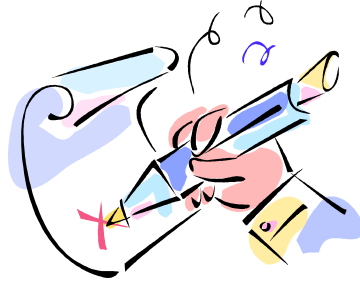


# STATE AGENCY PROCUREMENTS IN FLORIDA

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Most state agency contracts in Florida must be established via the competitive procurement laws, unless they fall within a specific statutory exemption. Because of the award of such a contract affects the substantial interests of the participating vendors in the procurement, the agency's intended award (or other decision) is considered preliminary agency action subject to sections 120.569 and 120.57, Fla. Stat. Section 120.57(3) sets forth the administrative procedures for challenging agency decisions regarding the procurement decisions of agencies.

The purpose of this outline is to summarize the basics of a bid protest, to provide tips on how to avoid a bid protest and, if your agency cannot avoid a bid protest, to provide tips on how to survive a bid protest.

## THREE COMMON TYPES OF COMPETITIVE SOLICITATIONS:

1. *Invitation to Bid (ITB)* – An ITB is used when the agency can develop precise specifications or scope of work. Price is the controlling factor in an ITB and award is made to the lowest responsive<sup>1</sup> and responsible<sup>2</sup> bidder. §§ 287.012(15) and 287.057(1)(a), Fla. Stat.
2. *Request for Proposals (RFP)* – An RFP is used when it is not practicable for the agency to use an ITB. An RFP must include all of the relevant specifications, including the evaluation criteria to be used in determining the acceptability of the proposals received. While a contract resulting from an ITB is awarded based solely on price, in an RFP the evaluators may consider “technical excellence as well as cost.” *Sys. Dev. Corp. v. Dep’t of Health & Rehab. Servs.*, 423 So. 2d 433, 434 (Fla. 1st DCA 1982). Price must be a factor in the evaluation criteria, but other factors like the vendor’s technical expertise, financial capacity, etc., may also be evaluated. The award is made to the vendor determined to be the most advantageous to the state, considering all of the evaluation criteria. §§ 287.057(1)(b)4 and 287.012(22), Fla. Stat.
3. *Invitation to Negotiate (ITN)* – An ITN is appropriate when an agency determines that neither an ITB nor an RFP will result in the best value to the state. § 287.057(1)(c), Fla. Stat. The ITN was added by the 2000 Florida Legislature and refined several times in recent years. The main difference between an RFP and an ITN is that the ITN is used when the state agency determines that negotiations with one or more vendors may be necessary in order for the state to receive the best value. Similar to an RFP, evaluation criteria must be included in the specifications by which the

<sup>1</sup> A “Responsive vendor” is a “vendor who has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation.” § 287.012(26), Fla. Stat.

<sup>2</sup> A “Responsible vendor” 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(24), Fla. Stat.

agency evaluation committee will evaluate and rank the vendor replies. Based on this ranking and the ITN's specifications, an agency will pick one or more vendors with whom to negotiate. § 287.057(1)(c)4., Fla. Stat. At the conclusion of the negotiations, an award is based on the agency's determination of which vendor will provide the "best value" to the state. "Best value" is defined in section 287.012(4) as "the highest overall value to the state based on objective factors that include, but are not limited to, price, quality, design, and workmanship." §§ 287.012(16), 287.057(1)(c) and 287.012(4), Fla. Stat.

Other less common types of procurements include the Request for a Quote (RFQ), which is a request for pricing from a state term contract vendor for a good or services available on a state contract, section 287.012(23), Fla. Stat., and the Request for Information (RFI), which is used by the agency to gather information in preparation for drafting specifications and is not challengeable pursuant to chapter 120. § 287.012(21), Fla. Stat.

### **THE PROTEST PROCESS:**

Section 120.57(3) sets forth the administrative procedures for challenging agency decisions regarding a solicitation or contract award.

