Government Bid Protests

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A Survey of Florida’s Recent District Court of Appeal and Administrative Decisions Involving Bid Protests: Challenging the Government’s Conduct Regarding a Public Procurement

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I. INTRODUCTION

This article is a survey of recent Florida decisions of the district courts of appeal and the Division of Administrative Hearings involving government bid protests. Because there have been few, if any, recent articles on this topic, this article briefly discusses or cites to older, leading cases that are necessary to place certain issues in context.

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1. Many of the citations to decisions of the Division of Administrative Hearings ("DOAH") are to Recommended Orders, rather than Final Orders, and are thus not published in any reporter. These decisions, however, are available at the DOAH'S website, www.doah.state.fl.us/intemet.

2. For an excellent historical discussion of bid protests and public contracting in Florida in general, see J. Rex Farrior, Jr. & John H. Rains, III, Public Sector Competitive Bidding in Florida, 11 Stetson L. Rev. 428 (1982) and John H. Rains, III, An Update on Public Sector Competitive Bidding in Florida, 14 Stetson L. Rev. 771 (1990). See also F. Alan Cummings & Mary M. Piccard, Section 10: Bid Dispute Resolution in Florida Administrative Practice (Florida Bar Continuing Legal Education) (5th ed. March 1997); John W. Bakas, Jr., Section 7: Bids, Bid Disputes, and Competitive Negotiations Involving Public Entities in Florida Construction Law and Practice (Florida Bar Continuing Legal Education
A bid protest is a legal challenge to an action of a public entity relating to the procurement of goods or services. All state agencies and most local agencies must select contractors to provide goods or services through a competitive process. If a potential contractor objects to the process that a public entity uses to select the contractor or objects to the result of the process, then it may file a lawsuit challenging the public entity's action. With regard to state agencies, there is a comprehensive administrative process that must be followed. Local entities may elect either an administrative process, or an aggrieved potential contractor can file suit in circuit court.

II. STANDING TO COMMENCE A BID PROTEST

Like traditional lawsuits, to commence a bid protest the contractor must have standing. Under Florida statutory law, and most local government entity procurement codes, a contractor may commence a bid protest only if the contractor's "significant interests" have been affected by the public entity's conduct. This section of the survey reviews the circumstances under which a contractor's "significant interests" are affected, enabling it to have standing to file a bid protest.


3. See Farrior & Rains, supra note 2, at 443.

4. "Agency" means any of the various state officers, departments, boards, commissions, divisions, bureaus, councils, and any other unit of organization, however designated, of the executive branch of state government. "Agency" does not include the Board of Regents or the State University System. Fla. Stat. § 287.012(1) (2000).

5. See, e.g., Fla. Stat. § 255.20 (2000) (requiring competitive awarding of construction contracts by counties, municipalities, and other political subdivisions of the state); § 255.29 (requiring procedures for competitively awarding state construction contracts); § 287.057 (requiring the use of competitive sealed bidding for the purchase of all goods and services in excess of $25,000); § 287.055 (discussing competitive selection of contractors for the acquisition of professional architectural, engineering, landscape architectural, or surveying and mapping services, including design-build contractors); Broward County Procurement Code § 21.6, .29; Miami Dade County Code § 2-8.1.


7. Id.

8. See § 120.57(3)(b) (restricting standing to persons "adversely affected by the agency decision or intended decision"); see also Broward County Procurement Code § 21.118 (restricting standing to "[a]ny actual or prospective bidder or offeror who has a substantial interest in and is aggrieved in connection with the solicitation or proposed award of a contract").
A. *Generally Only Bidders or Prospective Bidders Have Standing*

Generally, only bidders or prospective bidders challenging the specifications or other procurement documents have standing to commence a bid protest. Accordingly, it has long been established that a bidder who fails to submit a proposal lacks standing to pursue a protest.\(^9\) Likewise, in *Fort Howard Co. v. Department of Management Services*,\(^10\) the appellate court confirmed that subcontractors and suppliers lack standing to commence a protest in which they are not bidders.\(^11\) Even a joint venturer who lacks the consent of the other joint venturers to bring a bid protest lacks standing to commence a bid protest.\(^12\) This nonbidder rule was recently followed in *More Financial Services, Inc. v. Broward County School Board*,\(^13\) where the administrative law judge granted the agency’s motion to dismiss the bid protest where the protester lacked standing because it was a subcontractor, rather than a bidder.\(^14\)

B. *Under Extraordinary Circumstances a Nonbidder May Commence a Bid Protest*

Despite the general rule that only bidders or prospective bidders have standing to commence a bid protest, one case created an exception, holding that in “extraordinary circumstances” other parties may have standing.\(^15\) In *Fairbanks, Inc. v. Department of Transportation*,\(^16\) a supplier that manufactured truck-weighing scales was permitted to maintain a bid protest even though it was not a bidder or prospective bidder.\(^17\) The intended


\(^10\) 624 So. 2d 783 (Fla. 1st Dist. Ct. App. 1993).

\(^11\) *Id.* at 785 (affirming finding that a manufacturer of paper towels who was a supplier to potential bidders, but not a bidder itself, lacked standing).

\(^12\) See Brasfield & Gorrie Gen. Contractor, Inc. v. Ajax Const. Co. of Tallahassee, 627 So. 2d 1200, 1203 (Fla. 1st Dist. Ct. App. 1993).

\(^13\) No. 00-2311BID (Fla. Div. Admin. Hr’gs June 26, 2000).


\(^15\) Advocacy Ctr. for Persons with Disabilities, Inc. v. Dep’t of Children & Family Servs., 721 So. 2d 753 (Fla. 1st Dist. Ct. App. 1998); see also Fairbanks, Inc. v. Dep’t of Transp., 635 So. 2d 58 (Fla. 1st Dist. Ct. App. 1994).

\(^16\) 635 So. 2d 58 (Fla. 1st Dist. Ct. App. 1994).

\(^17\) *Id.* at 61.
awardee of the public contract proposed using the scales manufactured by Fairbanks.\textsuperscript{18} The appellate court concluded that the supplier established standing by alleging the Department of Transportation ("DOT") intended to construct numerous weigh stations in Florida in the future using the same specifications, and it was impeding the competitive procurement of scales for weigh stations by permitting only one manufacturer's model.\textsuperscript{19}

The appellate court distinguished \textit{Fort Howard} because in that case the issue was decided upon whether the protester could file a bid protest.\textsuperscript{20} In \textit{Fairbanks}, the court focused on whether the protester was entitled to a formal hearing.\textsuperscript{21} The appellate court also found that the bidders in \textit{Fort Howard} had no interest in rebidding the procurement.\textsuperscript{22} These distinctions, along with allegations that the government intended to use the same challenged specifications in future procurements, sufficiently established such exceptional circumstances, although the court commented that generally most nonbidders would not have standing.\textsuperscript{23}

Despite the appellate court's creation of this exception, no other decisions have ever found similar exceptional circumstances justifying standing for a nonbidder. For instance, the court in \textit{Advocacy Center for Persons With Disabilities, Inc. v. Department of Children & Family Services},\textsuperscript{24} involving a privatized state psychiatric hospital, held that neither two involuntarily confined patients nor a nonprofit advocacy organization for the disabled had standing to challenge the public agency's request for proposals.\textsuperscript{25} The appellate court reasoned that in order to have standing to commence a bid protest, one must have some potential stake in the contract to be awarded.\textsuperscript{26} The court also noted that such standing is limited to potential bidders and perhaps suppliers to those bidders.\textsuperscript{27}

