

# **Florida Bid Protests, Advanced: The Law and Practical Tips**



**By Andrew E. Schwartz and  
Joseph M. Goldstein**

# Introduction

- This CLE will cover a few of the different aspects of bid protest law in Florida, focusing on Ch. 120 protests.
- Ch. 120 governs protests for state-level executive agencies, water management districts, and school boards that opt in.
- Although procedures for municipalities may be different, legal principles are same
- Real-world practice tips.

# Topics of Discussion

- What Is a Bid Protest?
- Types of Procurements
- Filing the Protest/Timeliness
- Settlement Conference
- Automatic Stay
- Challenges to a Solicitation/Timeliness
- Standing
- Merits
- Remedies
- Exceptions to Recommended Order
- Questions?

# What is a Bid Protest?

- When the Government Buys Goods or Services It Has to Hold a Competition
- Bid Protests Are a Process By Which Interested Parties Can Challenge the Government's Actions
- Extraordinary Concept – Does Not Exist in Private Sector

# Types of Procurements

- The government procures property or services through a “competitive solicitation,” which will generally be one of three types:
- An invitation to bid (“ITB”) - § 287.057(1)(a), Fla. Stat.
  - Award is made to the lowest responsive and responsible bidder. § 287.057(1)(a), Fla. Stat.
  - A “responsive” bidder is one who unequivocally agrees to all material terms and conditions of the solicitation. Material terms are those which affect the price, quantity, quality, or delivery of the goods, property, or services being procured.
  - A “responsible” bidder 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.
  - Cannot award to a higher-quality, higher priced offeror.

# Types of Procurements – Cntd.

- A request for proposal (“RFP”) - § 287.057(1)(b), Fla. Stat.
  - Award is made to the responsive, responsible offeror whose offer provides best value based on price and other factors, as per the RFP’s **stated evaluation criteria**.
  - The RFP **must** state the **relative importance** of price and the other evaluation criteria.
  - Can award to a higher-priced, higher-quality offeror, or a lower-priced, lower-quality offeror.
    - Can also award to lowest priced, technically acceptable offeror.
    - Other bases? Highest rated, reasonably priced offeror?
  - Gives agencies much more discretion than an ITB in selecting an awardee because award is based on subjective evaluation of qualitative factors.
    - Common misconception that agencies cannot use “subjective criteria,” but qualitative evaluations are inherently “subjective.”
  - *Agencies may only use an RFP if using an ITB is not practicable. § 287.057(1)(b), Fla. Stat.*

# Types of Procurements – Cntd.

- An invitation to negotiate (“ITN”) - § 287.057(1)(c), Fla. Stat.
  - **Unique to Florida/Ch. 287.**
  - Award is made to the responsive, responsible offeror whose offer provides best value based on price and other factors, as per the ITN’s **selection criteria.**
  - Award is to be made to an offeror the agency conducted negotiations with, and agencies select offerors for negotiation based on stated evaluation criteria.
  - **§ 287.057(1)(c) is silent as to whether ITN must state the relative importance of the initial evaluation criteria or final selection criteria.**
  - Gives agencies maximum discretion in selecting an awardee(s).
  - *Agencies may only use an ITN if using an ITB or RFP is not practicable. § 287.057(1)(c), Fla. Stat.*

# Filing the Protest/Timeliness

- Under Ch. 120, protesters have **72 hours** to file a notice of intent to protest once the agency “electronically posts” a “decision or intended decision” **on the Vendor Bid System** or VBS ([www.myflorida.com/apps/vbs](http://www.myflorida.com/apps/vbs)).
- There are four types of “decisions or intended decisions:”
  - (1) a solicitation, including addenda;
  - (2) a decision to make a sole source award;
  - (3) a decision to reject an offer or all offers; and
  - (4) an award or intended award.