#### WHAT ENTITIES ARE CONSIDERED AN "AGENCY" SUCH THAT SECTION 120.57(3) APPLIES?

Section 120.52(1) defines "agency" as the governor in the exercise of all executive functions except those derived from the Florida Constitution; a host of departments with statewide jurisdiction, including the Board of Governors of the State University System, certain commissions, a regional water supply authority, a regional planning agency, and educational units; and other units of government expressly made subject to chapter 120. In addition, section 120.57(3)(g) states that the definitions in section 287.012 apply for purposes of subsection (3). Section 287.012(1) defines "Agency" as state officers, departments, boards, commissions, divisions, bureaus, councils and other units of organization, not including state universities and colleges. Based on these definitions, the bid protest process in section 120.57(3) applies to most state agencies, departments and other entities within the executive branch. §§ 120.57(3)(g) and 287.012(1), Fla. Stat.

Section 120.57(3) also applies to some quasi-public or private entities that act on behalf of a state agency. *See e.g., Mae Volen Sr. Ctr. v. Area Agency on Aging Palm Beach/Treasure Coast*, 978 So. 2d 191 (Fla. 4th DCA 2008) (finding that a non-profit corporation acting as an area agency on aging was an "agency" for the purpose of chapter 120 and was therefore subject to section 120.57(3)). *But see First Quality Home Care v. Alliance for Aging*, 14 So. 3d 1149 (Fla. 3d DCA 2010) (contrary result). In determining whether a quasi-public entity is subject to chapter 120, courts look to the function and jurisdiction of the entity. *See Coastal Fuels Marketing, Inc. v. Canaveral Port Auth.*, 962 So. 2d 942 (Fla. 5th DCA 2007); *Orlando-Orange County Expressway Auth. v. Hubbard Constr.*, 682 So. 2d 566 (Fla. 5th DCA 1996); *Rubinstein v. Sarasota County Public Hosp. Bd.*, 498 So. 2d 1012 (Fla. 2d DCA 1986).

There has been some uncertainty regarding whether section 120.57(3) applies to state universities and community colleges based on the different definition in section 287.012(1), which seems to exclude universities and colleges, and 120.52(1)(a), which seems to include them. The issue has not yet been specifically litigated.

## WHO CAN PROTEST?

Who can bring a protest? “[A]ny person who is adversely affected by the agency decision or intended decision may file a protest.” § 120.57(3)(b), Fla. Stat. Specifically:

- **Specifications challenge** –After the specifications are released by the agency, potential vendors can challenge the specifications. *See Advocacy Ctr. for Persons with Disabilities v. Dep’t of Children & Family Servs.*, 721 So. 2d 753, 756 (Fla. 1st DCA 1998).
- **Challenge of any agency action:** Essentially, a vendor can challenge any action by the agency during the course of a procurement (such as an addenda, questions/answers, etc.). Any actions that are not timely protested are waived. *See* §120.57(3)(b) (“Failure to [timely] file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter.”).
- **Award challenge** – After a proposed award is announced, a losing vendor may protest the proposed award. Generally, the protesting vendor will have to show that but for alleged errors in the process, the protestor would have been awarded the contract or that the procurement process was so flawed that the best vendor cannot be determined. *See Capeletti Bros. v. Dep’t of Gen. Servs.*, 432 So. 2d 1235, 1360 (Fla. 1st DCA 1983) (finding that the fourth lowest vendor had standing to protest the proposed award only because the vendor alleged that none of the top three vendors were capable of performing the contract). For example, in a Department of Education bid protest, CTB/McGraw-Hill (the vendor that the department proposed to award the contract to) challenged Pearson’s standing because Pearson was the third-ranked bidder. However, the Division of Administrative Hearings (DOAH) Administrative Law Judge (ALJ) found that Pearson could challenge the proposed award on two bases: (1) even though Pearson was the third-ranked bidder, it had standing because its protest challenged the responsiveness of the first- and second-lowest bidders and (2) Pearson had an independent basis for standing because of it had also challenged the fundamental fairness of the RFP process. *NCS Pearson, Inc. d/b/a Pearson Educ. Measurement v. Dep’t of Educ.*, Case No. 04-3976BID (DOAH Feb. 8, 2005) (Final Order Feb. 21, 2005, adopting Recommended Order). The ALJ also found that the second-ranked vendor, Harcourt Assessment, which did not protest but intervened in the proceeding, had standing because Harcourt challenged the fundamental fairness of the process. *See also Metcalf & Eddy Inc. v. Dep’t of Transp.*, Case No. 00-0494BID (DOAH July 30, 2001) (Final Order Sept. 27, 2001, adopting Recommended Order) (when third-lowest bidder files protest alleging that both first- and second-lowest bidders should be rejected as nonresponsive, third-lowest bidder has standing); *Rovel Const. Inc. v. Dep’t of Health*, Case No. 99-0596BID (DOAH April 27, 1999) (Final Order May 28, 1999, adopting Recommended Order) (fourth-lowest bidder that filed formal written protest contesting scoring/qualification of first-, second-, and third-lowest bidders had standing.).

