



Procurement Update to TACNIGP

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Welcome

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Recent Cases or Issues

- Piggybacking
- Payment of Judgments
- Equitable Tolling or Excusable Neglect

Piggybacking

- Exception to Competition
- Purchase from Another Agency
- Agency Already Purchased Competitively
- Saves Time and Resources
- Save Money – Know the Specific Price

Appellate Case

- Challenged “piggybacking” by County
- Trial Court – Granted SJ for County
- Appellate Court - Reversed
- Non-Chapter 120 Case – Direction Action

- *Accela, Inc. v. Sarasota County*, --- So.2d ----, 2008 WL 508397, 33 Fla. L. Weekly D601 (Fla. 2nd DCA Feb. 27, 2008)

Piggybacking Case - Facts

- Purchase of Software to Track Land Management Issues
- Visited Two Local Jurisdictions that Used Software and Converted from Current System
- Piggybacked On Vendor's Most Current Contract from Wisconsin

Standard of Review

- Whether the County acted arbitrarily or capriciously in entering into the piggyback agreements with company
- Government must follow its own laws for a contract with the entity to be valid
- Essentially Same Standard as Chapter 120

Sarasota Procurement Code

- Other local government or public entity
- Vendor extends the terms and conditions of the existing contract
- Other government entity competed competitively
- Procurement Code, at § 2-256(3)

Piggybacking is Competitive

- Key issue: Extension of Terms
- Increased “Modules”: 176k to 711k
- Increased Implementation: 269k to 688k
- Increased Maintenance: 31k to 179k

Piggybacking: Lessons Learned

- Terms and Scope of New Contract must be Substantially the Same as Original Contract
- Cannot Use Another Entity's Contracts Merely as a Basis to Begin Negotiations

Application to State Agencies?

- State Piggybacking
- State Term Contract
- Another Agency's Contract procured as IFB, RFP, or ITN
- Doesn't include – “extend terms and conditions”
- Fla. Stat. § 287.057(5)(b) (2008)

Payment of Judgments

- Demonstrates why a Lawyer's Most Common Answer is "It Depends," "Maybe," "It is 50-50%"
- OK, so you sued the Government and You Won, what next?
- Are you going to Disney World

Facts of Contractpoint

- Concessions agreement to finance, construct, and operate 143 vacation cabins and associated concessions in 8 state parks, obligating contractor to pay DEP fifteen percent of its gross sales for thirty years
- Contractor prevailed in breach of contract challenging its termination, judgment of \$628,543.
- DEP refused to pay without a specific appropriation

Payment of Judgments

- Fla. Stat. § 11.066 was not intended to require a specific legislative appropriation before a governmental entity can be required to pay a valid judgment entered into for breach of contract with a private entity
- *Florida DEP v. Contractpoint Florida Parks, LLC*, --- So.2d ----, 2008 WL 2678812 (Fla.), 33 Fla. L. Weekly S493 (Fla. July 10, 2008)

Timeliness of Bid Protests

- 72 Hours – Notice of Protest
- 10 Days – Formal Written Protest
- When is Untimely Timely?

Equitable Tolling

- Misled or lulled into inaction
 - Has in some extraordinary way been prevented from asserting rights; or
 - Timely asserted rights mistakenly in the wrong forum
-
- *Machules v. Dep't of Admin.*, 523 So.2d 1132, 1134 (Fla.1988).

Three Potential Valid Excuses

- Improper Posting
- Equitable Tolling
- Excusable Neglect

Equitable Tolling

- Lulled Into Inaction by Agency
- Filed timely, but with wrong person
 - *Gibbons & Co., Inc. v. Florida Board of Regents*, DOAH 99-0697BID (September 17, 1999)
- Did Not Know or Counsel mistake not sufficient
 - *Envtl. Res. Assocs. of Fla., Inc. v. State, Dep't of Gen. Servs.*, 624 So.2d 330 (Fla. 1st DCA 1993);
 - *Cann v. Dep't of Children & Family Servs.*, 813 So.2d 237 (Fla. 2d DCA 2002);
 - *Williams v. Albertson's, Inc.*, 879 So.2d 657 (Fla. 5th DCA 2004);
 - *Aleong v. State, Dept. of Business and Professional Regulation*, 963 So.2d 799 (Fla. 4th DCA 2007)

Excusable Neglect - Bid Protests

- No conduct by Agency caused lateness
- Protester/Lawyer Screwed Up
- May Still Apply?

Excusable Neglect

- First, timing starts from receipt of agency's notice.
- Second, timing is longer 21 days versus 72 hours.
- Third, the statutory language regarding "shall be dismissed" versus "waived"

Excusable Neglect

- “Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter.”
Fla. Stat. § 120.57(3)(b)
- “A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed.”
Fla. Stat. § 120.569(2)(c)