

Chapter XIX

Purchasing

A. Federal statutory issues affecting competitive bidding requirement.

1. When drafting bid documents, it is imperative to know the source of funds being utilized to ensure compliance with applicable federal laws. Most federal grants also have significant audit requirements. See, e.g., Fla. Admin. Code Rule 62-503.800, provides for the audit requirements for the federally funded State Revolving Fund Loan Program. Common areas where federal grant monies are received are transportation, planning, sewer, community development, aviation, beach renourishment, and emergency management.
2. The federal statutes relating to nondiscrimination, include the Civil Rights Act of 1964, PL 88-352, which prohibits discrimination on the basis of race, color, or national origin; the Age Discrimination Act, PL 94-135, which prohibits discrimination on the basis of age; section 13 of the Federal Water Pollution Control Act, PL 92-500, which prohibits sex discrimination; the Rehabilitation Act of 1973, PL 93-112, which prohibits discrimination on the basis of handicaps.
3. Executive order no. 11246, Equal Employment Opportunity, provides for equal opportunity for all qualified persons, Executive orders 11625 and 12138, Women's and Minority Business Enterprise, requires that small minority and women's businesses and labor surplus areas be used when possible as sources of supplies, equipment, construction, and services.
4. Executive order no. 12549, Debarment and Suspension, prohibits any award to a party which is debarred or suspended or is otherwise excluded from or ineligible for, participation in federal assistance programs.
5. The Davis Bacon Act, 40 U.S.C. 276, and related requirements of the Copeland Act, and Contract Work Hours and Safety Standards Act, require compliance with labor standards for construction.

B. State competitive bidding requirements.

1. Laws requiring competitive bidding are construed to advance their purpose and should not be circumvented. Robinson's, Inc. v. Short, 146 So. 2d 108, 1113 (Fla. 1st DCA 1962), cert. denied, 152 So. 2d 170 (Fla. 1963) ("laws requiring contracts to be let to the lowest responsible bidder are of great importance to the taxpayers, and ought not to be frittered away by exceptions."); Marriott Corp. v. Metropolitan Dade County, 383 So. 2d 662 (Fla. 3d DCA 1980) (purpose of competitive bidding is to protect public and statutes should be construed to advance their purpose and to avoid their being circumvented).

2. Florida law contains numerous statutory provisions mandating that public authorities use a competitive process to purchase goods and services. Several examples are listed below:
 - a. Construction projects - Political subdivisions of the State of Florida are required to competitively award all contracts for construction on projects permitted and commenced after October 1, 1995, and estimated to have construction costs of more than \$200,000. See section 255.20, Florida Statutes (1995). There are 10 stated exceptions to this requirement which are as follows:
 - (1) Reconstruction or repairs of existing facilities damaged by sudden, unexpected turn of events and which create immediate danger, to public health or safety, other loss to public or private property or interruption of an essential government service.
 - (2) After publication in accordance with applicable ordinances and resolutions, receipt of no responsive bids or responses.
 - (3) Constructing, repairing or improving the public utility or gas utility system when performed by personnel of the system.
 - (4) Constructing, remodeling, repairing and improving by a utility commission whose major contracts are to construct and operate a public electric utility system.
 - (5) Repairing or maintaining an existing utility.
 - (6) Construction undertaken exclusively as part of a public educational program.
 - (7) Construction where the funding source of the project will be diminished or lost because of the time required to competitively award the project after the funds become available exceeds the time within which the funding source must be spent.
 - (8) Where the local government has competitively awarded a construction project to a private sector contractor and the contractor has abandoned the project before completion or the local government has terminated the contract.
 - (9) When, after a public meeting, the governing board determines by majority vote that it is in the public's interest to perform the project using its own services, employees and equipment.
 - (10) When the governing board determines that there is a sole source private sector contractor to perform the construction work.
 - b. Professional architectural, engineering, landscape architectural, and land surveying services - The acquisition of professional architectural, engineering and landscape

architectural and land surveying services must be through a competitive negotiation process. See section 287.055, Florida Statutes.

- c. Real estate conveyances - Counties must lease or dispose of their real property through a competitive bid process. Section 125.35(1)(a), Florida Statutes (1995).
- d. Other assorted statutory bidding requirements.
 - (1) Section 11.45, Florida Statutes, Auditor Selection- noncharter counties.
 - (2) Section 50.011, Florida Statutes, Legal Advertisements - counties, based on size.
 - (3) Section 101.293, Florida Statutes, Voting Machines and Equipment Purchases county or other local government empowered by general or special act or local ordinance.
 - (4) Section 125.012, Florida Statutes, Transportation and Port Facilities, Concession Franchises - counties defined in section 125.011(1), Florida Statutes.
 - (5) Section 125.031, Florida Statutes, Lease or Lease Purchases of Property for Public Purpose - county.
 - (6) Section 125.3401, Florida Statutes, Purchase or Sale of Water, Sewer, or Wastewater Reuse Utility – county.
 - (7) Section 125.35 – Property Sale or Lease - county
 - (8) Section 130.04-06, Florida Statutes, Bonds - county.
 - (9) Section 130.24, Florida Statutes, Public Works Contracts - city.
 - (10) Section 153.10, Florida Statutes, et seq., Water and Sewer System Construction Contracts - county.
 - (11) Section 154.011, Florida Statutes, Primary Health Care Services - county.
 - (12) Section 155.12, Florida Statutes, Supplies Purchased for Hospitals - trustees.
 - (13) Section 157.03, Florida Statutes, Drainage Projects - county.
 - (14) Section 166.045, Florida Statutes, Purchases of Land by cities which want public record exemption; otherwise bound by charter or ordinance.
 - (15) Section 180.24, Florida Statutes, Contracts for Construction - city.

