# What a Bright Idea! Florida's First District Court of Appeal Applies Common Sense to the Government in the Sunshine Law

**By Andrew Schwartz**

As Florida's First District Court of Appeal recently noted in *Carlson v. State*:

> Florida is the Sunshine State. It has long had the "Government in the Sunshine Law," which generally requires open meetings for boards, commissions, state agencies, and the like. *See* § 286.011, Fla. Stat. (2017); *see also* Art. I, § 23, Fla. Const. The statute, which the [Florida] Legislature "enacted in the public interest to protect the public from 'closed door' politics," is serious business: not only is there criminal liability for officials who knowingly disregard it, e.g., § 286.011(3)(b), Fla. Stat. (2017), but also Florida law provides that "where officials have violated section 286.011, the official action is void ab initio."[1]

However, an open door policy is not necessarily the best thing for public procurements—especially negotiated ones. Basically, engaging in open door negotiations gives an unfair advantage to whomever gets to negotiate last.[2] The Florida legislature recognizes the natural conflict or tension between the competing needs for open government and fair competition, and enacted Florida Statutes section 286.0113(2) as a work-around. Section 286.0113(2)(b)(2) exempts from the public meeting requirements "[a]ny portion of a team meeting at which negotiation strategies are discussed."[3] "But the exempted meetings do not forever remain out of public view"[4]: section 286.0113(2)(c) provides that "[a] complete recording shall be made of any portion of an exempt meeting," and the recordings become publicly available at "such time as the agency provides notice of an intended decision or . . . 30 days after opening the bids, proposals, or final replies, whichever occurs earlier."

*Carlson* involved a procurement in which the Florida Department of Revenue (Department) awarded a contract worth tens of millions of dollars to Systems and Methods Inc. (SMI) to assist the Department in maintaining a child support payment system. The only other bidder was the incumbent, Xerox State and Local Solutions Inc. (Xerox). During the bidding, an evaluation team conducted preliminary evaluations and recommended that the Department enter into negotiations with both Xerox and SMI. During this process, the evaluation team members all worked remotely and individually, meaning they did their work separately and had no contact with each other regarding evaluations. During negotiations, the negotiation team held 22 meetings that were closed in their entirety. Although the Department attempted to record all of these meetings, the recordings for four of the meetings were inaudible.

Naturally, Xerox protested the award to SMI and ultimately lost its administrative protest before both the Florida Division of Administrative Hearings and on appeal at the First District. However, Richard Carlson, one of Xerox's managers, collaterally attacked the award to SMI by filing a separate circuit court action alleging that the Department had violated the exemptions provided for in section 286.0113(2) by: (1) having its preliminary evaluation team members work individually and remotely instead of convening an open meeting as required by the Sunshine Law; (2) improperly closing the entire meeting at which the negotiation team selected SMI for award because that portion of the meeting was not a "portion of a team meeting [during] which *negotiation strategies* [were] discussed"; and (3) failing to properly record four of the negotiation team's meetings. The trial court granted summary judgment to the Department, and the First District affirmed.

The First District held that because the evaluation committee recommended that the Department negotiate with all of the bidders, it had no obligation to meet in the sunshine. This conclusion was consistent with prior decisions holding that in a competitive procurement a preliminary evaluation is only subject to the Sunshine Law if it has the effect of eliminating one of the bidders or otherwise "crystallizes" the decision to be made by the awarding authority.

The second and third issues were matters of first impression, however, and the First District affirmed on what were basically common sense grounds. The First District conceded that there was considerable legal merit to Xerox's second argument, that an "award decision" was not

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a "negotiation strategy." The First District also agreed with Xerox that agencies were not authorized to exempt entire meetings, only those portions of meetings at which "negotiation strategies" were discussed. However, the First District ultimately found that an award decision is "inextricably intertwined" with "negotiation strategy" because the decision to award to one bidder is necessarily also a decision to "cease negotiations." In other words, the First District had the good sense to see that some matters—such as award decisions—are so "inextricably intertwined" with negotiations that there is no way to consistently or meaningfully distinguish between them, and that accepting Xerox's position would effectively negate the statutory exemption by turning it into a legal minefield that no agency could ever hope to navigate.

On the third point, the First District rejected the Department's defense that the notes and minutes of the four meetings constituted "recordings." The First District nevertheless found that because there were no allegations of bad faith, the failure to record the four meetings due to a technical snafu did not amount to a "violation" of the statute. This is significant because Florida's appellate courts have historically voided any government action that involved any de minimis Sunshine Law violation.[5] However, the author believes the First District's decision was correct.

By the time the First District issued its decision, SMI had probably been performing the contract for nearly a year. Voiding the contract likely would have wreaked havoc on the Department's child support payment system and cost a significant amount of public money. It would have made little sense to void SMI's contract when there were no allegations or evidence that anything untoward occurred, or that the agency acted in bad faith. Equally important, there is no point in interpreting a statute in a manner that inflicts significant public costs while providing no corresponding benefits. PL

## Endnotes

1. 227 So. 3d 1261, 1264 (Fla. Dist. Ct. App. 2017) (footnote omitted) (citations omitted).

2. *E.g.*, Bright House Networks v. AT&T Corp., 205 So. 3d 837 (Fla. Dist. Ct. App. 2016) (reversing with directions to cancel the solicitation and conduct a new procurement after the agency took voluntary corrective action by awarding the contract to the protester who alleged that the original awardee was able to unfairly engage in negotiations after watching the agency's open negotiation meeting with the protester).

3. *Cf.* Fla. Stat. § 286.0113(2)(a)(2) ("'Team' means a group of members established by an agency for the purpose of conducting negotiations as part of a competitive solicitation.").

4. *Carlson*, 227 So. 3d at 1266.

5. *E.g.*, Sarasota Citizens for Responsible Gov't v. City of Sarasota, 48 So. 3d 755, 762 (Fla. 2010) ("'Mere showing that the government in the sunshine law has been violated constitutes an irreparable public injury . . . .' Therefore, where officials have violated section 286.011, the official action is void ab initio." (citations omitted)); *Id.* at 765 ("Sunshine Law violations can be cured by 'independent, final action in the sunshine,' which this Court distinguished from mere ceremonial acceptance or perfunctory ratification of secret actions and decisions. [But] '[o]nly a *full*, open hearing will cure a defect arising from a Sunshine Law violation. Such violation will not be cured by a perfunctory ratification of the action taken outside of the sunshine.'" (citations omitted)); Anderson v. City of St. Pete Beach, 161 So. 3d 548, 553 (Fla. Dist. Ct. App. 2014) ("We are also unpersuaded by the City's argument pointing to the trial court's alternative finding that even if the discussions exceeded the scope of the exemption that any violation was 'cured.' The doctrine of 'cure' in this context refers to the fact that an action that would otherwise be void because of a violation of the Sunshine Law may be reinstated or 'cured' if voted on again after full public discussion and participation.").