Florida Bid Protests

Overview and Statistical Analysis
Introduction

- Overview of Florida Bid Protests at State Level
- Statistical Analysis
- Joseph M. Goldstein
- Shutts & Bowen, [www.shutts.com](http://www.shutts.com)
- Federal, State, and Local Government Contracting
- Business Litigation
Procurement Law in Florida

- **State – Florida Statutes, Chapter 287 and Chapter 120**
  - Florida Department of Transportation, Chapter 337
  - Lottery, Chapter 24

- **County and Municipality**
  - Limited Statutes, § 287.055 Professional Services, and § 255.20
  - Ordinance
  - Policy or Manual
Bid Protests - State Agencies

- State Executive Agencies
- Not Counties or Municipalities
- Not Special Districts
- School Districts – optional
Similarities Among Jurisdictions

- Standing
- Specification Challenges (*)
- Award Challenges
- Reject All (*)
- Stay of Procurement or Award (*)
- Standard of Review (*)
- Bonds or Filing Fee
Differences Among Jurisdictions

- Fact Finder
- Discovery
- Amendments
- Hearing
State – Governing Statutes

- Florida Administrative Procedure Act
- Chapter 120, Florida Statutes
  - Fla. Stat. § 120.57(3) – bid protests
  - Fla. Stat. § 120.569 - generally
State - Regulations

- Florida Administrative Code
  - Fla. Admin. Code Chapter 28-110 (protests)
  - Fla. Admin. Code Chapter 28-106 (general)
  - Check Agency’s FAC

- Division of Administrative Hearings (DOAH)
State Bid Protests - Timeliness

- Trigger – Electronic Posting of Decision or Intended Decision
- Notice of Protest – 72 hours
  - Specification - from posting of solicitation
  - Award – from posting of award
- Formal Protest – 10 days from Notice
  - Exceptions – Lottery (72 hours)
- Stay commences upon filing Formal Protest
State Bid Protests - Format

- Notice – one page
- Formal – like complaint or summary judgment motion
- Amendments – freely given
State Bid Protests – Settlement

- Settlement Meeting Mandatory
  - Informal
  - Within 7 days for filing formal protest
  - Notice – one page

- If not settled
  - Informal hearing – no facts in dispute
  - Formal hearing – facts in dispute
State Bid Protests – Hearings

- Division of Administrative Hearings (DOAH)
- Administrative Law Judges
  - Like Federal Magistrates
  - All FL APA Matters
State Bid Protests – Time Period

- Expedited Hearings
  - Within 30 days
  - Like informal bench trial
- Decision
  - 30 days after hearing or transcript
- Exceptions – 10 days
- Final Order – 30 days
State Bid Protests – Standard of Review

- De Novo Proceeding - violation of statute, rule, policy or solicitation
- High Burden
  - Clearly Erroneous
  - Contrary to Competition
  - Arbitrary
  - Capricious
  - Reject All - illegal, arbitrary, dishonest, or fraudulent
State Protests - Bond

- Generally with Formal Protest
  - 1 percent of the estimated contract amount
  - Based on protester’s submission
  - Fla. Stat. § 287.042(2)(c)
  - Goods or Services

- Agency specific rules – FDOT
  - Qualification
    - Specification - $5,000
    - Others – 1% of lowest bid or $5,000 (greater)
  - No Pre-qualification - $2,500
State Protests – Bond Conditions

- Payment of all costs, including on appeal
  - Transcripts
  - Others
- Excludes attorney’s fees
State Protests – School Districts

- Fla. Stat. § 255.0516
- May require:
  - $25,000 or 2 percent of the lowest accepted bid, whichever is greater, for projects valued over $500,000
  - 5% of the lowest accepted bid for others
- Includes attorney’s fees
- Prevailing party
State Protests – Discovery

- Public Records
- Full Discovery
  - Written
  - Oral
- Motion Practice
- Protective Orders
- Conduct of Hearings
Non-State Protests

- Multi-steps
  - Procurement Director/Manager/Attorney
  - Hearing Officer
  - Elected Officials
  - Judicial
- Limited Discovery
- Limited Hearing Rights
Broward County, Florida

- $4.84 Billion Budget
- Population 2 Million (MD is $2.7 Million)
- Ordinance
- Administrative Code
- “Policy”
Broward County - Process

- Purchasing Director
- Multiple carve outs
  - Decision of E/SC limited to deviations from procedures and guidelines
  - Cannot protest vendor misconduct or misrepresentation
- Timeliness
  - 7 days – specifications
  - 5 days – award
Broward County - Process

- **Filing Fee** - nonrefundable
  - Up to $500 to $5,000
- **No Stay**
- **Public Records**
- **No Amendments**
- **No Discovery**
- **Weeks or Months**
- **Written Decision**
Broward County – Second Level

- Appeal - 10 days
- Bond
  - 1% of the contract amount
  - Costs and fees, not attorney’s fees
  - Returned if prevail
- Stay
- Hearing Officer
  - Limited discovery
  - Witnesses
Miami-Dade County, Florida

- $7.4 Billion Budget
- Population 2.7 Million
- Ordinance
- Implementing Order
Miami-Dade County - Process

- Hearing Officer
- Timeliness
  - 48 hours before due date – specifications
    - Cannot challenge weight or method
  - 3 days – award
- Supplementation
  - 3 days
  - 48 hours from receipt of public records
  - No other amendments
Miami-Dade County - Process

- Filing Fee - refundable
  - Up to $500 to $5,000
- Hearing within 10 business days
  - May extend 5 business days
- Public Records
- No Discovery
- Witnesses
- 2 Hour Presentation
- Written Decision within 5 days
Miami-Dade – Appeal

- Denial by Hearing Officer
  - No presentations to Commission
  - 2/3 to override decision except reject all

- Grant by Hearing Officer
  - Presentations
  - Majority Vote
Tallahassee – Capital City

- Nothing in Ordinance
- Purchasing Manual
- Timeliness
  - Specification – 72 hours before due date
  - Award – 72 hours after award
- Bond
  - 1% of Contract or $5,000, whichever less
Tallahassee – Capital City

- City Attorney
- Stay
- Informal Hearing
- No Discovery
- Witnesses
- Written Decision
Fort Lauderdale – Bid Protest

- Ordinance
- No mandatory stay
- Director of Procurement Services
- Timeliness
  - No mention specification challenge
  - 5 days from award
- Filing Fee of $50 to $200
- Written Decision within 7 days
- Appeal to City Commission
Bid Protests Filed and Closed

Florida DOAH Bid Protest Cases Filed and Closed

Avg. Filed = 37
Avg. Closed = 22
% of Cases Closed without Decision

Florida DOAH Bid Protests - Closed Rates

Avg. = 57%
Cases Decided on the Merits

Florida DOAH Decisions Decided on the Merits

Avg. = 15
% of Cases Decided on the Merits

Florida DOAH Bid Protest Cases Decided on the Merits Rate

Avg. = 43%
Florida DOAH Bid Protests - Sustains

Number of Sustains / % of Sustain Merit Cases

Avg. = 24%
Florida Bid Protests - % Sustained

Florida DOAH Sustain Rate All

Avg. = 10%
Florida DOAH Bid Protests Denied

Number of Denies

 Avg. = 11

9 15 9 10 10 14 16 13 10 9 17

Shutts
Florida DOAH Bid Cases Denied %

Deny Rates All / Deny Rates Merit Cases

Avgs. = 33% and 76%