

OVERVIEW OF THE BIDDING PROCESS
FOR PUBLIC CONSTRUCTION PROJECTS

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INTRODUCTION

Governmental agencies routinely procure millions of dollars worth of goods and services ranging from the construction of public works to basic supplies. All levels of government, including state, county, municipal, and special districts, award lucrative contracts to private sector vendors. Government agencies typically select vendors by way of a competitive procedure open to any company that can fulfill their stated requirements. Federal agencies also have specific procurement procedures, including the Federal regulations applicable to the particular agency, and the Federal Acquisition Regulation or “FAR”, which is found at 48 CFR Chapter 1. The focus of this outline is on state and local procurements in Florida.

The procedure for selection varies, depending upon the type of contract and the governmental agency. For example, procurements by state agencies are governed by Florida Statutes, and the Florida Administrative Code. In addition to applicable Florida Statutes, local governments, including counties and municipalities, each have their own policies and procedures. In order to take advantage of this opportunity, it is incumbent upon businesses desirous of seeking contract awards to become familiar with the procurement process. Contractors should determine which agencies typically require their particular service, and become familiar with the agency’s needs and process for pursuing a contract award.

Several procurement methods are utilized by government agencies, depending upon the value of the contract and type of procurement. Where an agency has specifications for a project, it may simply invite bids. Ordinarily, an invitation for bid is a method of procurement where price is the primary consideration. The bidder must also demonstrate an ability to comply with the terms of the contract and perform the work. This is referred to as demonstrating that the bidder is “responsible”. For traditional invitations to bid, the bidder found to be the lowest, most responsive and responsible, will be awarded the contract. A bid is responsive if bid conforms in all material respects to the solicitation. Contractors considering whether to submit a bid on a public construction project should carefully review the costs of the actual work, as well as, insurance premiums, permits, and other requirements of the agency to ensure that, if awarded, the contractor will be able to perform, while still making a profit.

When an agency seeks to award a contract, wherein the selection process includes an evaluation of criteria beyond price, a request for proposals or “RFP” may be utilized. With a request for proposals, price is a consideration, but may not be the determinative factor. For example, where an agency desires to enter into a contract for management or rental of a public facility such as a fixed base operator at an airport, recreation facility, restaurant, or concessionaire, price may only be one factor. Experience and a proven track record may be of equal or greater importance. Thus, where proposals require demonstrated experience and capability, an entity that submits a proposal must be able to demonstrate ability to perform under the proposed contract. The good news, however, is that a proposer can win such a contract without being the low bidder because other factors are as important, or more important than price.

It is important to note that regardless of the procurement method selected by the agency, there are usually strict submission deadlines. Failure to submit a complete bid by the deadline will generally result in the agency not considering the proposal.

At or shortly after the submittal deadline, the agency typically will conduct a bid “opening” wherein sealed bids or proposals are opened and respondents announced. Agency staff will then proceed to evaluate the submittals and make recommendations to the particular governing board or commission. It is important that a contractor is familiar with its own submittal, as well as those of the other respondents. With limited exceptions, bids or proposals become public record and open to inspection, once the agency provides notice of a decision or an intended decision, or within thirty days after the opening, whichever is earlier.¹ However, if an agency decides to reject all bids or proposals, it may retain the bids or proposals as exempt from public disclosure until such time as the agency provides notice of a decision or intended decision concerning the reissued invitations to bid or request for proposals or until the agency withdraws the reissued invitation to bid or request for proposals. See, Florida Statutes, Section 119.071(1)(b)3. Note, however, that Florida Statutes, Section 255.0518, applicable to State and local competitive solicitations for construction or repairs on a public building or public work, requires sealed bids to be opened at a public meeting conducted in compliance with F.S. 286.011 and that the name of each bidder and the price submitted shall be announced.