\textbf{C. A Bidder Must Also be Likely to Obtain Award if Protest is Granted}

The mere fact that someone is a bidder, however, is not enough to have standing to commence a bid protest. In order to have standing, a bidder must

\begin{enumerate}
\item \textit{Id.} at 59.
\item \textit{Id.}
\item \textit{Id.} at 61.
\item \textit{Fairbanks}, 635 So. 2d at 61.
\item \textit{Id.}
\item \textit{See id.}
\item 721 So. 2d 753 (Fla. 1st Dist. Ct. App. 1998).
\item \textit{Id.} at 755–56.
\item \textit{Id.} at 755.
\item \textit{Id.}
\end{enumerate}
also have a reasonable likelihood of obtaining the contract if its bid protest is successful.\footnote{Id.} Generally, this means the bidder must be either the highest ranked offeror, the lowest priced bidder, or the next bidder in line for an award.\footnote{E.g., Mid-Am. Waste Sys. of Fla., Inc. v. City of Jacksonville, 596 So. 2d 1187, 1189 (Fla. 1st Dist. Ct. App. 1992) (reversing dismissal of bid protest lawsuit and holding that second most responsible bidder had standing to seek injunctive and declaratory relief against awarding contract to sister corporation of waste hauler that had been convicted of price fixing); Preston Carroll Co. v. Fla. Keys Aqueduct Auth., 400 So. 2d 524, 525 (Fla. 3d Dist. Ct. App. 1981) (holding that the third lowest bidder lacked standing).} For instance, previous cases have found that a fourth ranked bidder had standing to file a protest,\footnote{E.g., Capeletti Bros., Inc. v. Fla. Dep’t of Gen. Servs., 432 So. 2d 1359, 1362 (Fla. 1st Dist. Ct. App. 1983) (affirming denial of protest by the fourth ranked bidder).} but have questioned whether the seventh ranked bidder had such standing.\footnote{See Brasfield & Gorrie Gen. Contractor, Inc. v. Ajax Const. Co. of Tallahassee, 627 So. 2d 1200, 1203 n.1 (Fla. 1st Dist. Ct. App. 1993) (questioning whether seventh ranked bidder would have standing).}

In contrast, in \textit{Rovel Construction, Inc. v. Department of Health},\footnote{No. 99-0596BID (Fla. Div. Admin. Hr’gs Apr. 27, 1999) (denying protest of fourth ranked proposal, and although finding standing, determining proposal nonresponsive and rejecting challenge to evaluation of awardee).} the Division applied an analysis that permits any bidder to file a bid protest.\footnote{See id. \S 18.} The fourth ranked bidder challenged the agency’s $1.6 million intended award for the procurement of the rehabilitation of the Gato Cigar Factory, an existing historic structure in Key West, and construction of internal office and clinic space for the Department of Health.\footnote{Id. \S 1-13.} The protester in \textit{Rovel Construction, Inc.} did not challenge the second and third bidders.\footnote{Id.} Nonetheless, the administrative law judge rejected the argument of the agency and the intervenor/awardee that the protester lacked standing as the fourth ranked bidder.\footnote{Id. \S 23.} The administrative law judge found standing decisions before the 1996 amendments to chapter 120 of the \textit{Florida Statutes} were not applicable because, among other things, the amendments added language that a bid protest proceeding was de novo.\footnote{Rovel Constr., No. 99-596BID \S 9–10.} Thus, the judge reasoned that because the second and third ranked bidders did not participate...
in the protest, the only possible outcome was that either the protester or the intervenor/awardee would receive the award.38

Because the standing analysis in *Rovel Construction, Inc.* is not persuasive, a potential protester should pause before relying on the decision to determine whether it has standing. Instead, a bidder, other than one who is next in line, should contend one or all of the following: 1) that all bidders in line for award are not eligible; 2) that the agency should reject all bids for some reason; or 3) that some reason prevents the procuring agency from selecting the higher ranked proposals. For instance, in *Enpower, Inc. v. Tampa Bay Water*,39 the fourth ranked bidder challenged the evaluation of the two highest ranked proposals, but not that of the third.40 However, the administrative law judge found the protester had standing because it contended that the agency should not be able to select the third ranked proposal without retaining an independent consultant, one not affiliated with the agency, to select between its proposal and the third ranked proposal.41

Not only must a bidder be in line for an award to have standing, but as noted in *Intercontinental Properties, Inc. v. Department of Health & Rehabilitative Services*,42 its bid or proposal must be responsive to the procurement requirements to challenge an award to another contractor.43 In *Intercontinental Properties, Inc.*, the appellate court held that the responsiveness of the protestor's bid was an issue that could be determined by the administrative law judge.44 However, the issue of responsiveness regarded the same procurement requirement for both the protester and the intended awardee.45 At least one agency has attempted to restrict the decision in *Intercontinental Properties, Inc.* to its specific facts.46 In

38. *Id.* ¶ 23.
40. *See id.* ¶ 177–78 (denying protest challenging evaluation of intended awardee and others).
41. *Id.* ¶ 178–84.
42. 606 So. 2d 380 (Fla. 3d Dist. Ct. App. 1992) (affirming rejection of bid as nonresponsive).
43. *Id.* at 385.
44. *Id.* at 384.
45. *Id.* at 381.
46. In a recent case in which this author is counsel to the protester, the Broward County School Board argued that it was premature for the intervenor to challenge the responsiveness of the protester, and the administrative law judge agreed. *Padula & Wadsworth Constr., Inc. v. Broward County Sch. Bd.*, No. 00-2408BID (Fla. Div. Admin. H'gs Aug. 21, 2000) (deferring issue challenging standing of protester until resolution of issue in underlying protest).
Wharton Investment Group, Ltd. v. Department of Juvenile Justice,\(^{47}\) however, the administrative law judge reviewed the protester's responsiveness as to its failure to submit a Public Entity Crime Addendum, which was not the basis for nonresponsiveness raised by the protester against the intended awardee.\(^{48}\) Thus, it is likely that future courts will permit intervenors and agencies to challenge the responsiveness of protesters for their failure to comply with any procurement requirement.

### III. TIMELINESS ISSUES

#### A. Submission of Bids

Bidders must be very careful to ensure their bids are timely received by the procuring entity. Untimely delivery, even if caused by third persons, such as a delivery service, is an appropriate basis for the procuring entity to reject the bid. For instance, in *Nationwide Credit, Inc. v. Department of Education*,\(^{49}\) the administrative law judge denied the protest of a bidder who challenged the agency's refusal to consider its late-filed proposal.\(^{50}\) The bidder, who had been the incumbent contractor for the previous nine years, provided its proposal to Federal Express on January 19, 2000, at 1:20 p.m., with instructions to deliver it to the agency by 10:00 a.m. on January 20, 2000.\(^{51}\) The Request for Proposal ("RFP") informed offerors that proposals were due by January 20, 1999, at 3:00 p.m., and that the agency could reject untimely proposals.\(^{52}\) Due to an error in the Federal Express distribution system, however, the agency did not receive the proposal until January 21, 1999.\(^{53}\) At that time, the agency had not completed any evaluations, but it refused to consider the proposal.\(^{54}\) The agency also refused to consider another proposal that had been received thirty minutes late.\(^{55}\) The administrative law judge held that, despite an agency's discretion to accept and review an untimely proposal, it was not improper to reject a proposal where the rejection was consistent with the agency's policy.\(^{56}\)


\(^{48}\) Id. ¶¶ 12–16 (relying on *Intercontinental Props., Inc.*, 606 So. 2d at 380).


\(^{50}\) Id. ¶ 26.

\(^{51}\) Id. ¶ 9–10.

\(^{52}\) Id. ¶ 4.

\(^{53}\) Id. ¶ 10.

\(^{54}\) *Nationwide Credit, Inc.*, No. 99-1192BID ¶ 17.

\(^{55}\) Id. ¶ 16.

\(^{56}\) Id. ¶ 26.

https://nsuworks.nova.edu/nlr/vol25/iss1/3
the judge held, an exception would be made where the delay was caused by an act of God. 57

B. Timeliness of Bid Protests Challenging the Specifications

In addition to planning ahead regarding the delivery of a bid or proposal, prospective bidders must decide if they intend to challenge the terms of an invitation to bid ("ITB") 58 or an RFP. 59 In a procurement subject to chapter 120 of the Florida Statutes, bidders must make any such challenges within seventy-two hours of publication of the RFP. 60 Thus, a protest challenging the assignment of evaluation points regarding race-based classifications as unconstitutional was untimely when the bidder failed to file the protest until after the evaluation of proposals. 61

57. Id.
58. In general, the term “invitation to bid” means a written solicitation for competitive sealed bids. FLA. STAT. § 287.012(11) (2000). “The invitation to bid is used when the agency is capable of specifically defining the scope of work for which a contractual service is required or when the agency is capable of establishing precise specifications defining the actual commodity or group of commodities required.” Id.
59. In general, the term “request for proposals” means a written solicitation for competitive sealed proposals. § 287.012(15).