- (16) Section 190.033, Florida Statutes, Community Development District Contracts - community development districts.
 - (17) Section 217.15-19, Florida Statutes, Federal Surplus Property Procurement - city and county, school board, city and county officers.
 - (18) Section 255.20, Florida Statutes, Competitive Award of Construction Projects Exceeding \$200,000 or \$50,000 for Electrical Work.
 - (19) Section 286.043, Florida Statutes, Airport Automobile Rental Concession -city, county, and other units of local government.
 - (20) Section 287.055 – Consultants Competitive Negotiation Act – city, county or school board.
 - (21) Section 287.055(9) – Design Build Contracts – city, county or school board.
 - (22) Section 287.093 – Permits Set Asides of up to 10% or More of Total Contracts for Personal Property and Services or for Minority Business Enterprises.
 - (23) Section 370.162, Florida Statutes, Purchase of Sponges, Florida Preference - county officials, boards of county commissioners, school boards, and city councils.
 - (24) Section 705.103, Florida Statutes, Abandoned Property - city or county.
- e. Other state statutory provisions which regulate local bidding include the following:
- (1) Section 218.70 et. seq., Florida Statutes, Florida's Prompt Payment Act.
 - (2) Section 218.80, Florida Statutes, Public Bid Disclosure Act - local government entity's permits or fees.
 - (3) Sections 235.031, 287.093, 287.0943, 287.09431, Florida Statutes, Minority Business Enterprises.
 - (4) Section 255.05, Florida Statutes, Bond of Contractor Constructing Public Buildings - county, city or other public authority.
 - (5) Section 255.20, Florida Statutes, Local Bid Law
 - (6) Sections 283.32, 287.045, 336.044, Florida Statutes, Recycled Contents.
 - (7) Section 287.042, Florida Statutes, State Purchasing Contracts.
 - (8) Section 287.084, Florida Statutes, Commodities Purchases, Preference to Florida Businesses.

- (9) Section 287.087, Florida Statutes, Preference to Businesses with Drug Free Workplace Programs.
 - (10) Section 287.133, Florida Statutes, Public Entity Crimes.
 - (11) Section 336.41, Florida Statutes, Invitations to Bid County Road Work and Bridges.
- f. Another set of state statutes relate to expenditures of public funds.
- (1) Section 28.235, Florida Statutes (1995), authorizes advanced payments by clerk of circuit court pursuant to comptroller's rules or procedures.
 - (2) Section 129.07, Florida Statutes, provides for personal liability for excess indebtedness.
 - (3) Section 129.08, Florida Statutes (1995), prohibits county commissioners from incurring an indebtedness or paying a claim not authorized by law. Mayes Printing Company v. Flowers, 154 So. 2d 859 (Fla. 1st DCA 1963).
 - (4) Section 166.241, Florida Statutes (1995), provides similar restrictions on appropriations by municipalities.
 - (5) Statute of Frauds.
 - a. The Statute of Frauds operates as a defense to the enforcement of a contract. Specified agreements must be in writing or evidenced by some type of memorandum to be enforced.
 - b. The following are required to be evidenced by a writing: promises by executors/administrators to pay estates' debts out of their own funds; promises to answer for debt/default of another (surety); promises made in consideration of marriage; promises creating an interest in land (1 yr. or less generally not subject to SOF); promises that cannot be performed within 1 yr. (year runs from date of agreement and not date of performance); agreements for the sale of goods for \$500 or more – except for specially manufactured goods, written confirmation of an oral agreement, admissions in a pleading or court that contract existed, or partial payment or delivery was made and accepted; health care guarantees; debt barred by statute of limitations; newspaper subscriptions; home solicitation sales; home improvement contracts; and credit agreements.
 - c. Statute of Frauds is satisfied if the writing contains the following: identity of parties sought to be charged; identification of contract's subject matter; terms and conditions of agreement; recital of consideration; and signature of party to be charged.

d. The Statute of Frauds is particularly relevant in relation to change orders and/or amendments in contracts. It is important to document any of these changes in writing in order to avoid litigation/disputes.

g.

- (1) In Ackerman v. Dade County, 308 So. 2d 622 (Fla. 3d DCA 1975), the court held no petition for mandamus would lie where there was no clear legal right to the performance of an administrative act, adherence to competitive bidding procedure.
- (2) There is no requirement that counties adopt a home rule ordinance prescribing a general procedure for county purposes, they are free to deal with each contract or purchase on an individual basis with or without competitive bidding as may best serve the public interest. 1971 Op. Atty. Gen. 071-366 (November 9, 1971).

However, there is a strong public policy of this state which requires that even in the absence of controlling statutes, expenditures and public funds must be made on competitive bids whenever possible. 1966 Op. Atty. Gen. Fla. 066-9 (February 7, 1966).

C. Local requirements.

1. Locally adopted procedure. In addition to statutory competitive bidding requirements, many local governments have separate ordinances, resolutions or rules directing certain procurements be accomplished by competitive award.
2. State-mandated bidding.