In the event a competitor has submitted a bid or proposal which deviates from the requirements of the agency’s advertised solicitation, and a contractor desires to object or protest consideration thereof, it is imperative that such concerns be raised as soon after discovery is possible, and in accordance with the agency’s procedures. Further, agencies typically have administrative procedures which deem such concerns waived if not raised within a certain period of time, which may be as little as a few days. Note also that challenges to the terms of the solicitation or “specification challenges” must generally be brought at the time of the advertisement. Whether such a challenge needs to be asserted and the procedure for the particular agency to file a specification challenge must necessarily be reviewed on a case by case basis.

Formally objecting or “protesting” a proposed contract award to another vendor is a highly specialized area of the law for a number of reasons. First, each agency has a unique set of rules and regulations governing its procurement process which must be followed precisely. These rules may in fact include the terms of the invitation to bid or request for proposal as referenced above. Further, there are often very short time frames to protest an award. Thus, an expedited evaluation of the procedure as well as the technical issues raised by the bid is necessary.

¹ Florida Statutes, Section 119.071(1)(b).

II. Important Bidding Considerations

In order to pursue a contract award, a contractor must submit a responsive bid.² Prior to submission of a bid, a contractor must first identify which agencies to submit bids to, and how invitations to bid are advertised. Generally, each public agency has its own policy and procedure for advertising invitations to bid. Such advertisement may be in the form of notices posted at the agency's building, by website, or by local newspaper. For solicitation of competitive bids or proposals for state or local construction projects projected to cost more than \$200,000.00, Florida law mandates specific advertising requirements.³

If a contractor has interest in performing work for particular agencies, it should inquire whether the agency maintains a list for mailing notice of bid invitations. Most agencies have a purchasing manager which can advise if such a list is maintained. Additionally, most agencies maintain websites that list pending solicitations. Alternatively, a contractor may have to subscribe to privately operated services that may be utilized by the agency to facilitate advertisement and/or receipt of the bids.

Generally, Florida Statutes, Section 255.20, provides that county, municipal, special district, or other political subdivision construction projects must be "competitively awarded" to an appropriately licensed contractor for each project that is estimated to cost more than \$300,000. For electrical work, the threshold is \$75,000. The term "competitively award" means to award contracts based on the submission of sealed bids, proposals submitted in response to a request for proposal, proposals submitted in response to a request for qualifications, or proposals submitted for competitive negotiation. Section 255.20(1) expressly permits contracts for construction management services, design/build contracts, continuation contracts based on unit prices, and any other contract arrangement with a private sector contractor "permitted by any applicable municipal or county ordinance, by district resolution, or by state law." It should also be noted that the local government agency may have an adopted threshold that requires competitive bidding for contracts valued at less than the statutory amount.

Florida Statutes, Section 255.103 authorizes local governments, including counties, municipalities, school districts, and special districts to procure construction management services "pursuant to the process provided by s. 287.055", which is the Consultants' Competitive Negotiation Act ("CCNA"). The construction management entity must consist of or contract with a licensed or registered professionals for the specific fields or areas of construction to be performed, as required by law. Further, the construction management entity may retain necessary design professionals selected under the process provided in Section 287.055. Moreover, at the

² Florida Statutes, Section 287.012(25), applicable to state agencies, defines a "responsive bid" as a bid submitted by a responsive and responsible vendor that conforms in all material respects to the solicitation.

³ Florida Statutes, Section 255.0525, which requires at least twenty-one days notice for projects in excess of \$200,000.00; thirty days notice for projects in excess of \$500,000.00; and at least five days notice prior to any prebid conference.

option of the governmental entity, the construction management entity, after having been selected and after competitive negotiations, may be required to offer a guaranteed maximum price and a guaranteed completion date or a lump-sum price and a guaranteed completion date, in which case, the construction management entity must secure an appropriate bond pursuant to Section 255.05 and must hold construction subcontracts. See, Section 255.103(2). Note, however, while Section 255.103 permits procurement of a construction management entity through the CCNA process, Section 255.103(5) does not prohibit a competitive award process as provided by Florida Statutes, Section 255.20.