The request for proposals is used when the agency is incapable of specifically defining the scope of work for which the commodity, group of commodities, or contractual service is required and when the agency is requesting that a qualified offeror propose a commodity, group of commodities, or contractual service to meet the specifications of the solicitation document. A request for proposals includes, but is not limited to, general information, applicable laws and rules, functional or general specifications, statement of work, proposal instructions, and evaluation criteria. Requests for proposals shall state the relative importance of price and any other evaluation criteria. Id.

60. Section 120.57(3)(b) of the Florida Statutes provides:

With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for proposals, and the formal written protest shall be filed within 10 days after the date the notice of protest is filed.

§ 120.57(3)(b).
61. Optiplan, Inc. v. Sch. Bd. of Broward County, 710 So. 2d 569, 572–73 (Fla. 4th Dist. Ct. App. 1998) (citing Capeletti Bros. v. Dep’t of Transp., 499 So. 2d 855, 857 (Fla. 1st Dist. Ct. App. 1986)) (affirming administrative law judge’s holding that challenge to rejection of bid based on failure to comply with woman-owned business enterprise goal was untimely because it was a challenge to the specifications).
On the other hand, in *E.L. Cole Photography v. Department of Highway Safety & Motor Vehicles*, the court stated a protest filed after the opening of bids contending that the agency should have purchased the goods from the protester's preexisting contract rather than solicit bids was timely, since it was not a challenge to the bid specifications, and the protester participated in the procurement "under protest." In *E.L. Cole Photography*, the petitioner claimed that the award of the contract would breach its current contract because the photographic rolls were included in its already existing contract as "representative products." The administrative law judge held that the protest did not challenge the specifications because it did not seek to clarify, correct, or refine them. Instead, the protest sought to enjoin or cancel the bid solicitation and award altogether.

C. Timeliness of Bid Protests Challenging the Award

In procurements subject to chapter 120 of the *Florida Statutes*, protests must be filed "within 72 hours after the posting of the bid tabulation." Often, because of this short time frame, a protester's failure to file its protest within seventy-two hours is excused if the delay was due to the agency's failure to comply with the statutory and regulatory requirements regarding notice of its decisions. For instance, in *Bell Atlantic Business Systems Services, Inc. v. Department of Labor & Employment Security*, the appellate court reversed the Department's order finding the protest was untimely, since the protest was filed within seventy-two hours of Bell Atlantic's actual receipt of the posting by facsimile. The *Bell Atlantic*
court reasoned that the statute emphasizes actual receipt of the intended decision.\textsuperscript{71} Also, in \textit{Bell Atlantic}, the RFP was contradictory as to when results would be posted, and the last information that the Department provided to prospective offerors was that it would fax a copy of the decision to the offerors at the time of posting.\textsuperscript{72} Thus, because the protester filed within seventy-two hours of actual receipt of notice, the appellate court found that the protest was timely filed.\textsuperscript{73} Similarly, otherwise untimely protests have been permitted when agencies have failed to properly notify bidders of the results of the procurement or of their administrative protest rights.\textsuperscript{74}

Notwithstanding that an untimely protest will be permitted where an agency has failed in its notice requirement, potential protesters may not rely on oral statements from agency personnel that a protest need not be filed by a certain time.\textsuperscript{75} For instance, in \textit{Xerox Corp. v. Florida Department of Professional Regulation},\textsuperscript{76} the protester timely filed a notice of protest, but then failed to file a formal protest within ten days as required by chapter 120 of the \textit{Florida Statutes}.\textsuperscript{77} The protester attempted to excuse its untimeliness by stating that it relied on statements by the agency indicating that it was going to resolve the protest.\textsuperscript{78} The \textit{Xerox} court held that the protester was not permitted to rely on such oral communications and that the protest was untimely.\textsuperscript{79}

\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.; see also SWS P'ship v. Dep't of Corrs., 567 So. 2d 1048, 1050 (Fla. 5th Dist. Ct. App. 1990) (reversing Department's order finding protest untimely even though it was filed more than 72 hours after posting because it was disputed whether the bidders knew that the results would be posted).}
\textsuperscript{74} \textit{E.g., Northrop & Northrop Bldg. P'ship v. Fla. Dep't of Corrs., 528 So. 2d 1249, 1250 (Fla. 1st Dist. Ct. App. 1988) (reversing Department's order finding protest untimely because Department had failed to properly inform bidders of its intended award); Capital Copy, Inc. v. Univ. of Fla., 526 So. 2d 988, 988–89 (Fla. 1st Dist. Ct. App. 1988) (reversing agency's order finding protest untimely because posting did not include statutorily required notice informing bidders of the protest time requirements).}
\textsuperscript{75} \textit{See Xerox Corp. v. Fla. Dep't of Prof'l Regulation, 489 So. 2d 1230 (Fla. 1st Dist. Ct. App. 1986).}
\textsuperscript{76} 489 So. 2d 1230 (Fla. 1st Dist. Ct. App. 1986).
\textsuperscript{77} \textit{Id. at 1231.}
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
D. **Equitable Tolling Doctrine**

While it is not clear whether the doctrine of equitable tolling should apply within the context of an administrative bid protest, one recent case used the doctrine to reject an agency's argument that a technically untimely protest should be rejected. In *Gibbons & Co. v. Florida Board of Regents*, the Board contended that it lacked jurisdiction to hear the protest because the protester sent the protest to the correct address, but to the wrong person, arguably rendering the protest untimely. The administrative law judge, however, held that:

The time requirements for filing notices of protests and formal written protests prescribed by Section 120.57(3)(b), Florida Statutes... are "not jurisdictional in the sense that failure to comply is an absolute bar to [the agency's consideration of a protest] but [are] more analogous to statute[s] of limitations which are subject to equitable considerations such as tolling."

The administrative law judge noted that in *Machules v. Department of Administration*, the court stated the following regarding the doctrine of equitable tolling:

Equitable tolling is a type of equitable modification which "focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant."... Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been

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81. No. 99-0697BID (Fla. Div. Admin. Hr'gs Sept. 17, 1999) (holding that the protest was timely, but without merit).
82. *Id.* ¶ 270.
83. *Id.* ¶ 268 (citing Machules v. Dep't of Admin., 523 So. 2d 1132, 1133 n.2 (Fla. 1988)).
84. 523 So. 2d 1132 (Fla. 1988).
prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.\textsuperscript{85}

The administrative law judge reasoned that sending the protest to the right address, but to the wrong person, was essentially similar to sending it to the wrong forum and should be considered timely.\textsuperscript{86}

IV. AUTOMATIC STAY OF CONTRACT AWARD

A. Under Chapter 120 of the Florida Statutes, a Bid Protest Stays the Procurement

In order to ensure a successful bidder an effective remedy, under chapter 120 of the \textit{Florida Statutes}, consistent with federal law\textsuperscript{87} and nearly all other jurisdictions,\textsuperscript{88} an agency is required to stop the procurement process or contract award until the protest is resolved by final agency action.\textsuperscript{89} Some reasons for the necessity of the automatic stay are: 1) the prevention of a wrongful award; 2) the preservation of rights of the protester; 3) the resolution of the dispute before performance commences on an improper award; 4) the preservation of the public treasury by ensuring that a contract is awarded to the lowest, responsible bidder; and 5) the orderly resolution of bid and contract protests.\textsuperscript{90} Thus, compelling circumstances must exist to override the automatic stay.\textsuperscript{91}