# Filing the Protest/Timeliness – Cntd.

## Sources

§ 120.57(3), Fla. Stat. (APA bid protest provisions, including provisions regarding point of entry and filing deadlines)

§ 287.012(10), Fla. Stat. (definition of “electronic posting”)

Fla. Admin. Code R. 28–110.002(2) (definition of decision or intended decision)

Fla. Admin. Code R. 60A-1.021 (designating VBS as “electronic posting” site)

# Filing the Protest/Timeliness – Cntd.

*AT&T Corp. v. State, Dep't of Mgmt. Servs.*, 201 So. 3d 852 (Fla. 1st DCA 2016):

- A protester challenging an award in a negotiated procurement raised challenges to the acceptability of the awardee's initial offer and inclusion within the competitive range.
- The ALJ denied the protest on the merits, and ruled in the alternative that the protest had been waived because the protester did not challenge the awardee's inclusion in the competitive range when the agency posted a list of initial offerors that it would negotiate with.
- The First District affirmed the ALJ's denial of the protest on the merits, but noted in dicta that because “[a] Notice of Intent to Negotiate is not one of the listed ‘decisions’[ in Fla. Admin. Code R. 28-110.002(2),]” offerors are not required to protest the inclusion of their competitors within the competitive range at that time.

# Filing the Protest/Timeliness – Cntd.

- Notice of Intent to Protest is simply a letter that says a firm intends to protest a specifically identified “decision or intended decision.”
- **If a firm that submitted an offer is protesting, the notice must be filed on behalf of the legal entity that submitted the offer, otherwise protest subject to dismissal.**
  - If the protest is being filed by a firm challenging a solicitation/sole-source, must be filed on behalf of entity that would have bid.
- Protester has ten days after filing notice to protest to file a formal protest letter.
- Generally, formal protest letter must be accompanied by a protest bond equal to 1 percent of the estimated contract amount.
- Protesters should ask the agency for the estimated contract amount in their notice of protest, and a form protest bond can be found at Fla. Admin. Code R. 28-110.005.

# Filing the Protest/Timeliness – Cntd.

## Some exceptions:

- For projects valued over \$500,000, School Boards may require bonds in the amount of \$25,000 or 2% of the lowest accepted offer, whichever is greater. § 255.0516, Fla. Stat.
  - School Board bonds provide for prevailing party fees and costs, other protest bonds only provide for costs.
- FDOT protest bonds are generally for 1% of the project amount, or \$5,000, whichever is greater. § 337.11(5)(a), Fla. Stat.
  - For challenges to FDOT solicitations requiring qualification of bidders, the bond is in the amount of \$5,000.
- For Department of Lottery protests, there is no “notice of protest.” Instead, both the formal written protest and the protest bond must be filed within 72 hours of the posting of decision or intended decision. § 24.109(2)(a), Fla. Stat.

# Filing the Protest/Timeliness – Cntd.

- “The formal written protest shall state with **particularity the facts and law** upon which the protest is based.” § 120.57(3)(b).
- Fla. Admin. Code R. 28.106-104 and 28-110.004 includes a “checklist” of items that must be included in protest.
- **Practice Tip:** Ch. 120 protesters should also follow the U.S. Government Accountability Office’s (“GAO”)’s pleading standard, which requires written protests to “provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action.” *AeroSage, LLC*, B-415267.8, 2017 WL 6350826, at \*4 (Comp. Gen. Dec. 13, 2017).
- Treat a formal written protest more like a motion for summary judgment than a circuit court complaint.

**Why?**

# Settlement Conference

- Section 120.57(3) requires agencies to hold settlement conferences with protesters within seven days of the filing of the formal protest, and authorizes agencies to make any settlement agreement that is “not precluded by law[.]”
- “Voluntary corrective action” can include the following:
  - Rejecting some or all offers;
  - Awarding a contract to the protester;
  - Re-evaluating one or more offers under one or more factors;
  - Amending the solicitation and seeking revised offers;
  - Any other action that is not “precluded by law”
- If there is no settlement, goes to a DOAH ALJ for trial
- Agency should be able to decide to take voluntary corrective action after referring matter to DOAH, but agency should electronically post a notice of withdrawal of its decision or intended decision on VBS and subsequently move to relinquish jurisdiction back to agency on mootness grounds.

# Settlement Conference

- **Practice Tip:**
- Protesters have an exponentially better chance of obtaining “voluntary corrective action” (a settlement) than they do of convincing an ALJ or a appellate court to overturn a procurement.
- **This means agency counsel is the real target audience for a formal written protest, not the ALJ.**
  - Don’t wait until to the settlement conference to present your good arguments or to convince the agency to settle.
- The formal written protest should be detailed and specific enough to (1) convince agency counsel that his or her client did something wrong that should be corrected; and (2) give him or her solid grounds to convince the agency this is the case.