In certain instances, the Florida Legislature has compelled the local governments to enact ordinances governing the competitive award of services. For example, section 287.055(9)(a), Florida Statutes, the Consultant's Competitive Negotiation Act (CCNA) requires each local jurisdiction to adopt rules or ordinances for the award of design-build contracts, that is, contracts for a professional contractor team supplying a "turn-key" project. Local rules must contain, at a minimum, the criteria listed in the statute. City of Lynn Haven v. Bay County Council of Registered Architects, 528 So. 2d 1244 (Fla. 1st DCA 1988) (CCNA was violated where low bidder was allowed to select and hire the project architect).

3. Public policy.

Strong public policy considerations favor competitive purchasing. Webster v. Belote, 138 So. 721, 723-24 (Fla. 1931) the purpose of competitive bidding is "to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to

remove not only collusion but the temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government] by affording an exact comparison of bids." Id. at 723-724. See also 1966 Op. Atty. Gen. Fla. 066-9 (February 7, 1966).

4. Local option.

When there is no controlling provision requiring the use of a competitive process, the local jurisdiction may procure goods and services without competition. Grove Key Marina, Inc. v. Sakolsky, 383 So. 2d 695 (Fla. 3d DCA 1980). Absent charter provision requiring bids, city could lease public lands without bidding when no expenditure of city funds was involved. See also Ackman v. Dade County, supr.

5. Cases on local requirements.

a. In Berbusse v. North Broward Hosp. Dist., 117 So. 2d 550 (Fla. 2d DCA 1960), the court held standard of review for compliance with bidding requirements in hospital district special act is that district board's discretion will not be interfered with by the court unless the district exercised discretion arbitrarily or capriciously, or unless in its discretion based upon a misconception of law, or upon ignorance through lack of inquiry, or in violation of law, or was the result of improper influence.

6. County or city charter requirements.

a. In Marriott Corp. v. Dade County, 383 So. 2d 662 (Fla. 3d DCA 1980), the court held where charter contravened requirements that when "sealed competitive bids have been received ... the award of such franchise shall be to that bidder whose bid, when accepted, will result in the greatest financial benefit to the port authority." That award must be overturned; thus, an award made solely because the contractor was a local man who would use local contractors and local labor and would patronize local supply houses was an error.

b. In City of Opa-locka v. Trustees of Plumbing Ind. Pro. F, 193 So. 2d 29 (Fla. 3d DCA 1966), the court held that the city could not waive county code provision requiring a bidder to hold an appropriate certificate of competency qualifying him to perform the work proposed by the bid.

c. In Miami Marinas Ass'n, Inc. v. City of Miami, 408 So. 2d 615 (Fla. 3d DCA 1981), the court held that city charter of the city of Miami required competitive bidding process and prevented award of waterfront property management contract through competitive negotiation instead.

d. In Coconut Creek Golf Club v. City of Miami, 23 Fla. L. Weekly D69 (Fla. 3d DCA Dec. 24, 1997), the court held that management agreement for golf course was not a

lease of city property that would require city to follow competitive bidding requirements of city charter.

7. Local preference.

- a. In City of Port Orange v. Leechase Corp., 430 So. 2d 534 (Fla. 5th DCA 1983), the court upheld a provision of ordinance which gave a preference to local entities in an amount not to exceed three percent of the bid price. See also 2002 Op. Atty. Gen. Fla. 2002-03 (January 7, 2002), 2001 Op. Atty. Gen. Fla. 2001-65 (September 14, 2001 – local preferences adopted by various school boards are permissible in the award of purchasing and professional service contracts to the extent that such a policy does not conflict with statutes or rules.)
- b. Marriott Corp. v. Dade County, 383 So. 2d 662 (Fla. 3d DCA 1980). Where there was no local preference in statute which required bidding, or in specifications, it was an abuse of discretion to award to a local firm.
- c. In Adolphus v. Baskin, 116 So. 2d 225 (Fla. 1928), the court held it was improper to give 15 percent advantage to contractor who "is a local man, will use local contractors and local labor, and will patronize local supply houses."

8. Local standards.

- a. In All-Time Towing, Inc. v. McCutcheon, 22 Fla. L. Weekly D2538 (Fla. 4th DCA Nov. 5, 1997), the court held that sheriff had authority to issue request for competitive bids for towing contract under general statutory powers and could also place minimum performance standard into the contract.

D. Bid splitting to avoid legal requirements.

1. In Mayes Printing Co. v. Flowers, 154 So. 2d 859 (Fla. 1st DCA 1963), the court held where three sections of a counter were separately bid and that exceeded statutory requirement for competitive purchase pursuant to section 125.08, Florida Statutes, an illegal warrant resulted.
2. In Armco Drainage and Metal Products Inc. v. County of Pinellas, 137 So. 2d 234 (Fla. 2d DCA 1962), the court held county was not estopped to deny claim of bidder where three separate orders for metal resulted in purchase in excess of statutory amount requiring competition

E. Various competitive purchasing methods.

1. The competitive process may take several forms, either because it is mandated to occur through the use of a particular procurement vehicle, or through choice of the local jurisdiction. In all instances, however, the procurement vehicle must provide a basis for a meaningful comparison of the submissions. Caber Sys. v. DGS, 530So. 2d 325,339, (Fla. 1st DCA 1988) (DGS practice of having "unwritten specifications" violated basic concepts of competitive bidding). Aurora Pump Div. of Gen. Signal Corp. v. Goulds Pumps, Inc., 424 So. 2d 70, 75 (Fla. 1st DCA 1982) (public authorities have a duty to prepare "clear and precise bidding instructions").