## WHEN AND HOW IS A PROTEST BROUGHT?

- **Notice of Intent** – To preserve the right to bring a protest of an agency decision, an affected party must first file a written notice of intent to protest with the purchasing agency with 72 hours after the decision being challenged is posted.<sup>3</sup> § 120.57(3)(b), Fla. Stat. (Weekend and state holidays are

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<sup>3</sup> Generally, failure to comply with the filing deadlines is deemed a waiver of the right to protest.

excluded in the time calculation). Per Rule 28-110.003(1), F.A.C., the Notice of Intent must include sufficient information for the agency to identify the decision being protested and must state that the entity filing the notice intends to protest that decision. The Notice of Intent should be filed with the office making the decision, with a copy to the agency clerk or other person identified in the solicitation document.

- **Protest Petition** – After filing a Notice of Intent, a protesting vendor must file its formal written protest or petition by the close of business on the 10th calendar day after the filing of the Notice of Intent.<sup>4</sup> § 120.57(3)(b), Fla. Stat. (Weekend and holidays are included in the time calculation except if the 10th day falls on a weekend or holiday, it would be due on the next regular business day). The petition must conform to all of the requirements of Rule 28-106.201(1), F.A.C. The petition is filed with the agency clerk. (There are some specific exceptions. For example, protests of a purchase of professional administrator services for state group insurance and all purchases by the Department of Lottery must be challenged by the filing of a formal written protest petition (and any bond) within the 72 hours. §§ 110.123(3)(d)4.a and 24.109(2)(a), Fla. Stat.).
- **Bond** - In addition, a protest bond payable to the agency is generally required to be filed with the petition. R. 28-110.005(3), F.A.C. The amount of the bond varies, depending upon the statutory authority under which the agency is making the purchase. For purchases under chapter 287, the bond is 1% of the contract value. (For protests of Florida Department of Transportation contract decisions relating to the State Highway System or the State Park Road System, the bond must be posted at the time of the notice of protest is filed. § 337.11(5)(a), Fla. Stat.).
- **Attempt Resolution** – Within seven business days after a formal written protest is filed, the agency must schedule a meeting with the protestor and other parties to attempt mutual resolution of the protest. § 120.57(d)(1), Fla. Stat. The petition cannot be sent to the Division of Administrative Hearings (DOAH) or an informal proceeding cannot be scheduled until this meeting occurs.
- **Schedule or transfer to DOAH for proceeding** – After resolution has been attempted (and failed), the agency will: (1) schedule an informal proceeding (if there are no factual issues in dispute) or (2) send the petition to DOAH for a formal proceeding (if there are factual issues in dispute). § 120.57(3)(d)2, 3, Fla. Stat.
- **Hearing** – The informal proceeding or hearing at DOAH before an ALJ is held within 30 days of the ALJ being assigned unless all parties agree to a waiver of the statutory timeframe. The DOAH proceeding is *de novo*, however, it is not a pure *de novo*.<sup>5</sup> In the proceeding, the protestor has the burden of proof and must prove the agency’s action was contrary to the agency’s governing statutes, rules or policies, or the procurement specifications. § 120.57(3)(f), Fla. Stat. The protestor must also show that the agency’s decision was clearly erroneous, contrary to competition, arbitrary, or capricious. *Id.* Agency action is “clearly erroneous” if it lacks rational support and the ALJ has a “definite and firm conviction that a mistake has been committed.” *Health Mgmt. Sys. v. Agency for Health Care Admin.*, Case No. 08-2566BID (DOAH Aug. 15, 2008 ) at 21 (Final Order Aug. 28, 2008, adopting Recommended Order) (quoting *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). “An act is ‘contrary to competition’ if it unreasonably interferes with the objects of competitive

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<sup>4</sup> See footnote 3, *supra*.