# Automatic Stay

- “Upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.” § 120.57(3)(c), Fla. Stat.
- Timely filing a 120.57(3) protest triggers the “automatic stay,” which stays the procurement until a protest is resolved.
- Essentially, an automatic preliminary injunction to make sure that meaningful relief is available to the protester.
- Agencies can override a stay if necessary to “to avoid an immediate and serious danger to the public health, safety, or welfare.”



# Automatic Stay – Cntd.

Appellate courts are arguably split on whether an agency's failure to adequately plan for its procurement needs can justify a stay override.

- *AvMed, Inc. v. State, Sch. Brd. of Broward Cnty.*, 790 So. 2d 571 (Fla. 4th DCA 2001).
  - School Board procures health insurance contracts and award is protested.
  - School Board did not include a provision in previous contract allowing it to extend indefinitely in the event of a protest during the follow-on procurement, thus its employees would lose insurance coverage if it did not override stay.
  - Fourth District upheld School Board's decision to override stay, but does not give reasons applicable to other procurements.

# Automatic Stay – Cntd.

- *Cianbro Corp. v. Jacksonville Transp. Auth.*, 473 So. 2d 209 (Fla. 1st DCA 1985).
  - Protesters challenge the rejection of their bids for the construction of a bridge.
  - Agency overrides stay because it would lose the opportunity to obtain federal funding if it waited to make award until after protest process was completed.
  - First District reversed stay override. Agency had known about the funding deadline for years, but held a last-minute procurement that did not build in time for a protest.
  - First District broadly explains that upholding agency in case before it would encourage agencies to fail to plan ahead in order to create emergencies that would allow them to evade meaningful judicial review.

# Challenges to a Solicitation/Timeliness

Agencies can include provisions in a solicitation which are unlawful or improper. If a solicitation includes a provision that a prospective offeror thinks improperly excludes it from the competition, or otherwise improperly impacts its chances of winning, it can challenge the solicitation before offers are due.

*Audio Visual Solutions Corp. v. Sch. Brd. of Broward Cnty., Fla.*, DOAH No. 06-1969BID, 2006 WL 3101928 (Fla. Div. Admin. Hrgs. Oct. 30, 2006) (RO) (Parrish, ALJ):

- Solicitation provided for offerors to submit prices for multiple items.
- Solicitation provided that agency would post offerors' initial prices, then anyone who submitted the lowest for any one item could submit revised prices for all items.
- ALJ sustained protest, essentially finding that solicitation provided for improper "auctioning" or "bid shopping," which is when the agency plays bidders off each by revealing their prices then seeking new bids.

# Challenges to a Solicitation/Timeliness – Cntd.

- Under § 120.57(3)(b), challenges to a solicitation provision must be raised within 72 hours of issuance of the provision.
- **Protesters frequently raise putative challenges to an award that are really untimely challenges to the solicitation.**
- Under the waiver rule a contractor cannot compete for a contract, then challenge the ground rules of the competition after learning it has lost and reading its competitors' offers.
- After-the-fact challenges to the solicitation are costly and undermine the integrity of the competitive process.
- **The waiver provision is very broad, and can time-bar protests alleging unlawful agency action that is consistent with the solicitation.**

# Challenges to a Solicitation/Timeliness – Cntd.

*Optiplan, Inc. v. Sch. Bd. of Broward Cnty.*, 710 So. 2d 569 (Fla. 4th DCA 1998) (“[W]ith respect to the constitutional challenge to the RFP’s specifications because it awarded points tied to race-based classifications, 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. The purpose of such a protest is to allow an agency to correct or clarify plans and specifications prior to accepting bids in order to save expense to the bidders and to assure fair competition among them, Having failed to file a bid specification protest, and having submitted a proposal based on the published criteria, Optiplan has waived its right to challenge the criteria.”) (internal citations omitted).