2. The invitation for bids.

An invitation for bids (IFB) is typically rigid and identifies the resolution to the problem. It defines the scope of the work required by soliciting bids responsive to detailed plans and specifications set forth. See System Dev. Corp. v. Department of Health and Rehabilitative Servs., 423 So. 2d 433 (Fla. 1st DCA 1982).

3. The request for proposals.

- a. In contrast to invitations for bids, the request for proposals (RFP) is used when the public authority is incapable of completely defining the scope of work required, when the service may be provided in several different ways, when the qualifications and quality of service are considered the primary factors instead of price, or when responses contain varying levels of service which may require subsequent negotiation and specificity. System Dev. Corp., 423 So. 2d at 434 ("Implicit in the definition of an RFP is the underlying rationale that, in some types of competitive procurement, the agency may desire an ultimate goal but cannot specifically tell the offerors how to perform toward achieving that goal")
- b. An RFP includes, but is not limited to, applicable laws, rules, scope of services, proposer's qualifications, proposal instructions and evaluations/selection criteria. Award of contracts are generally not based solely upon price; rather, there is an extensive evaluation which includes criteria, qualifications and experience of principals and staff; methodology and management approach; understanding of the project and the local government's objectives; technical superiority, financial stability, experience and history; responsiveness to the RFP; and references.

4. The request for qualifications.

- a. A request for qualifications (RFQ) is used to obtain statements of qualifications from proposers when the scope of services or the service to be purchased can be completely defined by the public authority, and where specific qualifications are needed in order to be considered for contract award.

- b. A typical RFQ includes a brief explanation of the purpose of the RFQ, a description of the service to be purchased, the necessary qualifications, and the evaluation/selection criteria. Award of the contract is generally not based on price, rather, award is based on the qualifications and experience of the principals and staff, technical superiority, financial stability and experience and history of the proposer.

F. Evaluation of bids/proposals: Issues of responsiveness and responsibility.

Bids are generally awarded to the lowest "responsive" and "responsible" bidder. Proposals are generally awarded to the responsive and responsible proposer whose proposal receives the highest and best scores after the evaluation of proposals.

1. Responsible bidder.

The responsible bidder is one who possesses the required qualifications to perform the work or provide the services described in the solicitation. Questions of bidder responsibility relate to whether a given bidder has the necessary resources and experience to perform a given job. Issues of responsibility of the bidder may arise before the submission of bids, during any prequalification procedures, or after bid submission.

2. Generally, requirements pertaining to the responsibility of the bidder may not be waived in order to award the contract. If the bidder does not possess the required certification at the time of bid, it may not be allowed to obtain it following bid opening.

- a. In City of Opa Locka v. Trustees of Plumbing Industry Promotion Fund, 193 So. 2d 29, 32 (Fla. 3d DCA 1966), the court stated,

[T]o allow the [contracting authority] to permit bidders to qualify after their bids are accepted would circumvent the intent of the [certification requirement]. It would also be an unfair advantage over those who must pre-qualify. If the [contracting authority] may, in its discretion, waive this section, it would be conducive to favoritism by allowing some bidders to qualify after their bids are accepted, while refusing to consider bids submitted by others on the ground that they did not prequalify.

- b. The failure to submit documentation showing a bidder's responsibility, however, may be corrected after bid opening and prior to contract award, by submitting documentation showing that the bidder did possess all required certifications prior to bid.

- c. The purchasing authority defines in its solicitation and through rules and ordinances the scope of responsibility required. The traditional definition of a responsible bidder has expanded. It may now include the concept of a "qualified offeror," that is, a bidder who has the capability in all respects to perform fully the contract and has the integrity and reliability to assure good-faith performance. Section 287.012(24), Florida Statutes (1995).

- d. A bidder may be disqualified as nonresponsible for a variety of reasons. Examples include:
- (1) If the contractor has been delinquent on previous contracts, if the contractor submits false statements in a bid, or if the contractor becomes insolvent. Section 337.16, Florida Statutes; Cf. Couch Constr. Co., Inc. v. Department of Transp., 361 So. 2d 184, 187 (Fla. 1st DCA 1978) (apparent low bidder was not disqualified from submitting bids even though he had been issued preliminary notices of delinquency on the progress of other contracts by the department).
 - (2) For cases considering the issue of bidder responsibility, see also White Constr Co. v. Department of Transp., 526 So. 2d 998 (Fla. 1988), opinion on the merits, 515 So. 2d 684, 685 (Fla. 1st DCA 1988) (contractor who lists his certificate to qualify to bid for DOT projects not entitled to a stay); Department of Transp. v. Clark Constr. Co., Inc., 621 So. 2d 511 (Fla. 1st DCA 1993) (reversal of order enjoining administrative proceedings pertaining to contractor's delinquency on prior department project, as legislative policy was to have speedy administrative determinations of a contractor's delinquency).
 - (3) Responsive bids.
Responsive bids are those in which the bidder describes the work in the same way as is described in the solicitation. It means the bid is submitted on the correct forms, and contains all required information, signatures, and notarizations. Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Servs., 606 So. 2d 380 (Fla. 3d DCA 1992).

