

Recent Judicial Decisions of Interest in Public Procurement

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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, student discipline 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 and Southern Districts 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.

Garganese, Weiss & D'Agresta, P.A. is a full service law firm that dedicates its practice to the representation of local government entities and businesses throughout Florida. The firm enjoys an excellent reputation in the legal community, and is rated AV, the highest rating available, by the Martin-Hubbell Law Directory. The Firm is also listed in the Martindale-Hubbell Bar Register of Pre-Eminent Law Firms, which only includes those firms whose members have received the highest rating by Martindale-Hubbell.

The shareholders of the Firm have extensive expertise in representing school boards, cities, counties, regulatory boards, state agencies, and special districts. The Firm has an acute understanding and appreciation of the breadth of issues facing local government in Florida; is responsive to the needs of its clients and their staff; and dedicates itself to providing results-oriented legal representation in an efficient manner.

Our Mission

Providing superior, innovative legal services to businesses and local governments, with integrity, commitment and pride, while contributing to the well-being of our community.



I. Topics

- The Demise of Best and Final Offers in the Request for Proposal Process
- Section 287.057(13), Florida Statutes – Renewal Pricing Is Not A Requirement Unless You Make It One
- Words Have Meaning
- Questions a/k/a Stump the Lawyer

II. The Demise of Best & Final Offers

The Past: Several school districts for many years have used a two-step pricing process or best and final offer component in their requests for proposals (RFPs).

At least two DOAH ALJs approved two-step or multi-step pricing processes in bid protests of RFPs, as long as the processes were clearly described in the bid document.

II. The Demise of Best & Final Offers (cont'd)

ALJ Susan Kirkland

Humana Dental Insurance Company v. Lee County School Board, DOAH
Case No. 10-9846

The ALJ concluded the School District could have requested pricing post bid opening for “low option DPO plans” had it specified such a process in the RFP.

II. The Demise of Best & Final Offers (cont'd)

ALJ J. Lawrence Johnston

Empowers, Inc. v. Tampa Bay Water, DOAH Case No. 99-3398

The ALJ upheld a multi-step process after bid opening, including a request for binding offers and a subsequent request for best and final offers, all of which were specified in the RFP.

II. The Demise of Best & Final Offers (cont'd)

The Present: ALJ J.D. Parrish in the bid protest involving the Brevard School Board determined that section 120.57(3)(f), Florida Statutes, prohibited the School Board from using a two-step pricing process or best and final offer in an RFP, which allowed bidders to change their pricing (bids) after bid opening.

Section 120.57(3)(f), Florida Statutes, states in part:

In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered.

II. The Demise of Best & Final Offers (cont'd)

The Facts: Brevard School Board issued an RFP for an internet provider wide-area network. The RFP required sealed bids which would be ranked by the selection committee when opened. Additionally, as part of the oral presentation, the top responders were allowed to submit a best and final fee schedule which would be included in the final scoring.

While the sealed bids were opened in a closed meeting of the selection committee, the oral presentations were not conducted in a closed meeting and the second presenter (Bright House) heard the first presenter's (AT&T) best and final offer, and lowered their best and final offer accordingly. Bright House was recommended for the award and AT&T filed a bid protest.

II. The Demise of Best & Final Offers (cont'd)

At the conclusion of the bid protest process, the ALJ determined section 120.57(3)(f), Florida Statutes, did not permit a School Board to allow bidders to change their bids after submission and recommended the Brevard School Board reject all responses and rebid the project.

The Brevard School Board rejected the ALJ's conclusion that the best and final offer component of the RFP violated Florida law, found that by allowing Bright House to revise its best and final offer after hearing AT&T's best and final offer resulted in a competitive advantage to Bright House which was unfair to AT&T, and awarded the project to AT&T. Of course, Bright House filed an appeal.

II. The Demise of Best & Final Offers (cont'd)

On appeal, the Court agreed with the ALJ's conclusion that section 120.57(3)(f), Florida Statutes, prohibited price revisions or best and final offers or other material bid changes after the opening of sealed bids. This is the first Florida appellate court decision on this issue. *Bright House Networks v. AT&T Corp. and Brevard School Board* 205 So.3d 837 (Fla. 5th DCA 2016).

II. The Demise of Best & Final Offers (cont'd)

What Do We Do Now?

- Review template bid documents for any language contrary to the Court decision
- If a best and final offer component is crucial to your public procurement, consider using the invitation to negotiate process

III. Renewal Pricing Is Not A Requirement Unless You Make It One

Section 287.057(13), Florida Statutes, provides in part:

Contracts for commodities or contractual services may be renewed for a period that may not exceed 3 years or the term of the original contract, whichever is longer. Renewal of a contract for commodities or contractual services must be in writing and is subject to the same terms and conditions set forth in the initial contract and any written amendments signed by the parties. If the commodity or contractual service is purchased as a result of the solicitation of bids, proposals, or replies, the price of the commodity or contractual service to be renewed must be specified in the bid, proposal, or reply, except that an agency may negotiate lower pricing.

III. Renewal Pricing (cont'd)

The Facts: The Department of Revenue issued an invitation to negotiate (ITN) for a vendor to collect and disburse child support payments. The ITN required any renewal of the resulting contract to be on the same terms and conditions as the original contract. Thus, unless a responder specified a separate price for contract renewal, the price of any contract renewal was the original price.

III. Renewal Pricing (cont'd)

The losing responder to the ITN filed a bid protest and alleged the winning bid should have been rejected as unresponsive as it did not include a renewal price as required by section 287.057(13), Florida Statutes. At the conclusion of the bid protest, the ALJ recommended dismissal of the protest. The Department of Revenue dismissed the protest and the losing responder appealed.

The issue on appeal was the interpretation of section 287.057(13), Florida Statutes, NOT the bid documents. The Court determined failing to include renewal pricing in a bid response does not make the bid unresponsive under the statutory language.

III. Renewal Pricing (cont'd)

The statutory language does not mandate bidders include renewal pricing in their bid responses. The statutory language only describes the requirements that must be met before an agency may renew a contract.

The failure of a bidder to provide a renewal price in its bid does not render the bid unresponsive under the statutory language, it simply prohibits the agency from renewing the contract beyond its original term. *Xerox State & Local Solution, Inc. v. Dept. of Revenue*, 187 So. 3d 386 (Fla. 1st DCA 2016)

III. Renewal Pricing (cont'd)

Why Do I Care?

If the ability to renew a contract is important, make contract renewal a mandatory component of your bid document and require renewal pricing as part of any bid response. If it is not clear in your bid document, section 287.057(13), Florida Statutes, will not save you.

IV. Words Have Meaning

Life Insurance Company of the Southwest v. School Board of Broward County, DOAH Case No. 14-3549

If your bid documents forbid alterations to a form, then alterations to the form are not minor irregularities or waivable technicalities.

Stump the Lawyer