PUBLIC INFRASTRUCTURE CONTRACT SOLICITATIONS: A LEGAL PRIMER

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Anyone interested in obtaining government-funded contracts to engage in infrastructure projects in Florida needs to have at least a basic understanding of the law and rules governing the solicitation of such agreements. Federal, state, and local contracting all have their requirements and cultures, from the beginning of the solicitation process through potential litigation to reach contract execution. Still, they share many general principles and procedural similarities. This blog will focus on the specifics of state solicitations.

Most government contracting in Florida is done through a competitive procurement process. Its guiding principle is that the award of public contracts must be free from favoritism and collusion. This is prevented by securing fair and open competition among all vendors to ensure that no vendor is afforded an unfair advantage. There is no potential for fraud or misconduct by public officials. Accomplishing this requires an open and transparent process for how agencies solicit and award contracts, and equal opportunity for all qualified vendors to submit bids, a fair process for evaluating and awarding contracts, and the opportunity of respondents to solicitations to challenge decisions where the agency does not follow the proper procedures or is arbitrary or capricious in its decision-making process.

Agencies can avoid the competitive procurement process through sole-source contracting, which is very limited and strictly regulated. Otherwise, an aspiring contractor first needs to be aware of the opportunities and how to participate. The Florida Department of Management Services is the state agency responsible for overall supervision of the state contracting process and establishing rules, basic procedures, and forms to be implemented by the individual agencies. These can all be found at the DMS website, including a designated site for state procurement, called “MyFloridaMarketPlace,” which provides extensive information on how the system works and what procurement opportunities are available, as well as on the status of existing solicitations.
For prospective vendors, it explains how to register on the DMS “eProcurement” portal and indicates what qualifications and preferences they have on the types of procurement that interest them, with what agencies, as well as the ability to review notices regarding the status of current and closed solicitations. County and municipal governments each have their protocols, as established in their codes and agency websites.

All state agencies are required to provide public notice of their solicitations through the DMS portal. They provide notifications separately through their notices published in the Florida Administrative Register, part of the Florida Administrative Code. They may offer notices in other media to spread the word more broadly.

A prospective vendor may also be able to contact the agency to sign up to obtain notice directly. Local governments, however, have their separate notice procedures, and the requirements of each local government need to be examined by the prospective vendor to understand how the process works and how to receive notices, either directly, through publication, or both, of opportunities.

Different types of solicitation can accomplish the “best value” for the government. At the state and often local level, an Invitation to Bid (ITB) is used for specific items or projects, which vary, for example, from buying boxes of staples in bulk to building bridges to particular design and construction standards. Price is generally

the determining factor, subject to adequate quality and contractor competence threshold requirements. A Request for Proposals (RFP) is used for procurement where the price is not entirely determinative, and often there is some flexibility in project design and features. Instead, proposals are scored on factors such as price, vendor experience, technical quality, location, and financial capability.

An Invitation to Negotiate (ITN) is designed to allow agencies much more flexibility achieving "best value" by enabling them to continue competition between proposers after proposal opening by being authorized to continue to negotiate final contract prices starting with the top-ranked proposer and then working their way down to see if they can obtain a better deal from the next one on the list, and so on. Agencies love ITNs because of the additional negotiating flexibility, which a court had previously determined was not authorized by the then-existing procurement law. The process, however, leaves little negotiating room for a proposer who has left everything on the table in the proposal as originally submitted.

Whichever form of solicitation the agency publishes, considerations for the prospective vendor include the following:

- It helps to do your homework both on the agency and the types of solicitations it is likely to consider, based upon what factors, as much as possible, as well as to find out what might be in the agency's pipeline. This includes familiarizing yourself with the agency website and any relevant other publications, attending agency public forums, and introducing yourself to key staff where appropriate.
- Where possible, get on mailing lists. In any event, make sure you are receiving and attending to solicitation notices as early as possible and at least as soon as they are published, as time frames for responding are limited and late submissions will be disqualified except under highly rare circumstances.
- Communication with agency staff after a solicitation has been published is generally allowed only to the individual designated in the solicitation, and those communications must be in writing and publicly available. Any communication otherwise may only be permissible between the proposer's counsel and agency counsel following proper protocols.
- Improper communications with agency staff after solicitation publication can result in disqualification of a submission, except to the limited extent such communication is authorized in the solicitation specifications.
- A submission can be disqualified if it does not respond to all of the mandatory requirements of the proposer. If parts of the solicitation are not clear, questions about it are permissible, and usually advisable, but must be submitted in writing within a designated time frame to the designated person, in accordance with procedures authorized in the solicitation, and the questions and answers will become a part of the solicitation and made available to all responders.
- If the solicitation has fundamental problems of legality, fairness, incoherence, or the like, either originally or after answers are unsatisfactory, the language of the solicitation itself can be protested, but only if the challenge is filed within, usually, 72 hours of publication or 72 hours of a modification of the solicitation, including through the question and answer process. Otherwise, what you see is what you get.

Once the solicitation responses are received, opened, and evaluated by the agency, the results are announced and published as indicated in the solicitation. Those who object to the result and want to challenge it must submit a brief written notice of protest, which must be received within 72 hours of publication by the agency person at the address designated in the solicitation. Within10 days thereafter, the objector must file a formal written protest, stating grounds and relief requested as required by law, and submit with the protest a bond in an amount designated by law or rule for that solicitation. Failure to do both is grounds for dismissal of it.

The protest can be formal or informal, and if litigated based upon disputes of "material fact" (formal), will be referred to the Florida Division of Administrative Hearing for an evidentiary hearing and a recommended order by an Administrative Law Judge, with a Final Order to be issued by the agency head. Details of that process and the resolution of it are beyond the scope of this article. Briefly, here are some factors to consider throughout the solicitation process and going forward:

- The litigation process is complicated and can be very fast moving. Having counsel involved is critical, at least for any signification solicitation. The earlier counsel is involved before the realization of a need to protest, the better.
- Solicitation responses are confidential and exempt from Florida's Public Records Act until a designated time after opening, but in any even no later than when the notice of award is made. Thereafter, obtaining them and other critical information should be done as soon as possible.
- If you have confidential information that is exempt from the Act by law, such as trade secrets, you must designate them in accordance with law.
- Agencies have a great deal of discretion in making award decisions, assuming they evaluate the submissions in accordance with the requirements in the solicitation, and are not arbitrary and capricious—a threshold that is very high. Unless that threshold has been exceeded, agencies generally lose only when they fail to follow material procedures required by law or clearly set forth in the solicitation.

Agencies have a lot of discretion to reject all bids. A solidly grounded protest petition can often result in the agency rejecting all bids rather than being stuck with an unwanted winner of the protest.

Generally, therefore, the best outcome of a protest may be just a withdrawal of a solicitation and a second chance to respond to a revised one. Still, one in which all other respondents to the solicitation have at least already have shown their hand. Of course, the best outcome of all is to receive the award yourself—and not have that award challenged.

The protest process can be very fast-moving. Particularly for major projects, protest litigation can be costly, mainly once it goes into formal proceedings at the Division of Administrative Hearings, which can be as complex as major court trials and involve expert witnesses, depositions, and plenty of legal filings.

Timing is critical and missed opportunities can be fatal. Whether or not a prospective proposer has the appetite for extensive litigation, there are many much less costly steps along the process before then—such as challenging proposal specifications within 72 hours of publication or asking well-considered questions before the proposal submission deadline—that may achieve very favorable results. Particularly for complex and expensive projects, therefore, the cost of having the assistance of counsel commencing early on in the process may well be worth the benefit achieved.

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