G. Bid mistakes: Circumstances under which irregularities are waivable by the public authority.

1. When the bid submitted by the lowest or best bidder contains a mistake or irregularity, or deviates from the solicitation in some way, the contracting authority must determine whether the bid must be rejected. Minor errors are of no significance. The issue in the analysis of bid mistakes is whether the deviation renders the low bid nonresponsive, or whether the low bidder who committed the mistake gained an unfair competitive advantage over the other responsive bidders, thereby restricting competition.
2. In Harry Pepper and Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977), the court stated, "The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders."
3. Wide discretion is accorded the public authority.
A contracting authority's determinations regarding mistakes which affect the responsiveness of a bid are accorded wide discretion. If a reasonable rationale is

advanced for the contracting authority's determinations on responsiveness, it is likely that it will be upheld on review by the courts.

4. In Department of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 913 (Fla. 1988), the court stated, "[a] public body has wide discretion in soliciting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree."
5. Whether a bid mistake is material depends on the facts.
 - a. Irregularities or omissions determined to be material, and requiring a rejection of the lowest bid:
 - (1) The failure to submit a completed list of subcontractors; as required in the ITB, rendered a bid nonresponsive as it gives the low bidder an unfair competitive advantage. In E.M. Watkins and Co., Inc. v. Board of Regents, 414 So. 2d 583 (Fla. 1st DCA 1982), rev. denied, 421 So. 2d 67 (Fla. 1982), the court stated, "It allows the potential for speculation by use of a phantom price and efforts to shop that item or trade until a subcontractor can be found at the speculative contract price."
 - (2) Apparent low bidder who bid on pumps which did not conform to the solicitation enjoyed a competitive advantage over other bidders, and the authority's determination to waive this irregularity was an abuse of discretion. Harry Pepper and Assoc., Inc., 352 So. 2d at 1190.
 - (3) In City of Miami Beach v. Klinger, 179 So. 2d 864 (Fla. 3d DCA 1965), the court determined when city, pursuant to its charter, published an invitation for sealed bids for the dockage concession for hire of charter fishing boats only for a five-year period and where additional supplemental offer was contained in alternative bid based upon the city granting an additional five-year term by way of an option, the result was the invalidation of the entire agreement absent rebidding.
 - (4) In Central Florida Equipment Rentals of Dade County, Inc. v. Lowell Dunn Co., 585 So. 2d 1171 (Fla. 3d DCA 1991), the court held preliminary injunction would not lie to prohibit Dade County from awarding bid to next low bidder when lowest bidder had a material irregularity based on its failure to designate single manufacturer and installer of landfill liner and no bidders submitted quality control manuals, which the low bidder claimed was also a material irregularity of the next low bidder.

- b. Irregularities or omissions determined to be waivable.
- (1) The submission of a cashier's check instead of a bid bond failed to constitute a material variation from Dade County's ITB. Robinson Elec. Co., Inc. v. Dade County, 417 So. 2d 1032 (Fla. 3d DCA 1982).
 - (2) Failure to submit written evidence that agent signing for the owner had authority to bind the bidder was an irregularity which could be cured after the fact. In Intercontinental Properties, Inc., 606 So. 2d 380, the court stated, "This is plainly the sort of deficiency which a public agency can, in its discretion, allow a bidder to cure after the fact."
 - (3) DOT rejection of lowest bid, which contained a DBE utilization form with the bid at bid opening, but which was detached and lost after bid opening, was an arbitrary decision. Asphalt Pavers, Inc. v. Department of Transp., 602 So. 2d 558 (Fla. 1st DCA 1992).
 - (4) Omission of a DBE utilization form is a technical, minor discrepancy which did not give low bidder a competitive advantage. Overstreet Paving Co. v. Department of Transp., 608 So. 2d 851 (Fla. 2d DCA 1992).
 - (5) Tropabest Foods, Inc. v. State Dep't of Gen. Servs., 493 So. 2d 50 (Fla. 1st DCA 1986). Irregularity as to beverage mix which did not affect price did not constitute grounds for awarding contract to another bidder.
 - (6) Cases disfavoring rejecting the lowest bid for bid irregularities.
 - (a) In Intercontinental Properties, *supra* at 380, the court stated that there is a very strong public interest in favor of saving tax dollars in awarding public contracts. There is no public interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, when the low bidder did not derive any unfair advantage by reason of the technical omission.
 - (b) In Air Support Serv. Int'l, Inc. v. Metropolitan Dade County, 614 So. 2d 583 (Fla. 3d DCA 1993), the court stated, "The purpose of competitive bidding is to secure the lowest responsible offer That public purpose is best served by construing the bid requirements, if at all reasonable, in a way that would give all bidders an opportunity to compete."
 - (c) In Liberty County v. Baxter's Asphalt, 421 So. 2d 505 (Fla. 1982), the court held public body's decision on award will not be overturned by court even if it may appear erroneous when reasonable persons may disagree. The court held that where there was no fraud or misrepresentation on county's part, it was within discretion of county to award

contract to lowest bidder although it had only submitted bid on one of two types of asphalt.