\textsuperscript{85} Id. at 1134.
\textsuperscript{86} Gibbons \& Co., No. 99-0697BID \textsuperscript{11} 267-271.
\textsuperscript{87} 31 U.S.C. §§ 3553(c), (d)(3)(A)(ii) (1998) (providing for stay of award and cessation of performance); \textit{see also} \textit{Fed. Acquisition Regulation} § 33.103(f) (providing for stay of award or performance pending the resolution of agency-level protests).
\textsuperscript{89} “Upon receipt of the formal written protest which has been timely filed, the agency shall stop the bid solicitation process or the contract award process until the subject of the protest is resolved by final agency action . . . .” \textit{Fla. Stat.} § 120.57(3)(c) (2000).
\textsuperscript{91} Id.
The automatic stay, however, is not absolute. An agency may override the stay "to avoid an immediate and serious danger to the public health, safety, or welfare."92 Because of this high standard, agency overrides are rare and subject to appellate review. Only one such override has been sustained by an appellate court.93 In Global Water Conditioning v. Department of Agriculture & Consumer Services, Division of Forestry,94 the Department of Agriculture rejected all bids on a procurement for the installation and exchange of ethylene dibromide water filters.95 These filters reduce exposure to a toxin that causes cancer.96 A bidder challenged the rejection of all bids and appealed an order of the Commissioner of Agriculture declaring that there existed a state of emergency requiring immediate re-advertising for filters and the award of a temporary contract for a partial award of the filters.97 The court sustained the agency's determination that immediate and serious danger to public health was sufficient to override the automatic stay, accepting affidavits of the agency establishing that these filters were necessary to reduce human exposure to this harmful toxin.98

The court in NEC Business Communication Systems (East), Inc. v. Seminole County School Board,99 held that convenience and efficiency are not sufficient reasons to override the automatic stay, unlike the prevention of serious health risks.100 In NEC, an unsuccessful bidder sought judicial review of the county school board's decision to proceed with the contract award pending its protest.101 The basis for the override was that the school board needed an operating phone system, which was the item being purchased, so that it could transfer its personnel into a recently completed school building.102 The appellate court found that this rationale failed to

92. FLA. STAT. § 120.57(3)(c) (2000) (providing in full for an override if "the agency head sets forth in writing particular facts and circumstances which require the continuance of the bid solicitation process or the contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare").
94. Id. at 126.
95. Id. at 127–28.
96. Id. at 130.
97. Id. at 129–30.
98. Global Water Conditioning, 521 So. 2d at 130.
100. Id. at 339.
101. Id. at 338–39.
102. Id. at 339–40.
establish that the stay of the contract award process presented a serious and immediate danger to the public welfare, and therefore, ordered the stay.103 Even if an agency has violated the automatic stay, however, relief may not be appropriate where an agency has not awarded a contract and where the protester continued to contract with the agency as the incumbent vendor.104

B. Injunctions

In a nonchapter 120 bid protest where there is no automatic stay, or once an agency has denied a protest through final agency action, a party must seek a temporary injunction to stop the contract process.105 Traditionally, a bid protestor's remedy of choice was to seek injunctive relief.106 However, even before seeking such injunctive relief, a protester must first apply to the agency for stay of its order before it may request the same relief from an appellate court.107 Additionally, the last, or fourth element of a preliminary injunction, substantial likelihood of success on the merits, is difficult to meet, since courts have been opposed to granting an injunction in instances where an agency has acted in good faith and has not violated a statute or ordinance.108 Due to such procedural obstacles and the high standard to obtain injunctive relief, as demonstrated by the cases below, the benefit of the automatic stay is apparent.

One limitation on the injunctive relief against a public agency is the doctrine of "exhaustion of administrative remedies."109 For instance, since it

103. Id.; see also Cianbro Corp. v. Jacksonville Transp. Auth., 473 So. 2d 209, 212-14 (Fla. 1st Dist. Ct. App. 1985) (reversing override of stay because agency's reasons for alleged immediate danger to the public health were insufficient, especially where potential emergency caused in large part by agency's delay in starting procurement, which was not explained and emergency could be averted by requesting extension).


105. FLA. STAT. § 120.68(1)-(2)(a) (2000). A party who is adversely affected by final agency action is entitled to judicial review in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law. Id.

106. Farrior & Rains, supra note 2, at 445.

107. MSQ Props. v. Dep't of Health & Rehab. Servs., 626 So. 2d 292, 293 (Fla. 1st Dist. Ct. App. 1993) (denying stay where a landlord sought a stay of a final order of the Department of Health and Rehabilitative Services from awarding a lease contract to its competitor where the landlord had not first sought such a stay from the agency under section 120.68 of the Florida Statutes).

108. Farrior & Rains, supra note 2, at 446.

109. Id.
is required that administrative remedies be exhausted prior to going to the circuit court, in *Department of Transportation v. Anderson Columbia Co.*,\(^{110}\) the DOT petitioned for writs of prohibition challenging jurisdiction of the circuit court to enter orders enjoining the DOT from awarding road construction contracts to the lowest bidder.\(^{111}\) The DOT’s challenge came during the pendency of administrative proceedings initiated to protest bidding procedures on the basis that the lowest bidder was not the lowest responsible bidder.\(^{112}\) The DOT also filed interlocutory appeals from the injunctive orders.\(^{113}\) The district court of appeal held that the corporation had adequate administrative remedies available to it, and thus, the circuit court lacked jurisdiction to enter injunctive relief.\(^{114}\)

In *Miami-Dade County v. Church & Tower, Inc.*,\(^{115}\) the appellate court affirmed the denial of a temporary injunction holding that the protester did not have a substantial likelihood to prevail on the merits.\(^{116}\) In light of the deference given agency decisions, this is a common basis to deny such requests for temporary injunctions.\(^{117}\) *Church & Tower, Inc.* was a procurement involving the Dade County Procurement Code, rather than the automatic stay provision of chapter 120 of the *Florida Statutes*, where the appellate court determined that it was not likely that the protester would prevail on its challenge to the county’s decision, since the court found that the contractor was not responsible based on its performance on other contracts.\(^{118}\) Although it denied the injunction, the court noted, contrary to


\(^{111}\) Id. at 1267.

\(^{112}\) Id.

\(^{113}\) Id.

\(^{114}\) Id.

\(^{115}\) 715 So. 2d 1084 (Fla. 3d Dist. Ct. App. 1998).

\(^{116}\) Id. at 1090.

\(^{117}\) E.g., Cent. Fla. Equip. Rentals of Dade County, Inc. v. Lowell Dunn Co., 586 So. 2d 1171, 1172 (Fla. 3d Dist. Ct. App. 1991) (reversing entry of temporary injunction for failure to show a substantial likelihood of prevailing on the merits). In this case, the unsuccessful bidder on a landfill construction project sued to enjoin the county from awarding a contract to the next lowest bidder. *Id.* The trial court entered a preliminary injunction, and the defendants appealed. *Id.* The appellate court held that an unsuccessful bidder on a landfill construction project, whose bid had been rejected as materially irregular because of its failure to designate a single manufacturer and installer of landfill liner, was not entitled to a preliminary injunction to prevent the county from awarding a contract to the next lowest bidder because it was not substantially likely to prevail due to the wide discretion given to the county’s award decision. *Id.* at 1172–73.

\(^{118}\) *Church & Tower, Inc.*, 715 So. 2d at 1090.
other decisions,\textsuperscript{119} that the protesting bidder ordinarily has no adequate remedy at law.\textsuperscript{120}

V. HEARING PROCEDURES

Little precedent exists as to prehearing procedures or the conduct of a bid protest hearing, but two cases confirm a protester’s entitlement to amend its pleadings and to request a continuance of the hearing. In a significant decision, the Fourth District recently held that an administrative law judge abused his discretion, and thus committed reversible error, when he failed to permit a protester to amend its protest at the outset of the hearing based on information obtained during discovery, and where amendment would not prejudice the other party.\textsuperscript{121}

In a case regarding a request for a continuance, the appellate court reversed an administrative law judge’s dismissal of a protest where counsel for the protester failed to appear at the final hearing but had asked agency counsel for a continuance of the hearing.\textsuperscript{122} Counsel for the protester sought the continuance from the agency’s counsel due to a previously scheduled pretrial conference.\textsuperscript{123} At the hearing however, counsel for the agency told the administrative law judge that he did not know why counsel for the protester could not attend, allowing the judge to dismiss the protest.\textsuperscript{124} The appellate court reversed the ruling based on the agency’s counsel’s failure to inform the administrative law judge of counsel’s request for a continuance.\textsuperscript{125}

\textsuperscript{119} Agency for Health Care Admin. v. Cont’l Car Servs., Inc., 650 So. 2d 173, 175 (Fla. 2d Dist. Ct. App. 1995) (reversing temporary injunction because if protester should have been awarded contract there were sufficient records to determine the monetary loss that protester would suffer, thus, protester had an adequate remedy at law).

