

Recent Changes of Interest in Public Procurement: The 2016 Legislative Session and More

Florida Association of School Business Officials
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Suzanne D'Agresta is a shareholder with Garganese, Weiss & D'Agresta, P.A. She is certified by The Florida Bar as a specialist in City, County and Local Government Law, and has significant experience in transactional and litigation matters involving School Boards. She concentrates her practice in the area of local government law. She is the recipient of the highest rating (AV) given by Martindale-Hubbell for legal ability and ethics. Ms. D'Agresta is recognized as a Florida Super Lawyer by *Law and Politics*. She is a member of the Florida School Board Attorney's Association, and served as its President in 2006. She was appointed to the City, County and Local Government Certification Committee for the maximum 6 year term and the Ninth Circuit Grievance Committee "D" for the maximum 3 year term. She is also a member of the National School Board Association/Council of School Attorneys, and The Florida Bar Education Law Committee.

Ms. D'Agresta currently serves as the school board attorney for the School Board of Indian River County, and has performed significant legal work for the School Board of Osceola County, and other school boards and cities in Florida. She is a frequent speaker on such local government issues as Sunshine Law, public records, public procurement and employment matters.

Ms. D'Agresta is admitted to practice in Florida state and federal courts. She is admitted to The Florida Bar, and the Bars of the United States District Court for the Middle District of Florida, the United States Court of Appeals for the Eleventh Circuit and the Supreme Court of the United States. She earned her law degree from the University of Florida, and received her Bachelor's degree from the University of Central Florida.

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Topics for Discussion

- I. Public Records
- II. Scrutinized Companies
- III. Procurement Procedures
- IV. Recent Decisions of Interest

I. Public Records

House Bill 273 – Effective March 8, 2016, amended § 119.0701, Florida Statutes, providing guidance for vendors regarding public records requests.

I. Public Records (cont'd)

- A. Any request for public records relating to a contract for services must be made directly to the public agency.

If the public agency does not possess the requested records, the public agency shall immediately request the records from the vendor, and the vendor must provide the records to the public agency or allow the records to be inspected/copied within a reasonable time.

If the vendor fails to provide the public records to the public agency within a reasonable time, the vendor may be subject to the criminal penalties under §119.10, Florida Statutes (misdemeanor of the first degree – punishable up to one year in jail and a fine not to exceed \$1,000.00).

I. Public Records (cont'd)

B. If a lawsuit is filed to compel production of public records relating to a contract for services, the Court shall assess the reasonable cost of enforcement against the vendor if:

- The Court determines the vendor unlawfully refused to comply with the public records request within a reasonable time; and
- At least eight (8) business days before filing the lawsuit, the plaintiff provided written notice of the public records request and the failure to respond to both the public agency and the vendor.

I. Public Records (cont'd)

- C. Each public agency contract for services with a vendor who is acting on behalf of the public agency, and entered into or amended on or after July 1, 2016, must include: [**Sample contract language**]

[**This heading must be at least 14 point boldfaced type**]

IF THE CONTRACTOR HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONTRACTOR'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE SCHOOL BOARD'S CUSTODIAN OR RECORDS: [**INSERT NAME, TELEPHONE NUMBER, EMAIL ADDRESS AND MAILING ADDRESS**].

1. This Agreement is subject to and governed by the laws of the State of Florida, including without limitation Chapter 119, Florida Statutes, which generally makes public all records or other writings made by or received by the parties. The Contractor acknowledges its legal obligation to comply with § 119.0701, Florida Statutes.

I. Public Records (cont'd)

2. The Contractor shall keep and maintain public records, as that phrase is defined in the Florida Public Records Act, required by the School Board in order to perform the scope of services.

3. Upon request by the School Board, the Contractor shall provide the School Board with a copy of any and all requested public records or allow the requested public records to be inspected or copied, within a reasonable time, at a cost that does not exceed the cost allowed by law.

I. Public Records (cont'd)

4. The Contractor shall not disclose public records that are exempt, or confidential and exempt, from public records disclosure unless specifically authorized by law for the duration of the Agreement term and following completion of the Agreement if the Contractor does not transfer the public records to the School Board as indicated below.

[CHOOSE A PARAGRAPH 5]

5. [**option 1**] The Contractor shall comply with all requirements for retaining public records and shall transfer, at no cost to the School Board, all public records in the possession of the Contractor upon termination or expiration of this Agreement. The Contractor shall destroy any duplicate public records that are exempt, or confidential and exempt, from public records disclosure requirements. All public records stored electronically must be provided to the School Board in a format that is compatible with the information technology systems of the School Board.