# Challenges to a Solicitation/Timeliness – Cntd.

*South Florida Community Care Network v. Fla. Dep't of Health*, DOAH No. 18-4242BID, 2018 WL 6622136 (Fla. Div. Admin. Hrgs. Nov. 19, 2018) (RO) (Telfer, ALJ)

- The Department of Health (“DOH”) issued an invitation to negotiate which explained that it had entered into a prime contract with the Agency for Health Care Administration (“AHCA”), another Florida agency, pursuant to which it was procuring one or more Children Medical Services (“CMS”) Medicaid plans.
- The ITN essentially divided the state of Florida into multiple “clusters” or regions, and allowed offerors to bid on as many regions as they wanted, but states “The Department intends to award one state-wide Contract to a Respondent to assist with the administration of the CMS Plan. The Department will award additional contracts only if there is no acceptable state-wide Respondent for all areas of the state. The Department reserves the right to award more than one contract based on regional clusters.”

# Challenges to a Solicitation/Timeliness – Cntd.

*South Florida Community Care Network v. Fla. Dep't of Health*, DOAH No. 18-4242BID, 2018 WL 6622136 (Fla. Div. Admin. Hrgs. Nov. 19, 2018) (RO) (Telfer, ALJ)

- Two Q&A's in an addendum to the ITN both include questions addressed to the “statewide” preference, and the answers to both questions state, in part, that “Additional points/preference will be given to state-wide bids regardless of risk type. The Department will award contracts by Regional Cluster only if there is no acceptable state-wide Respondent for all areas of the state.”
- Protester submitted a bid in three regions, lost, then alleged, amongst other things, that:
  - The entire procurement was illegal because under the federal Medicaid “single-state agency requirement” AHCA could not lawfully delegate the authority to conduct the procurement to the DOH.
  - The “statewide” preference provision in the ITN violates Ch. 409, Fla. Stat.
- ALJ held the allegations were untimely challenges to the ITN.

# Challenges to a Solicitation/Timeliness – Cntd.

## Practice Tip:

- Most solicitations provide for a Question and Answer (“Q&A”) process which allows prospective offerors to submit written questions regarding the solicitation to the agency.
- Pursuant to this process, the agency will include a list of the submitted questions and its answers to those questions in an addendum to the solicitation.
- Firm can submit question pointing out what it believes to be the problems with a provision and ask the agency to amend, clarify, or delete it.
- If the prospective offeror doesn’t agree with the agency’s answer, it can file a protest challenging the Q&A.

**\*\*\*Note** – There are no appellate decisions addressing whether a Q&A resets the clock for protesting the provision addressed in the Q&A, **so merely submitting a question may not extend the time.**



# Standing to Protest

- Only those who have been “adversely affected” by the agency’s “decision or intended decision” have standing to pursue a protest. § 120.57(3)(b) (“Any person who **is adversely affected** by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision.”) (emphasis added).
- Merely claiming that the agency’s actions are erroneous or otherwise illegal is **not** sufficient to establish standing to pursue a protest.

# Standing to Protest – Cntd.

For **post-award protests** (challenges by disappointed offerors to an award or decision to reject all), the protester must allege that, but for the agency's errors, there is a **substantial chance** it would have been selected for award. *E.g.*, *Madison Highlands, LLC v. Fla. Housing Fin. Corp.*, 220 So. 3d 467 (Fla. 5th DCA 2017); *Preston Carroll Co. v. Fla. Keys Aqueduct Auth.*, 400 So. 2d 524 (Fla. 3d DCA 1981).

- This does **not** mean only the “second-lowest” or “second-ranked” offeror has standing to protest.
- It means the protestor must challenge everyone between itself and the award and/or must put enough of its own factor ratings/scores **into play to potentially change the outcome of the competition for the protester.**

# Standing to Protest – Cntd.

- If a protester is ranked five out of five but its protest fails on the merits as to the fourth-ranked offeror, it lacks standing to maintain any challenges to the third-, second- or first-ranked offerors. *E.g., Louis Berger Grp., Inc. v. Fla. Div. of Emergency Mgmt.*, DOAH No. 15-2357BID, 2015 WL 3743152 (Fla. Div. Admin. Hrgs. June 10, 2015) (RO) (Quattlebaum, ALJ) (denying eighth-lowest bidder’s challenge to seventh-lowest bid on the merits, and dismissing remaining protests for lack of standing). *Cf. Madison Highlands*, 220 So. 3d 467 (citing *Louis Berger Grp.* with approval).
- In *Agency for Health Care Admin. v. Best Care Assurance, LLC*, No. 1D19-326, 2020 WL 4745394 (Fla. 1st DCA Aug. 17, 2020), the protester was a winner who sought to challenge a “fifth” contract award on the grounds this violated a Medicaid statute capping the number of awards at four. The Court found the protester lacked standing because the statute was not intended to protect Medicaid awardees against the harm alleged, which was “too much” competition.