\textsuperscript{120} Church & Tower, Inc., 715 So. 2d at 1086 n.2; see also S. Fla. Limousines, Inc. v. Broward County Aviation Dep’t, 512 So. 2d 1059 (Fla. 4th Dist. Ct. App. 1987). In South Florida Limousines, Inc., the appellate court affirmed the trial court’s denial of a temporary injunction, finding that no irreparable harm existed. \textit{Id.} at 1060. The appellate court, however, should have based its decision on the delay of the protester to seek injunctive relief or the unlikelihood that the protester would prevail on the merits.

\textsuperscript{121} Optiplan, Inc. v. Sch. Bd. of Broward County, 710 So. 2d 569, 571–72 (Fla. 4th Dist. Ct. App. 1998) (reversing denial of amendment to protest in procurement for group vision care).

\textsuperscript{122} \textit{Id.} at 571.

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} \textit{Id.} at 572; see also Ross v. Fla. Dep’t of Corrs., 669 So. 2d 1060, 1062 (Fla. 5th Dist. Ct. App. 1996) (reversing dismissal of protest).
VI. CHALLENGES TO THE EVALUATION PROPOSALS

A. Responsiveness

One of the most common and successful type of protest is one challenging the responsiveness of the awardee's proposal to the requirements of the solicitation. The seminal responsiveness case is *Harry Pepper & Associates, Inc. v. City of Cape Coral*, which reversed the trial court's denial of bid protest, challenging the responsiveness of the low bidder.

In *Harry Pepper*, the city required bidders to specify the manufacturer of the pumps they proposed to supply under the bid for construction of a water treatment plant. The low bidder had identified pumps that were unacceptable to the city. Rather than finding the low bidder nonresponsive, the city requested that the low bidder submit a letter stating that it would comply with the bid specifications as to the pumps. After submitting the letter, the city awarded the contract to the low bidder. The next lowest bidder filed a lawsuit, and on appeal the court held that the award to the low bidder was improper, concluding that the city exceeded its authority by allowing the lowest bidder to bring its bid into conformity with the specifications after bid opening.

Under statute, in a competitive-procurement protest, an agency may not consider "submissions made after the bid or proposal opening amending or supplementing the bid or proposal..." Despite this prohibition, in *Nippon Carbide Industries v. Department of Transportation*, the court held that an agency may reasonably seek clarification of an offeror's...

126. 352 So. 2d 1190 (Fla. 2d Dist. Ct. App. 1977).
127. *Id.* at 1193.
128. *Id.* at 1192.
129. *Id.*
130. *Id.*
131. *Harry Pepper & Assocs.*, 352 So. 2d at 1192.
In *Nippon Carbide*, the agency believed that the low bidder, Nippon Carbide Industries ("NCI"), was nonresponsive because the process inks used in its reflective sheeting for roadway signs did not meet the technical specifications. The DOT postponed the bid award date so that it could resolve whether NCI’s process inks could be utilized. After a telephone conversation with NCI’s director, where the mixing instructions were provided by NCI, the DOT confirmed that the NCI bid did not conform to the bid specifications. The administrative law judge held that the DOT acted reasonably in seeking clarification, and such actions were not an “open door for NCI to change or amend the bid it submitted.”

An example of a post-bid submission that was an “open door to change or amend a bid” is found in *Miami Elevator Co. v. Manatee County School Board*, where the intended awardee had supplemented its bid with a post-submission letter stating it had an office within the county, which was not disclosed in its bid. In *Miami Elevator Co.*, the school board issued a Request for Quotation for elevator and wheelchair lift maintenance services. The school board proposed to award the contract to General Elevator Company (“General”), and Miami Elevator protested, claiming that General was nonresponsive for failing to maintain a physical office in Manatee County, as required under the specifications.

In response, General stated that it had a Bradenton office in Manatee County. The evaluation committee determined that General’s bid met the requirements based on an unscientific survey to test the response time of General, which had technicians and some minimal office equipment present in the office. The administrative law judge found General’s bid nonresponsive, reasoning that the school board should not have considered the letter referencing the Bradenton office because it was sent after the deadline for submission of proposals. Furthermore, the Bradenton office

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135. *Id.* ¶ 20.
136. *Id.* ¶ 6.
137. *Id.* ¶ 8.
138. *Id.* ¶ 4.
140. No. 98-4474BID (Fla. Div. Admin. Hr’gs Nov. 23, 1998) (awarding the contract to the protestor, the second lowest bidder).
141. *Id.* ¶ 12.
142. *Id.* ¶ 1.
143. *Id.* ¶ 11.
144. *Id.* ¶ 12.
146. *Id.* ¶ 20.
was not a physical office within the county because no business was conducted there. The administrative law judge reasoned that, "[t]o ignore the requirement...operates to disadvantage vendors who met the requirement and any potential vendors who did not submit proposals because they did not have a 'physical office' located within the county."

In protests alleging an offeror is nonresponsive, the issue is usually whether a bid requirement is mandatory, rather than permissive, and whether the challenged proposal complies with the requirement. For example, in *National Computer Systems, Inc. v. Department of Education* ("NCSI"), the administrative law judge granted a protest challenging the evaluation of the intended awardee, but recommended rejection of all bids. This protest involved a procurement for the administration of the Florida Comprehensive Assessment Test ("FCAT"). The Department of Education received two proposals. One of the evaluation criteria was corporate qualification. The RFP established a minimum set of requirements for this criterion by stating that bidders "must demonstrate" that they have the "minimum threshold of experience." The requirements included that the bidders must have administered "a minimum of two assessment programs using image-based scoring that involved 'at least 200,000 students annually.'" The administrative law judge reasoned that these minimums were material requirements of the RFP, because they gave the Department some level of assurance that the awardee would be able to successfully perform a contract of such large magnitude. The intended awardee did not have sufficient image-based testing experience, and the administrative law judge

147. Id. ¶ 22.
148. Id. ¶ 26.
149. See *Lockheed Martin Info. Sys. v. Dep't of Children & Family Servs.*, No. 98-2570BID ¶ 77 (Fla. Div. Admin. H'gs Mar. 30, 1999) (finding conditional language in bid waivable as a minor irregularity because it was boilerplate language, commonly used to provide an edge on future negotiations).
151. Id. ¶ 64.
152. Id. at Statement of Issues.
153. Id. ¶¶ 45, 52.
154. Id. ¶¶ 5–15.
156. Id. ¶ 21.
157. Id. ¶ 22.
found that the intended awardee should have been disqualified from further evaluation because it was a mandatory requirement. 158

In NCSI, the administrative law judge also held that the Department should have found the protester nonresponsive. 159 The administrative law judge noted that the Department improperly waived the protester's failure to have experience in a statewide procurement as a minor technicality. 160 Without this waiver, the protester also failed to meet the minimum requirement of having two statewide procurements. 161 Thus, the administrative law judge recommended that the Department rebid because only 2.06 evaluation points out of 150 separated the proposals, and if other bidders knew that the Department was going to ignore these stated minimum requirements and evaluate the proposals "holistically," the Department could have received more than two proposals. 162

It is well-settled that an agency may not accept a bid or proposal that is materially at variance with the specifications set forth in an RFP. 163 Thus, offerors who failed to submit required audited financial statements and bidding and insurance costs were properly found to be nonresponsive. 164 A bidder will also be considered nonresponsive if it, or its designated subcontractors, fails to possess the licenses required by the solicitation. 165 Additionally, an offeror who fails to include a completed public entity crime certification is nonresponsive since such failure is considered a material deviation. 166 However, it has been held that offerors' identification of key