I. Public Records (cont'd)

5. [option 2] The Contractor shall comply with all requirements for retaining public records and shall keep and maintain all such public records required by the School Board to perform the scope of services. Upon request by the School Board, all public records stored electronically must be provided to the School Board in a format that is compatible with the information technology systems of the School Board.

I. Public Records (cont'd)

6. [**not required - optional**] Notwithstanding any other provision of this Agreement to the contrary, failure to comply with this requirement shall result in the immediate termination of the Agreement, without penalty to the School Board. Further, the Contractor shall fully indemnify and hold harmless the School Board, its officers, agents and employees from any liability and/or damages, including attorney's fees through any appeals, resulting from the Contractor's failure to comply with these requirements.

II. Scrutinized Companies

Senate Bill 86 – Effective October 1, 2016, amends § 287.135, Florida Statutes, by expanding the contract prohibitions with scrutinized companies for local governments.

II. Scrutinized Companies (cont'd)

- A. A local government is prohibited from contracting with a company for goods or services of \$1,000,000.00, or more, if the company is on the scrutinized companies that boycott Israel list or is engaging in a boycott of Israel.

“Local government” is defined as a county, municipality, special district, or other political subdivision of the state.

II. Scrutinized Companies (cont'd)

- B. On and after October 1, 2016, any contract for goods or services of \$1,000,000.00, or more, must contain a provision that allows for the termination of the contract at the option of the local government if the company:
- Is found to have submitted a false certification about being on a scrutinized company list;
 - Has been placed on the scrutinized companies that boycott Israel list or is engaged in a boycott of Israel;
 - Has been placed on the scrutinized companies with activities in Sudan list or the scrutinized companies with activities in the Iran Petroleum Energy Sector list;
 - Has been engaged in business operations in Cuba or Syria.

II. Scrutinized Companies (cont'd)

- C. The certification a company is required to provide to a local government when it submits a bid or proposal for a contract for goods or services of \$1,000,000.00, or more, must also include whether or not the company is participating in a boycott of Israel.

III. Procurement Procedures

Senate Bill 350 – Effective July 1, 2016, amended § 1010.04, Florida Statutes, by expanding required procurement procedures.

III. Procurement Procedures (cont'd)

- A. Before purchasing non-academic commodities and contractual services, School Boards and Florida College System board of trustees must review the purchasing agreements and state term contracts available through the Department of Management Services to determine if the available contracts are to their economic advantage.

III. Procurement Procedures (cont'd)

- B. Bid specifications for non-academic commodities and contractual services must include a statement that the purchasing agreements and state term contracts available through the Department of Management Services have been reviewed.

Does not apply to services eligible for reimbursement under the federal E-rate program.

III. Procurement Procedures (cont'd)

- C. Purchases may be made through an online procurement system, an electronic auction service, or other efficient procurement tool.

IV. Recent Decisions of Interest

AGO 2015-04 City of Ocala

Section 255.05(7), Florida Statutes, authorizes a contractor to file an alternative form of security (other than payment and performance bonds) for public construction projects, as described in the statute, and there is no authority to refuse to accept the alternate form of authorized security.

IV. Recent Decisions of Interest (cont'd)

Xerox State & Local Solution, Inc. v. Dept. of Revenue, 187 So. 3d 386 (Fla. 1st DCA 2016)

Section 287.057(13), Florida Statutes, does not require vendors to include renewal pricing in their responses to procurement solicitations. Rather, it describes the requirements that must be met before an agency may renew a contract. The failure of a vendor to provide a renewal price in its bid did not render its bid unresponsive, it simply prohibits the agency from renewing the contract beyond the original term.

IV. Recent Decisions of Interest (cont'd)

Douglas Gardens V, Ltd. v. Fla. Housing Finance Corp., DOAH Case No. 16-0418BID (Mar. 2016)

Douglas Gardens and La Joya Estates submitted applications in response to a Request for Applications (RFA). The RFA required all bidders to submit the Survey Certification Form and specifically warned that if an applicant submits any prior version of the form, the form will not be considered. La Joya Estates was awarded the project and Douglas Gardens filed a protest, arguing La Joya Estates was improperly awarded points for submitting the wrong version of the form.

At the administrative hearing, the agency admitted the form submitted by La Joya Estates should not have been scored “for consistency purposes.” However, the hearing officer found La Joya Estates’ form was a waivable minor irregularity because the differences in the forms did not provide La Joya Estates a competitive advantage, and recommended the bid protest be denied. When the hearing officer recommendation was considered by the agency, the agency determined it would not waive the requirement to submit the correct version of the form and withdrew its award to La Joya Estates.

QUESTIONS?