# Standing to Protest – Cntd.

- **Practice Tip:**
- Protesters Challenging an Award: For each ground of protest, try to explain in protest letter why that ground of protest is, on its own, sufficient to show prejudice to avoid a “pick off.”
- Agencies/Intervenors: Try to “pick off” protests. Examples:
  - If a bidder who was eliminated challenges its own elimination and the awardee’s scores, show why the elimination was proper. If the elimination was proper, then lowering the awardee’s scores does nothing to increase protester’s chances of winning and it lacks standing.
  - If a bidder challenges scores under multiple factors, but must prevail on all factor challenges to win, then move to dismiss or for MSJ on weakest score challenge, and to dismiss for lack of standing to pursue other factor challenges.

# Standing to Protest – Cntd.

For “pre-award” protests (challenges to a solicitation) or “other” protests (protests that are neither pre-award nor post-award protests), the protester must allege it has sustained some sort of “non-trivial competitive injury” that is susceptible to meaningful judicial relief.

*Asphalt Paving Systems, Inc. v. Columbia*, 264 So. 3d 1110 (Fla. 1st DCA 2019):

- Agency modified an existing contract by adding new work.
- Protester alleges that new work was out-of-scope and that addition of such work to an existing contract was an improper, *de facto* sole-source award for work that it would have bid on if a competition had been held.

# Standing to Protest – Cntd.

*Asphalt Paving Systems, Inc. v. Columbia*, 264 So. 3d 1110 (Fla. 1st DCA 2019):

- Agency preliminarily dismisses protest for lack of standing, argues that protester lacks standing to challenge modification of contract.
  
- First District reverses, finds that because the protester alleged that the agency unlawfully deprived it of any opportunity to compete for a government contract it had standing. Remanded for hearing on merits.
  - Asphalt Paving was a § 120.57(1) substantial interest proceeding, not a § 120.57(3) protest.
  - A modification of an existing contract is not a “decision or intended decision” that gets “posted” on VBS.
  - Protester learned about modification because it had been in negotiations with prime to perform the work as its subcontractor.

# Standing to Protest – Cntd.

*Accela, Inc. v. Sarasota Cnty.*, 901 So. 2d 237 (Fla. 2d DCA 2005) (**common law protest**):

- County issues “piggyback” awards for software instead of conducting a competition;
- Protesters allege they had experience providing similar software that could meet the County’s needs and that if the County had conducted a competition instead of making improper “piggyback” awards, they would have submitted offers.
- Protesters had standing. The protesters’ “injury” was being improperly deprived of an opportunity to compete for a government contract.

# Standing to Protest – Cntd.

*Advocacy Ctr. for Persons with Disabilities, Inc. v. State, Fla. Dep't of Child. with Disabilities*, 721 So. 2d 753 (Fla. 1st DCA 1998).

- Several inmates challenged the terms of a solicitation which allegedly “remove[d] mechanisms which [] allow[ed] persons confined at SFSH to manage their own funds, fail[ed] to require that a private provider assist persons in gaining access to community supports and services, fail[ed] to prohibit any decrease in spending for confined persons, fail[ed] to allow bidders to propose creative mental health treatment systems, etc.”
- First District held that because the inmates were not prospective bidders, but merely the intended beneficiaries of the procurement, they lacked standing to challenge the terms of the solicitation.



# Standing to Protest – Cntd.

Non-bidders, including sub-contractors and joint venture members, generally do not have standing to challenge an award. However, non-bidders may have standing to protest under limited circumstances.

First, a non-bidder may have standing to challenge an award if it alleges the scope of work in the contract actually being awarded is materially different than the scope advertised in the solicitation and that it would have submitted an offer if the solicitation had accurately indicated the government's needs. *E.g. City of Miami Beach v. Klinger*, 179 So. 2d 864 (Fla. 3d DCA 1965) (***common law protest***).

*Klinger* may no longer be persuasive since it was decided before the Supreme Court abolished taxpayer standing in *N. Broward Hosp. Distr. v. Fornes*, 476 So. 2d 154 (Fla. 1985), but in the fact-scenario laid out above the injury to the non-bidder is being unlawfully deprived of an opportunity to compete. *See also Asphalt Paving Systems*.