158. Id. ¶ 62 (citing Jacobs Assoc., Inc. v. Dep't of Corrs., No. 96-5831BID (Fla. Div. Admin. H'gs Mar. 4, 1997)).
159. Id. ¶ 63.
161. Id. ¶ 54.
164. Rattler Constr. Contractors, Inc. v. Dep't of Corrs., No. 98-5623BID ¶¶ 35–36 (Fla. Div. Admin. H'gs Mar. 4, 1999) (granting protest, but rejecting all bids rather than selecting protester since all bids were found nonresponsive).
personnel who were not current employees (all offerors submitted the same people) where they had agreed to work with whomever became the actual awardee complied with the RFP’s requirement to include the names of qualified personnel to perform the work. 167

Offerors face a difficult obstacle establishing that a procuring agency’s determination that it was nonresponsive was arbitrary or capricious, due to the extreme deference normally given to an agency’s interpretations of the terms of the procurement. 168 In Bobick v. Florida Keys Aqueduct Authority, one of the most extreme examples of deference to agency discretion, Aqueduct Authority rejected a bid that contained three references, but not three letters supporting the bidder from those references. 169 The district court of appeal held that Aqueduct Authority’s interpretation of the bid requirement for “references from three vendors” to mean that the bidder must include three “letters” of reference, not a list including three references, was not improper. 170 The court noted that although Aqueduct Authority had the power to waive the irregularity, it was not obliged to do so. 171 This decision is an example of the tenet in bid protests that the agency is likely to prevail regardless of its decision. Here, if the agency had accepted the three references, rather than requiring three letters of reference, or had waived this failure as a minor irregularity, a challenge to this decision by the other bidder would likely have failed.

Similarly, in Center Printing, Inc. v. University of North Florida, 172 appearing to give too much deference to an agency’s determination than should have been due, an administrative law judge upheld an agency’s

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168. Id.


170. Id.


determination that a bidder was nonresponsive because it did not demonstrate its ability to be able to perform the contract. In Center Printing, Inc., which involved a procurement for printing services, the invitation to bidders required that the bidders have a manufacturing plant capable of doing the work at the time of the bid opening. The protester was a new company founded by the former owner of the incumbent contractor and the intended awardee. The protester appeared to have underbid the contract, and the agency was concerned it would be unable to perform. The agency conducted an inspection of the plants and determined that the protester did not have an adequate inventory system, storage space, and produced no samples; thus, the protester was found to be nonresponsive, and the contract was awarded to another bidder. The administrative law judge held that the finding of nonresponsiveness was not clearly erroneous. In view of the bid requirements, it appears that the administrative law judge gave too much deference to the agency (even though under the facts the protester did not deserve the award), because the ITB did not appear to actually require the bidder's ability to establish that it could perform as required. It appears that the agency did a responsibility determination without calling it as such. This decision demonstrates the difficulty that a new business can face in obtaining a government contract.

In Humana Medical Plan, Inc. v. School Board, the issue was whether the school board's decision to reject the proposal of Humana and to award it to HIP Health Plan of Florida, Inc. ("HIP") and Foundation Health, was contrary to the school board's governing statutes and rules, policies, or the proposal specifications. The RFP related to health coverage for school board employees. The school board announced its intent to award contracts to Foundation Health and HIP, and Humana protested. Humana responded to the RFP stating that it would "strive" to meet the requirements. Humana testified that the statement meant that it would

173. Id. ¶ 54 (denying protest challenging protester's nonresponsiveness).
174. Id. ¶ 4.
175. Id. ¶ 16, 21.
176. Id. ¶ 34.
178. Id. ¶ 54.
180. Id. at Statement of Issues.
181. Id. at Prelim. Statement.
182. Id.
183. Id. ¶ 19.
“make a strong effort” to comply. The administrative law judge held that this language was insufficient to indicate compliance with the requirements of the RFP that Humana could not correct this error by submission of a post-bid letter stating it would comply.

B. Exceptions to the Specifications

Any bidder whose proposal takes exception to the specifications or places conditions on its proposal is at high risk of being rejected by the agency. Thus, a protest by an offeror challenging the award of another offeror who took exception to the specifications is likely to be successful, while a challenge to the agency’s rejection of a proposal that took exception to the specifications is likely to fail.

In Ryan Inc. Eastern v. Peace River/Manasota Regional Water Supply Authority, involving a procurement for six miles of water pipeline that required forty-two inch pipe to specified standards, the low bidder included a letter from its pipe supplier with its bid indicating that it could not supply the required pipes. The agency allowed the low bidder and its pipe supplier eight days after the bid opening to decide whether to withdraw the conditions and exceptions to the specifications, which rendered its bid nonresponsive. Instead of withdrawing, the bidder stated that it could supply the required pipes.

The administrative law judge granted the protest, reasoning that the agency’s award of the contract to the low bidder was manifestly unfair to the other bidders and undermined the integrity of the bidding process. The administrative law judge noted that in the eight days following the bid opening, the bidder enjoyed the unfair advantage, not shared by other bidders, of analyzing the job and its bid, knowing that the absence of an enforceable contract would allow it to walk away from the job with
impunity. The fact that the bidder did not walk away from the job meant only that its post-bidding analysis disclosed that the job would be profitable. Thus, the administrative law judge found the bidder nonresponsive even though the solicitation contained a provision requiring the contractor to comply with the specifications without exception.

On the other hand, in *Bellsouth Communication Systems, Inc. v. Department of the Lottery*, a procurement for the maintenance of telecommunications equipment and software, the agency received four proposals, but found only one responsive. In its proposal, Bellsouth, who had held the incumbent contract for twelve years, had suggested several clarifications and modifications to the specifications, relating to its price, agency approval of subcontractors, agency ability to demand documentation, indemnification, and warranty. Bellsouth believed that these clarifications and modifications were permissible due to the language of the RFP, but the Department of the Lottery found them to be “material deviations” from the specifications and eliminated Bellsouth as nonresponsive. The administrative law judge agreed with the agency’s determination, noting that in the absence of anything in the proposal to indicate that Bellsouth intended to put forward these clarifications and modifications simply as negotiating points, the Department could reasonably interpret Bellsouth’s responses as conveying its refusal to accept the mandatory requirements of the RFP. Further, the administrative law judge reasoned that it was of no legal significance in determining the materiality of the deviations that the clarifications and

193. *Id.*
194. *Id.* ¶ 41.
196. *Id.* ¶ 41. The administrative law judge also held that sections 287.057(3) and 287.012(5) of the *Florida Statutes*, when read together, meant that for a procurement in excess of $25,000, an agency must receive at least two responsive proposals to go forward with the award. *Id.* ¶¶ 46, 51, 58. If not, then the agency must document the reasons that awarding the contract is in the best interest of the state rather than resoliciting. *Id.* ¶ 59. The administrative law judge found such reasons present here because the agency had tried twice to obtain the services and the current contract, which was to expire within 30 days, had already been extended. *Id.*; see also *E.L. Cole Photography, Inc. v. Dep’t of Law Enforcement*, No. 99-3401BID (Fla. Div. Admin. Hr’gs Oct. 2, 1998) (denying protest challenging evaluation of awardee). Although not addressed specifically, failure of all bidders, except one, to identify duplicates, was not a basis to resolicit when not a material deviation. See *id.*
198. *Id.* ¶ 37.
199. *Id.* ¶¶ 56–57.
modifications were commercially reasonable and necessary to remedy ambiguities and potentially unenforceable terms in the RFP.\textsuperscript{200}