<sup>5</sup> The *de novo* standard in a bid protest proceeding is discussed further in the third bullet on page 6, *infra*.

bidding,” including to secure fair competition, to avoid favoritism and to secure the best value for the public. *Id.* “An action is ‘arbitrary if it is not supported by logic or the necessary facts’ and ‘capricious if it is adopted without thought or reason or is irrational.’” *Id.* (quoting *Hadi v. Liberty Behavioral Health Corp.*, 927 So. 3d, 38 (Fla. 1st DCA 2006)). For a good discussion of these standards, see *R.N. Expertise, Inc. v. Miami-Dade County Sch. Bd.*, Case No. 01-2663BID (DOAH Feb. 4, 2002) at ¶¶ 80-102 (Final Order March 13, 2002, adopting Recommended Order).

- **Order** – Within 10 days after the transcript is prepared, each party may file a proposed recommended order with the ALJ, outlining proposed findings of fact and conclusions of law. After reviewing the record and the proposed recommended orders, the ALJ enters a recommended order within 30 days. Parties can file exceptions with the agency. The agency enters a final order within 30 days after receipt of the ALJ’s recommended order.

### WHAT IS RESPONSIVENESS?

All three of the common procurement types require that a vendor be “responsive” in order to properly receive an award. Whether a vendor is “responsive” is often a key focus of the litigation in a bid protest. “‘Responsive bid,’ ‘responsive proposal,’ or ‘responsive reply’ means a bid, or proposal, or reply submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation.” § 287.012(25), Fla. Stat. As noted previously, a “Responsive vendor” is a “vendor who has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation.” § 287.012(26), Fla. Stat. Based on this language, whether a difference between the solicitation document’s requirements and the vendor’s bid, proposal, or reply is “material” becomes critical. If a vendor’s bid, proposal, or reply has a major deviation, it is non-responsive; however, not every deviation is material. *Robinson Elec. Co. v. Dade County*, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982); *Glatstein v. Miami*, 399 So. 2d 1005 (Fla. 3d DCA 1981). Minor irregularities can be waived by the agency. *Robinson Elec. Co.*, 417 So. 2d at 1034. To determine whether a deviation is material (and therefore non-waivable), courts have looked at:

. . . first, whether the effect of the waiver would be to deprive the [agency] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary standard common of competition.

*Id.* In other words, a deviation is material, and thus makes a vendor non-responsive, if the deviation gives the vendor “a substantial advantage” over the other vendors “and thereby restricts or stifles competition.” *Id.*; see, e.g., *Tropabest Foods, Inc. v. Dep’t of Gen. Servs.*, 493 So.2d 50, 52 (Fla. 1st DCA 1986); *Harry Pepper & Assocs., Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977). For example, in *Robinson Electrical*, the court determined that the submission of a cashier’s check in the correct amount, instead of a bid bond, was not a material deviation. 417 So. 2d at 1034.

Although ITNs provide greater flexibility than ITBs or RFPs and permit negotiation between the agency and selected vendors, a vendor must still be responsive in order to receive award via an ITN. DOAH orders initially construing the ITN process allowed the agency almost unlimited latitude in the procurement process and in the award. See e.g., *Health Mgmt. Sys.*, Case No. 08-2566BID (recommending that the agency’s proposed award to ACS be upheld as “an honest exercise of discretion” even though the agency requested an additional “best and final offer” (BAFO) from ACS but

not from the other vendor). These orders essentially held that the specifications were no longer relevant once the vendors entered into negotiations with the agency and anything could be negotiated at that stage. In 2010, the Florida Legislature enacted Chapter 2010-151, which included a requirement that “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.” See § 287.057(1)(c)4., Fla. Stat. (emphasis supplied). Thus, although agencies have flexibility in negotiations, the original requirements of the ITN must be adhered to.