# Standing to Protest – Cntd.

Second, non-bidders may challenge an award under “extraordinary circumstances”. *E.g., Fairbanks , Inc. v. FDOT*, 635 So. 2d 58 (Fla. 1st DCA 1994).

*Fairbanks* is the **only** appellate case finding “extraordinary circumstances”:

- FDOT was building weigh stations, and the solicitation included a “brand name or equal” specification for vehicle scales.
- FDOT informed the lowest bidder that it did not think the brand name had any “equals” but gave it an opportunity to substitute Fairbanks’ scales for the more expensive brand name scales.
- Although First District did not explain reasoning, what makes this case “extraordinary” is the government’s actions incentivize the prime to be complicit in the misconduct because it secures the prime the contract.

# Merits

“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. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency’s intended action is illegal, arbitrary, dishonest, or fraudulent.” § 120.57(3)(f).

# Merits – Cntd.

- Under this standard, a protester must show that the agency's decision lacks a rational basis or is otherwise unlawful.
- Must show “no reasonable person” would agree with agency's decision.
- This is a highly deferential standard of review, and court may not substitute its judgment for the agency's.
- Standard contemplates a “range of reasonableness” because more often than not, the agency can make more than one reasonable choice.
- Not enough to show reasonable people could find your offer is better, or that your competitor's offer is worse. *Volume Servs. Division of Interstate United Corp. v. Canteen Corp.*, 369 So. 2d 391, 397 (Fla. 2d DCA 1979) (“Canteen can make a strong case that its bid was more favorable, but we cannot say that TSA's decision was arbitrary, capricious or beyond the scope of its discretion”).

# Merits – Cntd.

How does a protester raise protests that rise above “mere disagreement” with the agency???

## Solid Strategies/Grounds of Protest

- *First, and most important*, show the agency’s evaluations violated, are inconsistent with, or are unreasonable under one or more **specifically identified solicitation provisions**. *Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Comm’rs*, 955 So. 2d 647, 652-53 (Fla. 1st DCA 2007) (“Whether the Board acted arbitrarily is generally controlled by a determination of whether the Board complied with its own proposal criteria as outlined in the RFP”).
- *Second*, show unequal treatment. For example, show, as a matter of objective fact, that your offer is either equal to or better than your competitors’ under a specific factor, but you got a lower score. Thus, even if the competitors’ higher score was proper you were being held to a harsher standard and subjected to unequal treatment.

# Merits – Cntd.

- *Third*, show the evaluation is based on facts the evaluators **knew or should have known** were objectively wrong. For example, if you got bad past performance because a Department of Economic Opportunity evaluator told committee you breached a prior contract with DEO, but you never previously held a contract with DEO.
- *Fourth*, show the awardee intentionally or negligently made a material misrepresentation.
  - Florida law allows elimination under this circumstance.
  - Florida law is unclear whether integrity of competitive process **requires** elimination.
  - Agencies should not be allowed to reward such behavior by turning a blind eye.

# Merits – Cntd.

- Expert Witnesses – Limited Usefulness
- Expert testimony can help give the ALJ “background information” on the procurement by educating him or her on technical matters, industry practices, terms of art, or the meaning of solicitation provisions. *E.g. Jani-King Gulf Coast Region v. Escambia Cnty. Sch. Brd.*, DOAH No. 16-2726BID, 2016 WL 4567195 (Fla. Div. Admin. Hrgs. Aug. 26, 2016) (RO).
- As a practical matter, “background information” will usually be adequately covered by the agency personnel who participated in the procurement, and there is a rebuttable presumption they are qualified to perform and testify about their jobs. *Smith v. Mott*, 100 So. 2d 173, 176 (Fla. 1957).
  - **Practice Tip**: Agencies and intervenors should designate agency witnesses as hybrid fact-expert witnesses in their pre-trial disclosures, witness lists, and discovery responses.

