*, Case No. 15-6333BID, ¶¶ 53-60 (DOAH

Recommended Order Jan. 28, 2016) (finding a that failure to submit financial statements that met the specifications in the RFP was a material deviation from the terms of the solicitation that could not be waived because it provided a competitive advantage over other vendors); *Affiliated Computer Servs., Inc. v. Agency for Health Care Admin.*, DOAH Case No. 05-3676BID, 43-44 (DOAH Jan. 17, 2006; AHCA Mar. 3, 2006) (finding that failure to submit the proper financial information requested by the agency was not a waivable irregularity).

D. Sunshine Law Violations

Committees that meet and evaluate procurements are subject to the Sunshine Law. *Silver Express Co. v. Dist. Bd. of Lower Tribunal Trustees of Miami-Dade Cmty. Coll.*, 691 So. 2d 1099, 1100-01 (Fla. 3d DCA 1997). *See also* § 286.011, Fla. Stat. ("All meetings of any board or commission of any state agency . . . at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting."). In *Silver Express*, the court explained that the committee's job was to weed through various proposals, determine which were acceptable, and rank them accordingly. In other words, the committee "helped to crystalize the decision made by the College." *Id.* at 1100. Because the committee had the authority to eliminate some choices and rank applications, its rulings affected the decision-making process and it was subject to the Sunshine Law. *Id.* at 1101.

This means that an evaluation team cannot meet out of the Sunshine and discuss the bids, proposals, or replies. The Sunshine Law was amended in 2011 to add a temporary exemption for negotiations and negotiation strategy sessions.

> (2)(a) For purposes of this subsection:
> 1. "Competitive solicitation" means the process of requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement.

> 2. "Team" means a group of members established by an agency for the purpose of conducting negotiations as part of a competitive solicitation.
> (b)1. 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 is exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution.
> 2. Any portion of a team meeting at which negotiation strategies are discussed is exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution.
> (c)1. A complete recording shall be made of any portion of an exempt meeting. No portion of the exempt meeting may be held off the record.
> 2. The recording of, and any records presented at, the exempt meeting are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time as the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever occurs earlier.

§ 286.0113(2), Fla. Stat.

The exemption includes only meetings that are part of a competitive solicitation at which (1) a negotiation with a vendor is conducted, at which a vendor makes an oral presentation, or at which a vendor answers questions and (2) meetings of the negotiation team "at which negotiation strategies are discussed." *Id.* The statute does not define negotiation strategies, so it is not clear how much discussion the negotiation team may have as to the merits of the vendors' replies in these negotiation strategy meetings. The statute does not exempt meetings at which the team evaluates the vendors.

One additional, and important, consideration is that even if the negotiation team unintentionally discussed matters outside of the scope of the exemption in a meeting that was not open to the public during the procurement process, a Sunshine Law violation may be cured if the team meets in a public meeting and fully discusses the matter. *See, e.g., Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So. 3d 755, 765 (Fla. 2010) ("Sunshine Law violations can be cured by 'independent, final action in the sunshine,' which this Court distinguished from mere ceremonial acceptance or perfunctory ratification of secret actions and decisions.") (citing

Tolar v. School Bd. of Liberty Cnty., 398 So. 2d 427, 429 (Fla. 1981)). Thus, a public meeting in which the negotiation team fully discusses its selection of the vendors would likely cure any unintentional violation made by going outside of the scope of the exemption in a negotiation strategy meeting.

The circuit courts have jurisdiction to enforce the Sunshine Law by issuing an injunction. § 286.011(2), Fla. Stat. ("The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state."). Some DOAH judges interpret this language to mean that they lack jurisdiction to rule on a Sunshine Law issue. *See Veolia Transp. Servs., Inc. v. Comm'n for the Transp. Disadvantaged*, Case No. 08-1636BID, ¶ 48 (DOAH July 9, 2008; CTD Sept. 24, 2008) ("Under the statute, the Division of Administrative Hearings has no jurisdiction to enforce the Sunshine Law."); *Affiliated Computer Servs.,* Case No. 05-3676BID, ¶ 95 ("The Administrative Law Judges of the Division of Administrative Hearings continue to lack jurisdiction to dispose of disputes involving allegations of violations of Florida's Sunshine Law. Relief for any such violations must be sought elsewhere."). Some ALJs, however, will address the Sunshine Law arguments. *See Nat'l Beverages, Inc. v. The Univ. of Cent. Fla.*, Case Nos. 96-5320BID & 96-6089BID, ¶¶ 66-68, 71-73 (DOAH Mar. 19, 1997; UCF Apr. 23, 1991) (finding that a subsequent meeting cured an earlier Sunshine Law Violation, but denying attorney's fees because the administrative proceeding was not an action under section 286.011(4) that authorized an award of fees); *S. Fla. Jail Ministries, Inc. v. Dep't of Juvenile Justice*, Case No. 00-1366BID, ¶¶ 113 (DOAH June 23, 2000; DJJ July 24, 2000) (finding no merit in the petitioner's argument that committee members acted in violation of the public meeting requirements of the Sunshine Law). Thus, in order to raise a Sunshine Law violation, it may be necessary to institute a circuit proceeding in addition to the protest.