Where monetary thresholds are met (See, Sections 287.055(3) and 287.017, Florida Statutes) the CCNA regulates the acquisition of professional services and also provides for the procurement of design build firms. “Professional services” are defined to mean those services within the scope of the practice of architecture, professional engineering, landscape architecture, or registered surveying or mapping, as defined by the laws of the state, or those performed by any architect, professional engineer, landscape architect, or registered surveyor and mapper in connection with his or her professional employment or practice. See, Section 287.055(2)(a). The selection process for professional services is qualification based, where pricing is not a factor until the negotiation phase. The selection of a design build firm may utilize a competitive proposal process in lieu of the selection process used for professional services, if the agency has adopted procedures as specified at Section 287.055(9).

In 2013, the Legislature enacted Florida Statutes, Section 287.05712 relating to Public-Private Partnerships. In a nutshell, a public-private partnership is a project that envisions such arrangements as private financing and operation of public facilities as an alternative to the traditional model where the public agency pays up front, owns and operates the facility. Although there was nothing per se prohibiting public private partnerships which have been implemented prior to Section 287.05712, the new law provides a statutory acknowledgement and framework for this procurement method, and also authorizes the consideration of “unsolicited proposals”. The selection process set forth in Section 287.05712 is similar to other multi-step procurements whereby proposals are ranked, and then a “comprehensive agreement” satisfying the statutory requirements may be negotiated with the top ranked firm.

Once an opportunity is identified it is important for the contractor to procure a copy of the pertinent bid documents and become familiar with the bid terms. Contractors should also be mindful that the agency may issue addenda to the terms, and may place the burden on the contractor to inquire as to whether any have been issued. It is important to note that different types of procurement methods may have specific license and qualifications requirements. For example, design-build projects necessitate the involvement of design professionals along with the appropriate contractor license.⁴

⁴ Florida Statutes, Section 287.055(2)(h), defines a “design-build firm” to mean a partnership, corporation, or other legal entity that: 1. Is certified under s.489.119 to engage in contracting through a certified or registered general contractor or a certified or registered building contractor as the qualifying agent; or 2. Is certified under s.471.023 to

The terms of the bid may require a prebid meeting, and/or inspection of the existing public facilities. In preparing a bid, it may be necessary for contractors to have access to building plans, blueprints, schematic drawings, etc.. If such information is made available, the contractor should be cognizant that the information may be subject confidentiality provisions of the Public Records Law. In response to the threat of terror attack, the Public Records Law⁵ was amended to provide that building plans, and other documents which depict the internal layout and structural elements of public facilities, are exempt from public disclosure.⁶ This statute has been interpreted by the Florida Attorney General's office as permitting disclosure of information which may be necessary to comply with statutory requirements for competitive bidding; however, the entity or persons receiving such information shall maintain the exempt status of the information.⁷

Once the contractor has procured the bid documents, including terms and specifications, it must then assess whether it can meet the terms and what price to bid. Note that bid documents may incorporate by reference other regulations, ordinances, or policies which the contractor should be aware of.⁸

Common requirements and terms which the contractor should be mindful of include, but are not limited to:

- (a) Submittal deadlines;
- (b) License requirements, and attachment of any required forms;
- (c) Insurance, indemnification, and bonding;
- (d) Time for completion of the work;
- (e) The time which the bid and pricing must remain open for acceptance;
- (f) Materials specified, and whether alternatives are permissible or required; and
- (g) The cost of permits or other charges by the agency or agencies with jurisdiction over the project.⁹

practice or to offer to practice engineering; certified under s.481.219 to practice or to offer to practice architecture; or certified under s.481.319 to practice or to offer to practice landscape architecture.

⁵ Florida Statutes, Chapter 119.

⁶ Florida Statutes, Section 119.071(3).

⁷ Fla.Ago.2002-74; and Florida Statutes, Section 119.071(3)(b)(4).

⁸For example, where federal funds are being utilized, there may be specific anti-discrimination, recordkeeping, and auditing requirements.