H. Discretion of the contracting authority to reject all bids.

1. A contracting authority has wide discretion to reject all bids and readvertise the project, discontinue the solicitation, or waive the competitive process and enter into negotiations.
2. The discretion to reject bids is not limitless. In Wood-Hopkins Contracting Auth. v. Roger J. Au and Son, Inc., 354 So. 2d 446, (Fla. 1st DCA 1978) the court stated that in exercising the power to reject any or all bids, and proceeding with the awarding of the contract, the officers cannot act arbitrarily or capriciously, but must observe a good faith and accord to all bidders just consideration, thus avoiding favoritism, abuse of discretion, or corruption. Even where the right to reject any and all bids is properly reserved, the bidding law may not be evaded under the color of rejection ... Rejection of all bidders becomes the means of allowing a favorite bidder another chance to submit a bid.
3. Therefore, the decision to reject bids must be grounded on a legitimate basis. Couch Constr. Co., Inc. v Department of Transp., 361 So. 2d 172 (Fla. 1st DCA 1978) (decision to reject all bids and readvertise was arbitrary where DOT failed to articulate a rationale for the decision, which was prompted by a bid protest due to low bidder's failure to attend mandatory prebid meeting).

I. The Bid Protest: Issues of standing, administrative process, and wide discretion enjoyed by the contracting authority.

1. Standing to challenge the contracting authority's decision in competitive purchasing.
 - a. To challenge the contracting authority's decision on a proposed contract, the contractor must have submitted a bid itself. Brasfield & Gorrie Gen. Contractors, Inc. v. Ajax Constr. Co., 627 So. 2d 1200 (Fla. 1st DCA 1993), rev. denied, 639 So. 2d 975 (Fla. 1994) (city should not have been enjoined from contract award because contractor seeking injunction had not even submitted a bid on the project).
 - b. In Westinghouse Elec. Corp. v. Jacksonville Transp Auth., 491 So. 2d 1238 (Fla. 1st DCA 1986), the court held absent extraordinary circumstances, nonbidder has no standing to file bid protest.
 - c. In Fort Howard Co. v. Department of Management Servs. of Florida, 624 So. 2d 783 (Fla. 1st DCA 1993), the court held supplier to bidding vendors on contract for sale of paper towels had no standing to protest bid.
 - d. In Preston Carroll Co., Inc. v. Florida Keys Aqueduct Auth., 400 So. 2d 524 (Fla. 3d DCA 1981), the court held protester required to show that it was the second lowest responsive and responsible bidder before allowed to object to bid award.

- e. The protester must show that its own bid does not suffer from the same deficiency as the bid being protested. Intercontinental Properties, supra at 380.
2. The initial bid protest.
3. Wide discretion is enjoyed by the public entity.
 - a. Most bid protests are not successful in court because the public entity enjoys a great deal of discretion in the bid process and in awarding its contracts. If all bidders competed fairly and a legitimate reason exists for the proposed award, courts should not second-guess the challenged decision. See William A. Berbusse, Jr., Inc. v. North Broward Hosp. Dist., 117 So. 2d 550 (Fla. 2d DCA 1960); cf. Air Support Serv. Int'l, Inc. v. Metropolitan Dade County, 614 So. 2d 583 (Fla. 3d DCA 1993) (public bid requirements may not be materially altered after submission of bids).

J. Contract formation at the conclusion of the competitive procurement process.

1. Contract award following an invitation for bids.
 - a. In Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc., 359 So. 2d 446 (Fla. 1st DCA 1978), the court held that when a public entity votes to accept a bid, or on the bidder's notification of the acceptance vote, whichever occurs later a contractual relationship arises between the entity and the accepted bidder).
 - b. Generally, once a bidder is officially informed of the acceptance of its bid, a contract is formed, even though the contract may not have been officially executed. See Schloesser v. Dill, 383 So. 2d 1129 (Fla. 3d DCA 1980); Berry v. Okaloosa County, 334 So. 2d 349 (Fla. 1st DCA 1976) (mere attendance at a board meeting is insufficient to satisfy the notice requirements for creating a binding contract).
 - c. In Berry v. Okaloosa County, 334 So. 2d 349 (Fla. 1st DCA 1976), the court held when board of county commissioners' motion to award bid to plaintiff was rescinded by subsequent formal action, no binding contract resulted, because no formal notification of the acceptance of the bid had occurred, and the mere fact of a representative being present at the public meeting was not adequate notice.
 - d. In Dedmond v. Escambia County, 244 So. 2d 758 (Fla. 1st DCA 1971), the court held Escambia County had no authority to cancel award once notice had been given that offer was accepted despite fact that lease had not been executed.
2. Contract award following a request for proposals.
 - a. Typically, at the conclusion of a request for proposals, the procurement officer seeks authorization from the governing body to begin negotiating the terms of the ensuing contract with the highest ranked proposer, and if such negotiations prove unsuccessful, to be allowed to pursue negotiations with the next ranked proposer on

down, until a satisfactory contract is drawn up. Therefore, in contrast with the IFB process, the governing body's selection of a successful proposer at the conclusion of the RFP process should not create a binding contract, given that the terms of the contract are still not known.