E. Public Records

Bids, proposals, and replies are exempt from public records until the agency provides a notice of an intended decision or until 30 days after opening the bids, proposals or final replies, whichever is earlier (unless the agency rejects all bids, proposals, or replies and provides notice that it intends re-bid, in which case they remain exempt through the re-bid for up to twelve months). § 119.071(1)(b), Fla. Stat. The statute refers to "final" replies because in an ITN an agency may request additional replies and/or a best and final offer (referred to as a "BAFO"). The replies are not final until 30 days after the final reply is submitted.

One common issue that arises in bid protests is the extent to which vendors can access their competitor's documents. Many vendors claim that information in their bids, proposals, or replies is protected as "trade secret," which is confidential and exempt from disclosure under the public records laws. § 815.045, Fla. Stat. ("The Legislature finds that it is a public necessity that trade secret information as defined in s. 812.081, and as provided for in s. 815.04(3), be expressly made confidential and exempt from the public records law because it is a felony to disclose such records."). Trade secrets are defined in the criminal statutes. § 812.081, Fla. Stat.

Agencies usually require a vendor to submit a redacted and unredacted copy of the bid, proposal, or reply so that it has a redacted copy to provide in the event of a public record request. If the vendor does not provide a redacted copy or somehow otherwise label documents as confidential, an agency may assume there is no trade secret information included and produce the records. *See Sepro Corp. v. Fla. Dep't of Evntl. Prot.*, 839 So. 2d 781, 783-84 (Fla. 1st DCA 2003) (explaining that a trade secret is only protected if the owner takes reasonable measures to prevent it from becoming available to others and if a vendor to a state agency fails to label documents it provides to a governmental agency as trade secret, the owner has not taken measures to protect the

confidentiality so the documents are not exempt from public records requests). Some agencies, however, are reluctant to get involved in a dispute over whether vendors' information is trade secret, preferring to let vendors work it out among themselves. Often, the parties come to some kind of agreement to resolve the issues without fully disclosing the information. Some ALJs may be willing to enter protective orders governing protected trade secret information once the parties have stipulated as to how such information will be treated, but others ALJs will not issue such orders.

F. Scoring & Evaluation Issues

Another common issue that is raised is some kind of error in the scoring or evaluation process. A vendor may argue that the scores were arbitrary, that clear mathematical errors were made, that there is a clear bias on the part of one evaluator for or against one vendor based on the variation in scores or history with the vendors, that there were improper communications between evaluators regarding scores, that evaluators lacked the proper knowledge or training to evaluate correctly, or that an evaluator failed to follow the instructions in the solicitation.

G. Ex parte discussions/lobbying

All solicitations are required to include the following language:

> Respondents to this solicitation or persons acting on their behalf may not contact, between the release of the solicitation and the end of the 72-hour period following the agency posting the notice of intended award, excluding Saturdays, Sundays, and state holidays, any employee or officer of the executive or legislative branch concerning any aspect of this solicitation, except in writing to the procurement officer or as provided in the solicitation documents. Violation of this provision may be grounds for rejecting a response.

§ 287.057(23), Fla. Stat. In other words, vendors are prohibited from lobbying any state agency during a solicitation. Notable, however, is that the statute permits an agency to reject a response for violation of this section, but it is not mandatory.