⁹ Pursuant to the Public Bid Disclosure Act, Florida Statutes, Section 218.80, with certain exceptions, a local governmental agency is required to disclose all permits or fees payable by the contractor to the agency which issued the bidding documents.

- (f) Failure to supply all required information, such as relevant prior experience.¹⁰

Thus, there are a number of considerations above and beyond the hard cost of the labor and materials that must be addressed by the contractor in determining whether to submit a bid, and how to calculate a price.

III. Disqualification Of Bidders

A public construction project subject to a competitive bid process will generally be awarded to the lowest, qualified and responsive bidder.¹¹ If a contractor's bid is determined to be non-responsive, the bid will be subject to disqualification. Examples of non-responsiveness may include:

- (a) Failure to submit a bid prior to the deadline;
- (b) Failure to include a price, or an indefinite price;
- (c) Failure to execute required forms and signature pages;
- (d) Bidding terms or specifications which deviate from the agency's requirements;
- (e) Failure to include a bid bond as may be required by the solicitation¹²; or
- (f) Failure to specify subcontractors.¹³
- (g) Failure to produce evidence that the bidder holds the appropriate license.¹⁴

As demonstrated above, a contractor can submit a bid with the lowest price, and still not be awarded the contract. Public agencies typically reserve the right to waive minor irregularities, or to reject all bids; however, an agency cannot waive material terms which would provide a bidder with an unfair competitive advantage. Florida courts have held that an agency may not

¹⁰ American Engineering and Development Corporation v. Town of Highland Beach, Florida, 20 So. 3d 1000 (Fla. 4th DCA 2009).

¹¹ See for example, Florida Statutes, Section 255.20(1)(d) applicable to certain local government construction projects.

¹² Where required, a bid bond or bid security provides a guaranty that the bidder, if awarded the contract will execute any necessary contract documents, and supply required bonds, such as the performance and payment bond. The surety's liability on a bid bond is typically absolved once the contract has been signed and the other bonds and requirements have been fulfilled. The bid bond does not guaranty performance of the work itself.

¹³ It should be noted that in certain instances Florida law prohibits a contractor from substitution of subcontractors once the bids are opened. See for example, Florida Statutes, Section 255.0515.

¹⁴ Florida Statutes, Section 489.131(2) requires that bids be accompanied by evidence of appropriate certification or registration, unless the work is exempt pursuant to Section 489.103.

deviate from advertised requirements where the variation affects price and destroys the competitive character of the bid.¹⁵ In court challenges, remedies may include invalidation of the contract, injunctive relief, and an award of bid preparation costs. For example, in City of Cape Coral v. Water Services of America, Inc., 567 So. 2d 510 (Fla. 2nd DCA 1990), the Court held that an unsuccessful bidder was entitled to bid preparation costs, but not lost profits or attorney's fees, where the City rejected the bidder in spite of pre-bid representations as to licensure requirements.¹⁶

IV. Bidding Errors – Rules For Relief

Once bids are opened, agencies begin the process of determining responsiveness, tabulating/ranking the bids based upon price, and making recommendations to the governing body as to an award. Agency staff, individually or a committee, typically review each bid prior to presentation to the board or council having authority to make a final decision. In 2013, the Florida Legislature enacted Section 286.0114, which requires that members of the public, which would include the bidders, have an opportunity to be heard by a board or commission prior to official action being taken. Notwithstanding Section 286.0114, however, bidders and their representatives and agents must be cognizant of any lobbying, communication, cones of silence, or other restrictions on contact with the agency or its officials during the bidding process. Violation of such policies or restrictions may result in a disqualification of the bidder.

With respect to contract awards, the Florida Supreme Court has held that public agencies have wide discretion in soliciting and accepting bids.¹⁷ As set forth below, this discretion is not unlimited. Note that when reviewing the agency's award decision, there is authority that it is the actions of the agency and not alleged wrongdoing on the part of the awardee that is material. See, Academy Express, LLC v. Broward County, et al., 53 So.3d 1188 (Fla. 4th DCA 2011) wherein the Court held that an alleged misrepresentation made by a bidder in its proposal did not state a cause of action for arbitrary and capricious action on the part of the agency.