C. \textit{No Material Deviation in Bids}

Even when a bidder is nonresponsive, an agency may still accept a proposal if the bidder’s deviation from the solicitation is not material. In \textit{Tropabest Foods, Inc. v. Department of General Services},\textsuperscript{201} the court noted that “a minor irregularity [is] a variation [from the bid specifications that] ‘does not affect the price of the bid, or give the bidder an advantage or benefit not enjoyed by other bidders or does not adversely impact the interests of the agency.’”\textsuperscript{202} In \textit{Tropabest Foods, Inc.}, a case involving a procurement for specialty food, the solicitation sought, among other items, two items for beverage mixes, calling for “[1 lb. yields approximately 1 gal[lon] . . . .]”\textsuperscript{203} The solicitation sought other similar items, but generally included the specified yield “or more.”\textsuperscript{204} As to the two items at issue, the awardee’s product yielded more than one gallon (it yielded 3.5 gallons).\textsuperscript{205} A bidder protested, claiming that the awardee’s bid was nonresponsive because it did not yield approximately one gallon.\textsuperscript{206} The administrative law judge agreed that the awardee’s bid was at variance with the specifications, but held that such deviation was a minor irregularity that could be waived by the agency because the variance did not give the awardee a substantial advantage or restrict competition.\textsuperscript{207}

In \textit{Robinson Electrical Co. v. Dade County},\textsuperscript{208} the appellate court held that the low bidder’s submission of a cashier’s check instead of a bid bond, as required by the solicitation, did not constitute a material variance from the county’s invitation for bids, and thus, the low bidder should have been awarded the contract.\textsuperscript{209} While this decision appears to support the proposition that the agency must waive a minor deviation if it would enable

\begin{itemize}
\item \textsuperscript{200} \textit{Id.} § 56.
\item \textsuperscript{201} 493 So. 2d 50 (Fla. 1st Dist. Ct. App. 1986) (affirming denial of protest challenging responsiveness of awardee).
\item \textsuperscript{202} \textit{Id.} at 52.
\item \textsuperscript{203} \textit{Id.} at 50.
\item \textsuperscript{204} \textit{Id.}
\item \textsuperscript{205} \textit{Id.} at 51.
\item \textsuperscript{206} \textit{Tropabest Foods, Inc.}, 493 So. 2d at 51.
\item \textsuperscript{207} \textit{Id.} at 52.
\item \textsuperscript{208} 417 So. 2d 1032 (Fla. 3d Dist. Ct. App. 1982).
\item \textsuperscript{209} \textit{Id.} at 1034.
\end{itemize}
it to select the otherwise lowest bid or best value, other cases conclude that an agency may waive, but such is not required.

Other examples of minor deviations include a bidder's failure to bid on alternative items, untimely and/or misdelivery of forms, failure to provide an unemployment form, and failure to price an item that was not to be used in price evaluation but was to be negotiated after the award.


211. Bobick v. Fla. Keys Aqueduct Auth., 648 So. 2d 1263 (Fla. 3d Dist. Ct. App. 1995) (finding that although the Authority had the power to waive the irregularity, it was not obliged to do so and citing Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982)); see also Padula & Wadswoth Constr., Inc. v. Broward County Sch. Bd., No. 00-2408BID ¶ 7 n.2 (Fla. Div. Admin. Hr'gs., Sept. 26, 2000) (suggesting that failure to waive nonsubmission of Public Entity Crime Statement would be arbitrary and capricious because it served no useful purpose).

212. Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505, 506-07 (Fla. 1982) (holding that failure to bid on an alternative item for procurement to resurface roads was a minor irregularity); E.L. Cole Photography, Inc. v. Fla. Dep't of Law Enforcement, No. 99-3401BID (Fla. Div. Admin. Hr'gs Oct. 28, 1998) (petitioner failed to prove that the awardee's bid which offered a price for a discontinued item, contrary to instructions, was a minor irregularity); Rovel Constr., Inc. v. Dep't of Health, No. 99-0596BID (Fla. Div. Admin. Hr'gs Apr. 27, 1999) (denying protest, holding that offering different amount for bids on similar items was not material and properly waived as a minor irregularity even though it affects price, and finding it did not give awardee an advantage, since several other bidders made similar mistake, and price submitted reflected actual cost to perform).


215. Con-Air Indus., Inc. v. Seminole County Sch. Bd., No. 98-4714BID (Fla. Div. Admin. Hr'gs Dec. 11, 1998) (adopting in toto, a finding that the contract was properly awarded to the intervenor, and denying protest). The school board issued a call for bids for air filter maintenance, service, and replacement to Filter Service and Installation Corporation.
D. **Best Value**

One common type of bid protest is a challenge to the agency’s evaluation of either the protester’s proposal or the intended awardee’s proposal, contending that if the agency had properly performed the evaluation, then the protester would have received the award. This type of challenge often arises within the context of a procurement where the agency is not necessarily selecting the lowest-priced, responsive offeror, but instead is selecting the best value to the agency, considering price and other factors.\(^{216}\)

If a procuring agency awards a contract to an offeror on the basis that the proposal is of better value to the agency because of its technical superiority, for instance, the award will be improper if there is no reasonable basis supporting the superiority.\(^{217}\) In *Eagle Tire & Service Center v. Escambia County Utilities Authority*,\(^{218}\) involving a procurement for new truck tires and retread services, the bidders’ prices were essentially the same.\(^{219}\) At the meeting to select the awardee, one of the commissioners spoke very highly of one contractor, who was a local company, and presented a letter of recommendation from another local agency praising the contractor.\(^{220}\) In addition, at the commission meeting, persons stated


\(^{218}\) No. 00-0661BID (Fla. Div. Admin. Hr’gs June 14, 2000).

\(^{219}\) *Id.* § 4.

\(^{220}\) *Id.* ¶¶ 8, 14.
generally that the local contractor’s retread services were superior to those of the low bidder.\textsuperscript{221} 

The administrative law judge noted “a public agency has no obligation to accept the ‘lowest dollars and cents bid as being the ‘lowest responsible bid’ in every case, to the exclusion of all other pertinent facts which may well support a reasonable decision to award the contract to a contractor filing a higher bid.”\textsuperscript{222} In \textit{Eagle Tire}, however, there was no reasonable basis to determine that the local contractor was a better value than the lower priced bid. Despite a recommendation from the staff to award the contract to the low (non-local) bidder, the commissioners split the award and gave the retread portion to the local contractor.\textsuperscript{223} At the administrative hearing, it was clear that the local contractor’s product and services were not superior, but essentially equal to the low bidder’s, and thus the decision to award to the local contractor based on its purported superiority was found arbitrary and capricious.\textsuperscript{224} 

Even if the protester establishes that the agency improperly evaluated proposals, not all such errors are significant enough to merit granting the protest.\textsuperscript{225} For instance, in \textit{Youthtrack, Inc. v. Department of Juvenile Justice},\textsuperscript{226} the administrative law judge denied a protest challenging the evaluation of the protester where correcting the evaluation error would not have changed the award.\textsuperscript{227} After conducting a detailed review of the evaluations, the administrative law judge found that the evaluators made some errors, but that even if the errors were corrected, the protester would not garner enough points to exceed the points awarded to the intended awardee.\textsuperscript{228} The administrative law judge rejected the argument that the

\begin{itemize}
  \item \textsuperscript{221} \textit{Id. }\textsuperscript{\textit{8}}.
  \item \textsuperscript{222} \textit{Id. }\textsuperscript{\textit{36} (citing Culpepper v. Moore, 40 So. 2d 366, 370 (Fla. 1949)).
  \item \textsuperscript{223} \textit{Eagle Tire & Serv. Cir., No. 00-0661BID at Recomm.
  \item \textsuperscript{224} \textit{Id. }\textsuperscript{\textit{38}. The administrative law judge noted that in a nonsection 120.57(3), referral by contract, where statute or code does not provide a standard, public agencies have the obligation to engage in contracting procedures in a manner that is not arbitrary and capricious. \textit{Id. }\textsuperscript{\textit{35}. Also, where the local agency has adopted rules that mandate awarding contracts by competitive bids, the agency may not act arbitrarily to ignore those rules or select someone other than the lowest and best bidder. \textit{Id. }\textsuperscript{\textit{36}.
  \item \textsuperscript{226} \textit{No. 99-4403BID (Fla. Div. Admin. Hr’gs Jan 14, 2000).
  \item \textsuperscript{227} \textit{Id. }\textsuperscript{\textit{47–51}.
  \item \textsuperscript{228} \textit{See also Non-Secure Det. Home, Inc. v. Dep’t of Juvenile Justice, No. 99-2620BID (Fla. Div. Admin. Hr’gs Sept. 14, 1999) (finding the DJJ should have given both proposals zero points for their failure to include a financial statement or audit, but denying protest where such failure benefited the protester more than the awardee).
protester was harmed because two of three evaluators had failed to prepare a written narrative documenting their point scores, especially because the protester had an opportunity to depose the evaluators, but did not do so.\textsuperscript{229}