H. Agency Deviating from Specifications

When an ITB or RFP is used, an agency cannot award a contract that is materially different than what it stated it was seeking in the solicitation. *State, Dep't of Lottery v. GTech Corp.*, 816 So. 2d 648, 652-53 (Fla. 1st DCA 2001). An ITN allows for more flexibility in developing and negotiating the contract during the solicitation process. *Cushman & Wakefield of Fla., Inc. v. Dep't of Mgmt. Servs.*, Case Nos. 13-3895 & 13-3895, ¶ 102 (DOAH Jan. 24, 2014; DMS Feb. 5, 2014) ("The ITN process offers agencies much more discretion in negotiating with vendors than does the RFP process circumscribed by section 287.057(b).").

The court also addressed this issue in the *AT&T* case, explaining that the ITN process was added to the statute in response to the *GTech* case and explaining that the ITN is a more flexible process. *AT&T Corp.*, 201 So. 3d at 857. While the court agreed that the agency could not make "material changes to the ITN during negotiations," the ALJ properly found that material changes had not been made in this case. *Id.* at 858. The court applied the criteria it traditionally applies to whether a vendor's response is a deviation from the ITN. Specifically, it found that the changes did not restrict competition and it noted that its affirmance rested on the determination that AT&T was not harmed by the Department's actions. *Id.* The court also explained that it found compelling AT&T's argument that such an action has a potential chilling effect on third parties who chose not to reply to an ITN upon belief that they cannot meet the ITN specifications as written. *Id.* The court did not reach the issue, however, as such parties were not before the court seeking relief. *Id.*

ALJ's Standard of Review

The APA provides:

> Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to 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. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

§ 120.57(3)(f), Fla. Stat. (Emphasis supplied.)

Accordingly, the protestor of an intended decision related to a solicitation has the burden of proving by a preponderance of the evidence that the Division's proposed agency action is clearly erroneous, contrary to competition, arbitrary, or capricious and therefore invalid. *See id.* & § 120.57(1)(j), Fla. Stat. If the agency rejects all bids, the standard of review is "whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent." § 120.57(3)(f), Fla. Stat. In a challenge to a specification, the protestor must show the specifications are arbitrary or capricious, that the specifications are so vague that bidders cannot formulate an accurate bid, or that the specifications are so unreasonable that they are either impossible to comply with or it is too expensive to do so and remain competitive. *Advocacy Center for Persons with Disabilities, Inc. v. State, Dep't of Children & Families*, 721 So. 2d 753, 755 (Fla. 1st DCA 1998); *Hadi v. Liberty Behavioral Health Corp.*, 927 So. 2d 34, 39 (Fla. 1st DCA 2006).

An agency has "wide discretion in soliciting and accepting bids for public works." *Capaletti Bros., Inc. v. State, Dep't of Gen. Servs.*, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). Florida courts for years have recognized that procurement decisions by governmental entities are entitled to deference. *See, e.g., Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982) ("[A] public body has wide discretion in soliciting and accepting bids for public improvements . . . ."). The Florida Supreme Court has explained:

> Thus, although the APA provides the procedural mechanism for challenging an agency's decision to award or reject all bids, the scope of the inquiry is limited to whether the purpose of competitive bidding has been subverted. In short, the hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.

Dep't of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 914 (Fla. 1988). While the statutory standard of proof was later changed to whether the proposed agency action was "clearly erroneous, contrary to competition, arbitrary, or capricious," agencies still have wide discretion in solicitations. *See AT & T Corp.*, 201 So. 3d at 854 ("[A] 'public body has wide discretion' in the bidding process and 'its decision, when based on an honest exercise' of discretion, should not be overturned even if reasonable persons might disagree.") (quoting *Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Commn'rs*, 955 So. 2d 647, 651 (Fla. 1st DCA 2007)); *Accela, Inc. v. Sarasota Cnty.*, 993 So. 2d 1035, 1044 (Fla. 2d DCA 2008) (explaining that the principle that "a public body has wide discretion in soliciting and accepting bids for public improvements and its decision" also applies to RFPs).