The process by which a contractor must be selected is determined by the laws applicable to the public agency and particular project, as well as the terms and requirements of the bidding documents. Contractors may challenge decisions which are made in contravention of these standards, however, agencies often times have administrative protest procedures with limited

¹⁵ Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So.2d 1190 (Fla.2d DCA 1977).

¹⁶ In rare instances, contractors have been awarded damages including pre-construction costs even though a final contract was not entered into based upon promissory estoppel. See, Royal American Development, Inc. v. City of Jacksonville, 508 So. 2d 528 (Fla. 1st DCA 1987).

¹⁷ Liberty County v. Baxters Asphalt & Concrete, Inc., 421 So.2d 505 (Fla.1982).

filing deadlines.¹⁸ Additionally, in order to file a protest, a protest bond may be required by law or applicable ordinance.¹⁹

Protests may be based upon both substantive and procedural grounds. For example, an agency may not utilize criteria in scoring bids, which were not part of the advertised bid documents, and make an award to a contractor other than the lowest responsible, responsive bidder.²⁰ Moreover, where statute requires competitive sealed bidding, an agency cannot utilize a pre-bid shortlisting process to limit the number of contractors, which may submit bids on the project.²¹

Challenges have also been made based upon the Sunshine Law²² which requires that meetings where official actions are taken be open to the public. Where an agency, through its governing body, or a committee delegated with authority to evaluate and rank bids meets outside of an open meeting, the courts may enjoin the agency's construction project.²³ Note, however, that Section 286.0113, Florida Statutes provides that "portions" of "team" meetings wherein a negotiation with a vendor is conducted pursuant to a competitive solicitation, at which a vendor makes an oral presentation as part of a competitive solicitation, or at which a vendor answers questions as part of a competitive solicitation is exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution. Portions of team meetings wherein negotiation strategies are discussed are also exempt. Section 286.0113(2)(a) defines "team" to mean a group of members established by an agency for the purpose of conducting negotiations as part of a competitive solicitation. The portions of the meeting that are closed, however, must still be recorded. The recordings, as well as records presented during the closed meetings, become open to public inspection and copying 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. See, Section 286.0113(c).

It should also be noted that where an agency is required by law to utilize a competitive bidding or selection process, the agency cannot circumvent the requirement by utilization of a private agency. For example, the Florida Attorney General's office has opined that a county cannot avoid the competitive selection requirements by utilizing a non-profit corporation as the entity responsible for construction of a new jail.²⁴ Furthermore, a municipal bid providing for the contractor to hire and procure architectural drawings for a public project was found to violate

¹⁸ See for example, Florida Statute, Section 120.57(3) which provides that notice of intent to protest must be filed with seventy two hours after the posting of the notice of decision or intended decision by the agency.

¹⁹ See example, Florida Statutes, Section 337.11 applicable to certain Florida Department of Transportation Projects; and Florida Statutes, Section 255.0516 applicable to the protest of education board decisions.

²⁰ City of Sweetwater v. Solo Construction Corporation, 823 So.2d 798 (Fla.3d DCA 2002).

²¹ Engineering Contractors Association of South Florida, Inc. v. Broward County, 789 So.2d 445 (Fla., 4th DCA 2001).

²² Florida Statutes, Section 286.011.

²³ See for example, Leach-Wells v. City of Bradenton, 734 So.2d 1168(Fla.2d DCA 1999); Port Everglades Authority v. International Longshoremen's Association, Local 1922-1, 652 So.2d 1169 (Fla.4th DCA 1995) and Silver Express Company v. District Board of Lower Tribunal Trustees of Miami-Dade Community College, 691 So.2d 1099 (Fla.3d DCA 1997).

²⁴ See Fla.Ago.2002-59.