Recently ALJ’s have made it clear (as chapter 287 plainly requires) that a vendor’s reply to an ITN must be responsive in order to receive the contract award. *see, e.g., Infinity Software Dev., Inc. v. Dep’t of Educ.*, Case No. 11-1662BID (DOAH June 7, 2011) (Final Order July 7, 2011, adopting Recommended Order) (rejecting the argument of the agency that because the procurement was an ITN, variances in the vendor’s replies were “of no moment because there will be negotiations before a contract is awarded.”). The *Infinity* order emphasizes that the evaluation committee in an ITN process – as in other procurement evaluations – must evaluate all replies for responsiveness before applying the evaluation criteria and before entering into negotiations with vendors. A vendor that does not agree to be bound by the terms of the ITN or by the pricing submitted, or that puts disclaimers on its reply, is non-responsive, and this non-responsiveness cannot be negotiated away.

#### WHAT ARE THE UNIQUE FEATURES OF A BID PROTEST?

- While not completely unique to bid protests (because it is true in all 120.57(1) cases), a bid protest stays award of the agency’s contract until the protest is resolved (unless the agency can show that a stay will pose a serious and immediate danger to the public health, safety, or welfare). See § 120.57(3)(c), Fla. Stat. An agency’s self-imposed delay or the threat of litigation will not ordinarily suffice as a danger sufficient to avoid the stay. See *Cianbro Corp. v. Jacksonville Transp. Auth.*, 473 So. 2d 209 (Fla. 1st DCA 1985). However, it is important to note that once the agency issues a final order, there is no stay during any appeal of the agency’s final order and the agency is free to award the contract while the appeal proceeds. Even if the appellant is successful in appealing the final order, given that the award has continued, the appellant will often have few remedies available.
- A bid protest requires the contracting agency to delay scheduling an informal proceeding or transferring the protest petition to DOAH until an opportunity has been provided to attempt mutual resolution of the protest. See § 120.57(3)(d), Fla. Stat.
- In connection with an ITB or RFP, information that supplements or modifies a bid or proposal cannot be considered. In connection with an ITN, no information that supplements or modifies a reply can be considered if the information was first offered after the agency issued its decision. § 120.57(3)(f), Fla. Stat. Also, the standards of proof differ from those in most administrative hearings. While the hearing is a *de novo* proceeding, per section 120.57(3)(f), it is not a “pure” *de novo* proceeding that is intended to assist an agency with the formulation of final agency action. The ALJ’s role is not to weigh in on what the ultimate procurement decision should be, but rather his/her role is limited to determining whether the agency’s procurement decision is proper. In other words, the ALJ does not sit as a substitute for the agency, deciding which vendor should get the contract award. Instead, he or she sits in a review capacity to determine whether the procurement review criteria have been satisfied. *State Contracting and Eng’g Corp. v. Dep’t of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

- Bid protests move faster than normal DOAH proceedings. If a formal hearing is required, it must be convened within 30 days after an ALJ is assigned, unless the parties agree to a later date. After the hearing, the ALJ's recommended order must be entered within 30 days after the hearing. § 120.57(3)(e), Fla. Stat. The deadline for filing exceptions is only 10 days, as opposed to 15. The agency must enter its final order within 30 days after receipt of the recommended order.

#### WHAT ARE THE IMPACTS ON THE AGENCY RESULTING FROM A PROTEST?

- Generally, a protest stays award of the agency's contract until the protest is resolved and the final order is issued.
- Expect massive requests for public records immediately. Because bid protests move so quickly, the vendors will want to know what happened so that they can prepare their formal written protest petitions. It is to the agency's advantage to produce these quickly, as sometimes a protestor will determine it has no good case and will decide not to file the formal written protest.
- Delays project, which may be a big deal if there are strict timelines for project completion.
- Costly to the agency in terms of time and resources to defend the protest.
- May reveal mistakes in the procurement process and/or violations of the Sunshine Law that the agency would rather not have publicly known.
- Depending on the outcome of the protest, it could result in a "do-over" of the procurement process.

