Education Law Certification

Procurement and Bid Protests
Introduction

- Procurement and Bid Protests
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Goals for Presentation

- Help Pass Test
- Issue Spotting
- Fla. Stat. § 120.57(3) (2018) – bid protest procedures
Background

- Requirement and Rules for Competition
- 3 Types of Procurements
  - Invitation for Bids (IFB)
  - Request for Proposals (RFP)
  - Invitation to Negotiate (ITN)
- Bid Protests
- Detailed Written Materials
Basic Public Procurement Concepts

- No Common Law Requirement – No Constitutional Requirement
- Nearly All Government Has Requirements
  - Purpose – prevent favoritism and inspire public confidence in public spending
  - Fair and Open
  - Document decisions
Government has Broad Discretion

- Honest Discretion – even if reasonable people may disagree
- Arbitrary or Capricious – without facts or logic
- Even greater discretion to reject all bids
Chapter 287 Rules Do Not Apply

- State Agencies Only
- Executive Level
- Does Not Include Schools or Universities. *Dunbar Elec. Supply, Inc. v. School Bd. of Dade County*, 690 So.2d 1339, 1340 (Fla. 3rd DCA 1997)
- CCNA, 287.055(2018) - applies
Educational Institutions

- Law and Rules of State Board of Education or Board of Governors
  - District school board responsible for use of internal funds and shall develop principles and procedures consistent with State rules
Educational Facilities

- School Districts - FAC § 6A-1.012(7) – above $50,000
- Solicit from three or more sources
Universities

- Board of Governors Regulations, Chapter 18
- Competitive solicitations for the purchase of all goods and services greater than $75,000. BOG Regulation 18.001(2) (11/3/2016)
- If only one response received, re-procure or continue if second procurement will not serve a useful purpose
Colleges

- Fla. Stat. § 1010.04(1)(a) (2064) (“Purchases and leases of the Florida College System shall comply with the requirements of law and rules of the State Board of Education.”)

- FAC 6A-14.0734(1) (6/20/07) - compete among three sources above $65,000
Exceptions to Competition

- Fla. Stat. § 1010.04(4) (2016) (authorizes rule where impractical)
- FAC § 6A-1.012(11)
  - Legal Services
  - Academic Program Reviews
- Single or Sole Source – post for 7 days
- Emergencies – agency cannot create – limited competition
- Piggybacking – State/Term or Others – must be competitive (implied)
State Term Contracts

- No need to redo the wheel
- Added specific requirement in 2016 – 1010.04(1)(b)
- Nonacademic goods and services
- Whether it is in economic advantage to use pre-existing purchasing agreements or state term contract under 287.056 before letting procurement
Competitive Solicitations

- Three Types: IFB, RFP, ITN
- Bids (IFB) – low price, responsive and responsible
Common Elements

- Responsiveness – conform with instructions
  - Minor Irregularities v. material deviation
- Responsibility – integrity and capability to perform
  - Not most responsible
  - Litigation History
  - Definitive Responsibility
- Late Bids – have consistent practice
More Complex Methods

- Proposals (RFP)
  - Responsive and Responsible
  - Best Value: Price and Technical
  - Low Price, Technically Acceptable (LPTA)

- Negotiation (ITN)
  - Responsive and Responsible
  - Best Value: Price and Technical
  - Best and Final Offers
  - Negotiation
Common Issues

- Make Available to all through public posting
- Clear and Fair Specifications
- Reject All
Bid Protests

- School Board Not State Agency for Bid Protest

- For purposes of this subsection, the definitions in s. 287.012 apply. Fla. Stat. § 120.57(3)(g)

- So Not Mandatory Under Chapter 120

- Fla. Stat. § 255.0516 (2018) – opt in
Bid Protest Bond

- Bond –
- 25k or 2% lowest bid, the greater (500K+ projects)
- 5% all other projects
- Opportunity to Cure
  - should be yes
General Procedural Rules

- Notice of Protest – 72 hours
- Formal Written Protest – 10 days
- Bid Protest Bond
Standard of Review/Proof

- Award Decisions - clearly erroneous, contrary to competition, arbitrary, or capricious.
- Reject All - whether the agency’s intended action is illegal, arbitrary, dishonest, or fraudulent.
Attorney’s Fees

- If at the hearing the agency prevails, it shall recover all costs and attorney’s fees from the protestor.

- Bid Protest Bond Protects Agency

- If the protestor prevails, the protestor shall recover from the agency all costs and attorney’s fees.