# Merits – Cntd.

*Syslogic Tech. Servs., Inc. v. S. Fla. Water Mgmt. Dist.*, DOAH No. 01-4385BID, 2002 WL 76312 (Fla. Div. Admin. Hrgs. Jan. 18, 2002) (RO) (Van Laningham, ALJ):

- One of the evaluation criteria stated that an offeror “with no previous District work will receive a higher score than a proposer who has received work”. Purpose of provision was to ensure “equitable distribution” of work.
- Protester had done no work with agency. Awardee had done some, but less than \$50,000 worth, of work with the agency. Protester and awardee received same score for this factor and offerors were tied for overall points.
- Agency had used internal scoring policies that provided for maximum factor score for all offerors with less than \$50,000 worth of previous work.
- ALJ sustained the protest, explaining that while the internal policy may be reasonable, it could not be applied because it was inconsistent with the RFP’s stated evaluation criteria.



# Merits – Cntd.

*All Seasons Air Conditioning v. Fla. Dep't of Transp.*, DOAH No. 17-3184BID, 2017 WL 5958620 (Fla. Div. Admin. Hrgs. Aug. 28, 2017) (RO) (Schwartz, ALJ):

- ITB called for bids for all labor, materials, and incidentals necessary to provide maintenance and repair of 232 HVAC units located at 65 facilities along a 100 miles along of Turnpike, and the contractor will have to provide bimonthly maintenance on each of the 232 HVAC units. Moreover, the contractor must be available 24 hours a day, 365 days a year to provide unscheduled, emergency repair services.
- Bidders were required to provide references showing they had been actively involved in this type of business for a minimum of three years. Furthermore, the references had to “specifically be related to HVAC maintenance, repair, installation, replacement services of commercial facilities **similar in size, technical scope, and volume of work**” as that called for in the ITB.

# Merits – Cntd.

- The ITB specifically said bidders' references would be “reviewed carefully” by FDOT in order to determine whether a bidder was capable of performing the contract.
- The low bidder, Blue Ray'z's submitted a bid of \$128,630.00. However, its references were:
  - (1) repair 12 HVAC units per year at the same location for \$5,000 a year (5% of the number of HVAC units called for in the ITB, 3% of Blue Ray'z current bid);
  - (2) repair 8 HVAC units for an unknown price (3% of the work called for in the ITB);
  - (3) install 3 HVAC units for \$21,300 (1% of the HVAC units called for in the ITB, 16% of the Blue Ray'z current bid); and
  - (4) install two HVAC units for \$17,000 (.8% the number of HVAC units called for in the ITB, 13% of Blue Ray'z current bid).

# Merits – Cntd.

- Incumbent contractor protested, and the DOAH found FDOT had failed to review Blue Ray’z’s references to determine if they were “similar in size, technical scope, and volume of work”, rendering FDOT’s finding that Blue Ray’z could perform the contract arbitrary and capricious
- The DOAH also effectively found that because the past projects were all only for very small fractions of the work called for in the ITB they could not reasonably be considered “similar,” therefore awarding Blue Ray’z the contract was arbitrary and capricious.

# Merits – Cntd.

120.57(3) has a separate standard of review for protests challenging a decision rejecting all offers.

The plain language indicates that it is a heightened standard of review that is more difficult for a protester to satisfy.

Despite the different wording, it's the same standard of review.

But, it is still very difficult for a protester to prevail because of the high levels of discretion an agency has to decide to reject all offers.

Solicitations usually include a generic grant of “sole discretion” to reject all, so no solicitation provisions to violate or be inconsistent with.

As long as an agency has some legitimate (non-pretextual) rational basis to reject all, a challenge to such a decision should be denied.

# Remedies

- For pre-award protests challenging the solicitation, the remedies are amending or cancelling the solicitation
- For post-award protests, the remedies are either a re-evaluation of offers, an award of the contract to the protester, the amendment of the solicitation and the submittal of revised offers, or the rejection of all offers and cancellation of the procurement.
- For “other” protests, the remedy depends on the nature of the competitive injury.
  - For example, the remedy for an agency’s improper rejection of an offer as late should be the evaluation of the offer.

# Exceptions to Recommended Order

- After ALJ's recommended order is entered, parties have 10 days to file exceptions to ALJ's findings of fact and conclusions of law
- The agency may adopt the recommended order as its final order.
- Agency "may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." § 120.57(1)(I).
  - Agency must explain why its conclusion of law "is as or more reasonable than that which was rejected or modified." § 120.57(1)(I).
- Agency "may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." § 120.57(1)(I).

- Questions???