- b. In H. Gore Enterprises, Inc. v. City of West Palm Beach, 617 So. 2d 1160 (Fla. 4th DCA 1993), the city commission of Palm Beach voted to accept a bid for vehicle towing services, and thereafter voted to rescind the award. The court found that no binding contract had been formed upon the first commission vote, for the city manager had advised the board that the award of bid was simply the selection of a vendor with whom a contract would be negotiated, but if such negotiations were unsuccessful, the city would thereafter negotiate with the next bidder on the recommended list. Id. at 1161.
 - c. State v. Gtech Corp., 816 So. 2d 648 (Fla. 1st DCA 2001). (Court invalidated action by the Department of State which requested proposals and then subsequently negotiated a contract which was materially different from the original proposals.)
3. The public entity's ability to reconsider the award.
 - a. In City of Homestead v. Raney Constr., Inc., 357 So. 2d 49 (Fla. 3d DCA 1978), the court held a binding contract comes into being with the acceptance of a bid unless the action is rescinded at the same continuous meeting.
 - b. In Berry v. Okaloosa County, 334 So. 2d 349 (Fla. 1st DCA 1976), the court held that the mere fact that a representative of the initial winner in the competitive process is present at the city or county commission meeting where the vote to award is made does not prevent a governmental deliberative body from further considering the matter during the course of its meeting.
 4. Relief from contract based on mistake.
 - a. Intercontinental Properties, Inc. v. State Dep't of Health and Rehabilitative Servs., 606 So. 2d 380 (Fla. 3d DCA 1992). Protesting bidder must be prepared to show that low bid to lease space to agency is deficient and that its own bid does not suffer from the same deficiency.
 - b. Hotel China & Glassware Co. v. Board of Public Instruction of Alachua County, 130 So. 2d 78 (Fla. 1st DCA 1961). Generally, equity will relieve a unilateral mistake if the public body is informed promptly upon discovery and if the mistake is material, goes to substance, was not occasioned by the lack of due care or diligence or the result of neglect.
 - c. Lassiter Constr. Co. v. School Bd. of Palm Beach County, 395 So. 2d 567 (Fla. 4th DAC 1981). No upward adjustment to compensation made where error in transposing figure for concrete work from bid worksheet to final bid summary was negligently

- made by the president himself; error was less than four percent of intended bid, and he would still receive some profit.
- d. State Bd. of Control v. Clutter Constr. Corp., 139 So. 2d 153 (Fla. 1st DCA 1962). Contractor permitted to withdraw bid where complying in the face of honest mistake of \$100,000 would work severe hardship upon the bidder, error was not the result of gross negligence or willful inattention, and the error was discovered and communicated before acceptance.
 - e. Department of Transp. v. Ronlee, Inc., 518 So. 2d 1326 (Fla. 1987). Reformation of contract not appropriate remedy; rescission or withdrawal are appropriate remedies.
5. Change orders and amendments.
- a. Grove Key Marina, Inc. v. Sakolsky, 383 So. 2d 695 (Fla. 3d DCA 1980). Where 1973 lease had been executed as the result of competitive bidding process, but there was no competition relating to later amendments in the absence of requirement of expenditure, the amendments were not void.
 - b. George Hyman Constr. Co. v. City of Miami, 545 So. 2d 512 (Fla. 3d DCA 1989), rev. denied, 553 So. 2d 1164. Where change order to contract provided for disbursement of construction funds by checks jointly payable to contractor and subcontractor, latter could allege sufficient facts to support a cause of action for the breach of an express contract.
 - c. County of Brevard v. Miorelli Engineering, Inc., 703 So. 2d 1049 (Fla. 1997). (Contractor not entitled to recovery for changes without a written change order.)
 - d. Ajax Paving Industries, Inc. v. Charlotte County, 752 So. 2d 143 (Fla. 2d DCA 2000). (Distinguished claim in Miorelli as one for damages not covered in the original contract, whereas Ajax claimed damages for work and materials clearly addressed in the original contract between parties.)
6. Ratification of Unauthorized Agreement.
- Frankenmuth Mutual Insurance Company, etc. v. Magaha, 769 So. 2d 1012 (Fla. 2000). (Court set forth three-prong test for determining whether an after-the-fact ratification has occurred, but does not make a finding on this issue; also holds non-substitution clauses unconstitutional in light of Article VII, Section 12, of Fla. Const.)

K. Judicial review of proposed or actual contract awards following a competitive process.

1. Standing.
 - a. City of Lynn Haven v. Bay County Council of Registered Architects, 528 So. 2d 1244 (Fla. 1st DCA 1988). Nonprofit organization of registered architects had

standing to challenge alleged circumvention of Consultants Competitive Negotiation Act.

- b. Godheim v. City of Tampa, 426 So. 2d 1084 (Fla. 2d DCA 1983). Taxpayer failed to show special injury or assert constitutional challenge and thus did not have standing to enjoin city from entering into a contract for the design, construction, and operation of a solid waste landfill.
- c. Preston Carroll Co. v. Florida Keys Aqueduct Auth., 400 So. 2d 524 (Fla. 2d DCA 1981). Unsuccessful bidder failed to establish substantial interest and lacked standing where another contractor was second lowest bid.
- d. Brasfield & Gorrie Gen. Contractor, Inc. v. Ajax Constr. Co., Inc. of Tallahassee, 627 So. 2d 1200, *rev. denied*, 639 So. 2d 975 (Fla. 1st DCA 1993). Contractor's failure to submit bid for construction of city parking facility precluded standing.
- e. Mid-American Waste Systems of Florida, Inc. v. City of Jacksonville, 595 So. 2d 1187 (Fla. 1st DCA 1992). Second most responsible bidder had standing to protest award to another corporation of one convicted of price fixing.