Florida law. In the City of Lynn Haven v. Bay County Council of Registered Architects, Inc., 528 So.2d 1244 (Fla.1st DCA 1988), a municipality invited bids for construction of a new public safety building. The bid required the successful contractor to provide architectural drawings, which the court found to circumvent the requirements of the Consultants Competitive Negotiation Act (Florida Statutes, Section 287.055) which provides a specific competitive selection process for design professionals. Recently enacted Florida Statutes have also created similar procurement procedures for the selection of construction managers.²⁵

Florida Statutes, Section 120.57(3) provides an administrative remedy for protests as to contract solicitation or award. This remedy applies to covered public agencies, as defined by Florida Statutes, Section 120.52. There are stringent deadlines for the filing of the Notice of Intent to Protest, and Formal Protest which must be adhered to. Protests involving disputed issues of material fact are generally referred by the agency to the Division of Administrative Hearings²⁶. Additionally, the Florida Administrative Code provides for the form and content of the Formal Petition, Protest Bond (where applicable), as well as the procedures for discovery, motions, and hearings. (See 28 FL ADC 28-110, and 28 FL ADC 28-106).

For public agencies that do not fall within Chapter 120, such as counties and municipalities, the administrative remedies, if afforded, are typically provided by ordinance or administrative policy. The administrative remedies afforded by these public agencies vary. County and municipal protest procedures may be as simple as a letter with a written decision in response or as complex as administrative trials.

As referenced above, for protests that fall within Florida Statutes, Section 120.57, a Notice of Intent to protest must be filed with the agency within 72 hours after posting of the notice of decision or intended decision.²⁷ The formal written protest must be filed within 10 days after the date the notice of protest is filed, and state with particularity the facts and law upon which it is based. It should also be noted that protests as to the bid specifications may need to be raised at the time of the advertisement, and not after submittal of the bids. For agencies covered by Chapter 120, Florida Statutes, Section 120.57(3)(b) provides that the Notice of Protest must be filed within *72 hours of the solicitation*. The filing of the formal protest, with limited exception, stays the award until the protest is resolved by final agency action.²⁸ The requirements for the formal written protest, and form of the protest petition are also set forth at FL ADC Section 28-110.004.

When referred to the Division of Administrative Hearings, and administrative law judge will be appointed, who shall commence hearing on the protest within 30 days.²⁹ In a competitive-procurement protest relative to a proposed contract award, the administrative law

²⁵ Florida Statutes, Section 255.32, and Section 255.103.

²⁶ Florida Statutes, Section 120.57(3)(d)3.

²⁷ With respect to protests relative to the terms, conditions and specifications of a solicitation, Section 120.57(3)(b) requires that the notice of protest be filed within 72 hours after posting of the solicitation.

²⁸ Florida Statutes, Section, 120.57(3)(c).

²⁹ Florida Statutes, Section, 120.57(3)(e).

judge shall conduct a de novo proceeding to determine whether the proposed agency action was contrary to the agency's governing statutes, the agency's rules or policies or the solicitation specifications. The standard of proof in such proceedings is whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.³⁰ FL ADC Section 28-106.205 permits parties whose substantial interest will be affected by the proceeding and who desire to become parties may petition the presiding officer for leave to intervene. Except for good cause shown, petitions for leave to intervene must be filed at least 20 days before the final hearing.

Additionally, FL ADC Section 28-106.206 provides for obtaining discovery "through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure". The presiding officer may issue "appropriate orders" relative to the time for discovery, and the imposition of sanctions.

After hearing, the administrative law judge will enter a recommended order, and a final order is to be entered by the agency within thirty (30) days of the entry of the recommended order.³¹ Pursuant to Florida Statutes, Section 120.68 final agency action may be challenged in the appellate district where the agency maintains its headquarters. Judicial review pursuant to Section 120.68 is pursuant to the Florida Rules of Appellate Procedure and limited to a review of the record.³² Challenges to local government decisions would ordinarily be de novo proceedings filed with the circuit court.