Although the statute refers to a "de novo" review at DOAH, the courts have interpreted the de novo review in a solicitation protest to be different than a traditional de novo review under the APA. A "de novo" proceeding in the context of a bid protest is "a form of intra-agency review." *State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). "The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." *Id.* The party protesting the award has the burden "to establish a ground for invalidating the award." *Id.*

A decision is clearly erroneous when, although there is evidence to support it, after review of the entire record the tribunal is left with the definite and firm conviction that a mistake has been committed. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). *See also Floridian Constr. & Dev. Co., Inc. v. Dep't of Envtl. Prot.*, Case No. 09-0858BID, 2009 WL 1557182, *18 (DOAH May 1, 2009; DEP June 1, 2009) ("A decision is clearly erroneous when unsupported by substantial evidence or contrary to the clear weight of the evidence or is induced by an erroneous

view of the law."). An agency action is capricious if the agency takes the action without thought or reason or irrationally, and agency action is arbitrary if it is not supported by facts or logic. *Agrico Chem. Co. v. State Dep't of Envtl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). *See also* § 120.57(1)(e)3.d., Fla. Stat. "An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding." *James Hinson Electrical Contracting Co., Inc. v. Dep't of Transp.*, Case No. 13-0685, ¶ 43 (DOAH June 21, 2013; DOT July 17, 2013).

During a protest related to an ITB or RFP, the agency may not consider any "submissions made after the bid or proposal opening which amend or supplement the bid or proposal." § 120.57(3)(f), Fla. Stat. Likewise, in a protest related to an ITN, an agency may not consider any "submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply." *Id.*

The Lottery has a slightly different standard of review. In a protest, "including the rejection of all bids, proposals, or replies, the administrative law judge shall not substitute his or her procurement decision for the agency's procurement decision but shall review the intended agency action only to determine if the agency action is illegal, arbitrary, dishonest, or fraudulent." § 24.109(2)(b), Fla. Stat.

Remedies After Appeal

If a protestor loses at DOAH in a protest of an intended award, but is successful on appeal, its remedies are likely limited if no stay has been entered. *See Silver Express Co. v. Dist. Bd. of Lower Tribunal Trustees of Miami-Dade Cmty. Coll.*, 691 So. 2d 1099, 1101-02 (Fla. 3d DCA 1997) (finding that a temporary contract for flight training services should not be enjoined although the agency violated the Sunshine Law during its solicitation because it was not in the public interest to upset students' training). *See also Hubbard Constr. Co. v. Dep't of Transp.*, 642 So. 2d 1192,

1192 (Fla. 1st DCA 1994). In *Hubbard*, the Court reversed an agency's final order in a bid protest. As for the remedy, the Court stated as follows:

> we remand this cause to the department for an order awarding the contract to the appellant, if the contract has not already been awarded to a competitor. If the contract has already been awarded, the appellant may seek ancillary relief pursuant to section 120.68(13)(a)2., Florida Statutes (1993), in an appropriate circuit court.

Id. See also Overstreet Paving Co. v. State, Dep't of Transp., 608 So. 2d 851, 853 (Fla. 1st DCA 1992) (finding that the appellant bidder had no meaningful remedy in an administrative hearing because the contract had already been awarded and remanding for ancillary relief "in an appropriate circuit court"). A bidder may be entitled to some amount of damages from the agency, such as for bid preparation costs, but it is not entitled to lost profits. *City of Cape Coral v. Water Servs. of Am.*, 567 So. 2d 510, 514 (Fla. 2d DCA 1990). *See also Baxter's Asphalt & Concrete, Inc. v. Liberty Cnty.*, 406 So. 2d 461, 467 (Fla. 1st DCA 1981) *quashed on other grounds by Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982)).

Public/Private Partnerships

A developing area relates to public-private partnerships. In 2013, section 287.05712, Florida Statutes, was enacted to allow responsible public entities to create public-private partnerships ("P3s") for the construction, upgrade, operation, ownership, or financing of facilities that are used predominantly for public purposes. Ch. 2013-223, § 2, Laws of Florida (creating section 287.05712, Florida Statutes). In 2016, the statute was relocated to section 255.065, Florida Statutes. Ch. 2016-153, § 1, Laws of Fla. This a comprehensive statute governing P3s.

A "Responsible public entity" authorized to participate in a P3 is "a county, municipality, school district, special district, or any other political subdivision of the state; a public body corporate and politic; or a regional entity that serves a public purpose and is authorized to develop or operate a qualifying project." § 255.065(1)(j), Fla. Stat. Thus, state agencies, at this time, are

not included. DOT, however, has its own statute that authorizes it to enter into agreements with private entities for building, operation, ownership or financing of transportation facilities. § 334.30, Fla. Stat.

Conclusion

This guide highlights the most common issues and procedures involved in state agencies procurements. Procurement law, however, is complex, and this guide in no way is able to cover all of the issues that may arise or all requirements of the law.