<h4><b>TIPS FOR AVOIDING A PROTEST:</b></h4>
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- **Make sure specifications in the solicitation documents are sufficiently clear and unambiguous to inform prospective vendors of the project requirements.** Specifications that are unclear or can be interpreted in different ways may be protested within 72 hours of issuance or, if not timely protested, could result in inconsistent interpretations of ambiguous provisions by vendors, causing a protest of a proposed award.
- **Be careful of Sunshine Law violations (and make sure your evaluators and negotiators know what is allowed and not allowed).** Evaluation committees formed for purposes of a particular procurement are subject to the broad provisions of the Sunshine Law. For example, two evaluation committee members communicating about bids or the vendors outside of the formal evaluation committee meetings is not permitted, even if the discussions are general discussions about the procurement and even if vendors are not specifically named. This prohibition includes in-person meetings, phone conversations, emails, text messages, and written communications. Further, evaluation committee members may not use other individuals as "conduits" to relay communications to other committee members. Meetings of the evaluation committee must be properly noticed and recorded. Further, the agency has a duty to preserve the tape recordings of such meetings. Negotiation teams (when an ITN is used) may meet outside of the Sunshine (so long as the meetings are recorded) but still may not talk among themselves or communicate in any fashion outside of negotiation committee meetings. Public attendance is precluded at "[a]ny 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." § 286.0113(2)(b)1., Fla. Stat. Also exempt are team meetings at which negotiation strategies are discussed. § 286.0113(2)(b)2., Fla. Stat. Such meetings must be recorded, per section 286.0113(2)(c)1., and the recordings must be made available when the agency provides notice of an intended decision or 30 days after the opening of the bids, proposals, or

final replies, whichever is earlier. § 286.0113(2)(c)2., Fla. Stat. For more details, see the 2012 Government-in-the-Sunshine Manual, available at <http://www.myflsunshine.com/sun.nsf/sunmanual>.

- **Be careful of ex parte communications.** Per chapter 287, communications between vendors and the procuring agency are prohibited during the “quiet period.” Vendors may not communicate with anyone at the agency other than in writing to the purchasing agent. If this requirement is violated, the vendor’s submission may be rejected. Allegations about violations of the “quiet period” have been raised in several bid protests.
- **Make sure the agency decision-makers understand the difference between material variances and minor irregularities.** Bids must adhere to the material specifications of the solicitation document in order to be responsive. Only minor irregularities that do not limit competition or affect price can be waived.
- **Ensure that the agency is not attempting to award to a non-responsive vendor.**
- **Do not think that an ITN lets the agency do whatever it wants.**
- **Make sure the evaluation committee members do not commit or give the appearance of bias, improper conduct, or ethical violations.**
- **Watch evaluation errors.** Other grounds for protest may be that mistakes were made by the evaluators in scoring, such as that incorrect criteria were used or that mathematical mistakes were made in calculating a vendor’s total score.
- **Be careful that evaluators do not consider extraneous information.** Decisions for award of a contract from an ITB or RFP must be based solely on the material contained in the vendor’s bid or proposal. Statements made by the vendor that are not contained in the bid or proposal cannot be considered in evaluating the vendor or awarding the contract. For an ITN, discussions in negotiations and in the BAFO can be considered in the final round of scoring. However, no information that supplements or modifies a reply or BAFO can be considered if the information was first offered after the agency issued its decision. Also, the new information submitted to the agency by the vendor during the negotiation process must still be responsive to the ITN, even if it was not in the vendor’s original reply.

<b>IF YOUR AGENCY CANNOT AVOID A BID PROTEST, TIPS TO HELP YOU SURVIVE IT:</b>
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- **Preserve all relevant documents and recordings.**
- **Review these documents as soon as possible. If you spot major problems in the procurement, it’s easier and more efficient to have a “do-over” now rather than after going through another month or more of litigation.**
- **Provide responses to public records requests quickly and completely.**
- **Take the time to carefully prepare the agency witnesses before depositions and hearing.**
- **Work closely with counsel for the Intervenor, i.e., the winning vendor.**