The above examples highlight challenges which have been made to the bidding process and awards. These examples are not intended to be an exhaustive list. Further, due to the highly specialized and specific nature of the bidding process, whether a basis to challenge an award and/or administrative remedy exists must be evaluated on a case by case basis. It should also be noted that where an administrative remedy exists, failure to follow the administrative process may be deemed a waiver of filing a court action.³³

V. When A Bid Becomes A Contract

Determining when a bid becomes a contract also requires an analysis of the applicable law, bid documents and formal action by the public agency. Florida courts have found that a binding agreement may be formed without execution of a written contract. For example, in Schloesser v. Dill, 383 So.2d 1129 (Fla.3d DCA 1980), the court found that where a clear bid

³⁰ Florida Statutes, Section 120.57(3)(f).

³¹ Florida Statutes, Section 120.57(3)(e).

³² Florida Statutes, Section 120.68(2)

³³ See for example, State of Florida, Department of Lottery v. GTECH Corp., 816 So.2d 648 (Fla.1st DCA 2001).

was submitted, accepted by the County Commission, and the contractor was notified of the decision, a binding contract was created.³⁴

The fact that a contract may be binding without execution of an independent writing also highlights the importance of carefully pricing and preparing the contractor's bid. Courts have found that a bidder's mistake in its price was binding upon acceptance by the public agency.³⁵ In certain cases, a bidder may be relieved of a mistake, however, the circumstances justifying such relief are limited.³⁶ The binding nature of the agreement would also include the other terms, such as time for completion, further demonstrating the importance of the contractor's bid document as a firm offer.

On the other hand, under certain circumstances, a formal written contract may be required. The general proposition that a contract is formed by an "offer" and "acceptance" will not control where Florida Statutes mandate a written contract.³⁷ Similarly, a binding agreement is not formed until a written contract is signed where required by municipal ordinance, or the terms of the bid documents.³⁸ Alternatively, the filing of a bid protest by a competitor may prevent formation of a binding contract. For example, Florida Statutes, Section 120.57(3) provides that the filing of a protest thereunder stops the contract award process. The agency, however, may nonetheless proceed with an award in the event that it determines an emergency exists. Such protests may result in the rejection of all bids, notwithstanding the initial decision to accept a bid.³⁹

Where a competitor has filed a protest, a contractor that is an intended awardee should consider intervening as a party in the challenge. Much like the time for filing protests, applicable law may limit the time within which a party may seek to intervene in a pending proceeding.⁴⁰

VI. Conclusion

Government contracts provide a tremendous business opportunity for the construction industry. Knowledge of the process and requirements for particular government agencies is of critical importance in pursuing contract awards. Contractors participating in a competitive bid process should also be mindful of the remedies which may be available in the event a basis for legal challenge arises. These challenges may involve Florida Statutes, the terms of the bid, or compliance with procedural requirements such as the Sunshine Law.

³⁴ See also, Deadmond v. Escambia County, 244 So.2d 758 (Fla.1st DCA 1971), and Housing Authority of the City of Fort Pierce v. D.H.Foster, 237 So.2d 569 (Fla.4th DCA 1970).

³⁵ See Graham v. Clyde, 61 So.2d 656 (Fla.1952).

³⁶ See State Board of Control v. Clutter Construction Corporation, 139 So.2d 153 (1st DCA 1962), and Lassiter Construction Company v. School Board for Palm Beach County, 395 So.2d 567 (Fla. 4th DCA 1981).

³⁷ See for example, Florida Statutes Sections 336.44, and 287.055(2)(g) which differentiate between acceptance of a bid and a formal contract.

³⁸ See, H.Gore Enterprises, Inc. v. City of West Palm Beach, 617 So.2d 1160 (Fla.4th DCA 1993).

³⁹ Gulf Real Properties, Inc. v. Department of Health & Rehabilitative Services, 687 So.2d 1336 (Fla.1st DCA 1997).

⁴⁰ For a discussion as to the circumstances under which intervention is appropriate in lawsuits involving contract awards, see Grubbs, Inc. v. Suncoast Excavating, Inc., 594 So.2d 346 (Fla.5th DCA 1992).

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