2. Equitable relief.

- a. Injunctions. There is authority that one seeking relief in a bidding controversy should act before the public entity votes to award a bid or to approve a contract negotiated with the successful proposer, because of the rule that the commission vote creates a binding contractual relationship. See Wood Hopkins Contracting Auth., *supra* at 448.
- b. In City of Opa Locka v. Trustees of Plumbing Industry Promotion Fund, 193 So. 2d 29 (Fla. 3d DCA 1966), injunction was granted to prevent city from circumventing the county's certification requirements for contractors.
- c. In Pool & Kent Co. v. Capeletti Bros, Inc., 196 So. 2d 70 (Fla. 2d DCA 1966), the lower court enjoined award to low bidder on grounds that bidder was not properly qualified.
- d. Declaratory judgments. In Marriott Corp. v. Metropolitan Dade County, 383 So. 2d 662 (Fla. 3d DCA 1980), the court held county abused its discretion in awarding contract on basis that company was local, and held contract to be invalid.

3. Remedies to unsuccessful bidder after contract award.

- a. Although there is ample authority that a disappointed bidder should protest and/or seek injunctive relief before the contracting authority award, there is also authority that courts may invalidate contracts that are void being against public policy. See City of Miami v. Benson, 63 So. 2d 916 (Fla. 1953) (contract between city and bidder invalidated on public policy grounds after contract was signed); Mid-American Waste Systems of Florida, Inc. v. City of Jacksonville, 596 So. 2d 1187 (Fla. 1st DCA

1992), rev. denied, 604 So. 2d 486 (Fla. 1992) (appeal from order dismissing claim for injunctive and declaratory relief not rendered moot by legislation making exception to ordinance controlling earlier contract award).

- b. Bid preparation costs. Assuming no equitable relief is available, and a court does not invalidate the challenged contract on public policy grounds, the damages recoverable by a disappointed bidder are limited to bid preparation costs. See Wood-Hopkins Contracting Co., supra at 448.
- c. In City of Cape Coral v. Water Servs. of America, 567 So. 2d 510 (Fla. 2d DCA 1990), the court held that unsuccessful bidder who was enticed by city to bid even though it was not licensed contractor, whose bid was rejected on that basis, could recover bid preparation costs and prejudgment interest, but not lost profits.

L. Minority set asides.

1. In City of Wildwood v. Gibbs and Register Inc., 694 So. 2d 7763 (Fla. 5th DCA 1997), court held that city could recover from bid bond where low bidder breached contract by refusing to comply with minority and women's business enterprises participation requirements.

M. Applicability of public records.

1. Public Records Act contains an exemption for sealed bids for 10 days after opening. Section 119.07(3)(m), Florida Statutes. However, this exemption is discretionary and bids may be made open for public inspection.
2. Appraisals, reports relating to value, offers and counteroffers for purchase of real property are exempt under conditions set forth in section 119.07(3)(n), Florida Statutes.
3. Data processing software under license is exempt pursuant to section 119.07(3)(o), Florida Statutes (2003).
4. Shevin v. Byron, Harless, Schaffer, Reid and Assocs. Inc., 379 So. 2d 633 (Fla. 1980). Letters, memoranda, resumes and travel vouchers of consultant searching for director of the electric authority are public records.
5. The test for when a contractor is subject to the Public Record Law is set forth in News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group Inc., 596 So. 2d 1029 (Fla. 1992), and consist of the following factors: creation, funding, regulation, decision-making process, governmental function and goals.

Chapter XIX

Purchasing

C. Local requirements.

1. Locally adopted procedure. In addition to statutory competitive bidding requirements, many local governments have separate ordinances, resolutions or rules directing certain procurements be accomplished by competitive award.
 - a. Miami-Dade County v. Church & Tower, Inc., 715 So. 2d 1084 (Fla. 3d DCA 1998). Plaintiff was denied injunction forbidding county from entering into bid with other than low bidder, where ordinance allowed county to reject recommendation of hearing officer and determine lowest bidder was not responsible bidder based upon past contract disputes between county and lowest bidder.

F. Evaluation of bids/proposals: Issues of responsiveness and responsibility.

2. Generally, requirements pertaining to the responsibility of the bidder may not be waived in order to award the contract. If the bidder does not possess the required certification at the time of bid, it may not be allowed to obtain it following bid opening.
 - d. A bidder may be disqualified as nonresponsible for a variety of reasons. Examples include -
 - (1) If the contractor has been delinquent on previous contracts, if the contractor submits false statements in a bid, or if the contractor becomes insolvent. Section 337.16, Florida Statutes; Cf. Couch Constr. Co., Inc. v. Department of Transp., 361 So. 2d 184, 187 (Fla. 1st DCA 1978) (apparent low bidder was not disqualified from submitting bids even though he had been issued preliminary notices of delinquency on the progress of other contracts by the department).
 - (a) Miami-Dade County v. Church & Tower, Inc., 715 So. 2d 1084 (Fla. 3d DCA 1998). Plaintiff was denied injunction forbidding county from entering into bid with other than low bidder, where language of ordinance allowed county commission to reject recommendation of hearing officer and determine lowest bidder was not responsible bidder based upon past contract disputes between county and lowest bidder.