E. Evaluation Methodology

Challenges to the evaluation methodology are rarely successful. In \textit{Non-Secure Detention Home, Inc. v. Department of Juvenile Justice},\textsuperscript{230} the administrative law judge denied a protest challenging the Department of Juvenile Justice’s (“DJJ”) scoring of past performance.\textsuperscript{231} The RFP provided that where an offeror did not have past performance, it would receive the average score of the competing proposals for past performance.\textsuperscript{232} Only two offerors submitted proposals.\textsuperscript{233} Rather than giving the intended awardee, which had no past performance, the same score as the protester, the DJJ gave the protester the average of the individual evaluator’s score for the protester, which was one-third of the total score.\textsuperscript{234}

A different result was reached in \textit{Moore v. Department of Health \& Rehabilitative Services},\textsuperscript{235} where the evaluation was contrary to the agency’s guidelines.\textsuperscript{236} The agency’s manual required each committee member to evaluate the proposals independently.\textsuperscript{237} Nevertheless, three members provided their evaluations to the fourth evaluator, who then conducted an evaluation.\textsuperscript{238} The bidder recommended by the fourth evaluator, but not the other three, received the award.\textsuperscript{239} The appellate court held that the administrative law judge properly decided that the agency had acted arbitrarily by not following its own evaluation process, suggesting that a rebid or a proper reevaluation would be a permissible remedy.\textsuperscript{240}

\textsuperscript{229} \textit{Youthtrack, Inc.}, No. 99-4403BID ¶ 48.
\textsuperscript{231} \textit{Id.} ¶¶ 23–28.
\textsuperscript{232} \textit{Id.} ¶ 8.
\textsuperscript{233} \textit{Id.} ¶ 12.
\textsuperscript{234} \textit{Id.}
\textsuperscript{235} 596 So. 2d 759 (Fla. 1st Dist. Ct. App. 1992) (reversing hearing officer’s and agency’s award of the contract).
\textsuperscript{236} \textit{Id.} at 760.
\textsuperscript{237} \textit{Id.}
\textsuperscript{238} \textit{Id.}
\textsuperscript{239} \textit{Id.} at 761.
\textsuperscript{240} \textit{Moore}, 596 So. 2d at 761.
In *GTECH Corp. v. Department of the Lottery*, an unsuccessful bidder appealed a decision by the Department of the Lottery awarding a contract to provide computerized gaming systems and related services for the state lottery. The district court of appeal held that the Department did not violate the applicable procurement procedures or due process by referring the proposals back to the evaluation committee, some of whom testified at the bid protest hearing for the correction of its errors.

F. *Qualifications or Bias of Evaluators*

An award based on evaluations performed by unqualified persons is considered arbitrary and capricious if it affects the outcome of the procurement. In *Knaus Systems, Inc. of Florida v. Department of Children & Family Services*, a point-scored procurement for a three-year maintenance service contract for computer equipment worth between three and three-and-a-half million dollars, one of the areas evaluated was the financial capability of the offerors. However, the evaluators had a limited financial background, and all testified that they did not have enough knowledge to properly evaluate the financial requirements of the RFP. Their inexperience was demonstrated by their evaluation of the intended awardee as having above average financial capability although its financial statements showed that it had suffered sizable losses. Thus, the administrative law judge held that lack of qualifications of the evaluators coupled with grave deficiencies in results of scoring of the financial aspects of one of the four criteria, which had a material impact on the outcome of the relative scoring (though not explained in the decision) rendered the evaluation process clearly erroneous, contrary to competition, arbitrary, and 

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241. 737 So. 2d 615 (Fla. 1st Dist. Ct. App. 1999) (affirming agency's acceptance of hearing officer's decision to have proposals reevaluated).
242. Id. at 616.
243. Id. at 622.
246. Id. ¶ 1.
247. Id. ¶ 20.
248. Id. ¶¶ 21-24.
capricious. Based on this error, the administrative law judge recommended the rejection of all bids. Another frequent type of challenge alleges that the evaluators were biased in favor of the intended awardee. Again, success in such challenges is rare. In Non-Secure Detention Home, Inc., the administrative law judge denied a protest claiming that the evaluators were unfairly biased because two of the three evaluators knew a former employee of the awardee, who was now an employee of the DJJ. The judge reasoned that the bias challenge was without merit because the evaluators did not know that the former employee had an interest in the property that was to be used for the contract and because she had no involvement with the procurement.

G. Price Evaluation

Another area that protesters often challenge is the agency’s price analysis of the bids or proposals. One recent administrative decision denied a protest challenging a bid that contained “unbalanced” items because the internal imbalance did not affect the order of bids. In Anderson Columbia Co. v. Department of Transportation, a procurement for road resurfacing, the intended awardee’s bid price was $2,271,354.81 and the protester’s was $2,278,263.07. The administrative law judge held that the agency properly determined that the awardee’s bid was not materially unbalanced, noting that “[a] bid is...mathematically unbalanced if the prices quoted are significantly different from the approximate cost of the item to the contractor.” The administrative law judge reasoned that a bid is materially

250. Id. at Recomm.
252. See also Rattler Constr. Contractors, Inc. v. Dep’t of Corrs., No. 98-5623BID (Fla. Div. Admin. Hr’gs Mar. 4, 1999) (rejecting claim of bias where the son of the protester’s consulting engineer had previously made a complaint against one of the selection committee members reasoning that the engineer’s evaluation scores were in line with other evaluators, and even if his scores were not used, ranking would not have changed).
255. Id. ¶ 2.
256. Id. ¶ 6.
unbalanced if there is reasonable doubt as to whether the bid will ultimately result in the lowest cost. 257 Here, the intended awardee’s front-loading of the mobilization item would result in a potential advantage of only $434.84. 258 This potential advantage did not materially unbalance the bid by changing the ranking, did not have a detrimental effect upon the competitive process, and would not cause contract administration problems. 259 Thus, the administrative law judge denied the protest. 260 

In another decision, a protester challenged an agency’s decision to award the contract to an offeror whose proposal exceeded the agency’s estimated budgetary ceiling amount set forth in the RFP. 261 In Old Tampa Bay Enterprises, Inc. v. Department of Transportation, 262 the agency contended that it interpreted the ceiling as an estimate and not a maximum cap and could accept the awardee’s price proposal even though it exceeded the ceiling. 263 The administrative law judge agreed, holding that the “agency’s interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations.” 264

VII. REJECTION OF ALL BIDS

Rather than announce that it intends to award a procurement to one offeror, an agency sometimes decides to reject all of the bids and start over or cancel the procurement altogether. Because this type of agency action treats all bidders equally, the agency’s decision to reject all bids is subject to less scrutiny than when an agency treats certain bidders differently, such as the rejection of a bidder as nonresponsive. Thus, an agency’s decision to

257. Id. ¶ 7.
258. Id. ¶ 18.
260. Id. ¶ 25.
263. Id. ¶ 10.
264. Id. ¶ 51 (quoting Orange Park Kennel Club, Inc. v. Dep’t of Bus. & Prof’l Regulation, 644 So. 2d 574, 576 (Fla. 1st Dist. Ct. App. 1994)).
reject all bids will only be overturned if it is arbitrary, illegal, dishonest, or fraudulent.

In Department of Transportation v. Groves-Watkins Constructors, an early decision foreshadowing the lower statutory standard of review for decisions rejecting all bids, the appellate court quashed the administrative law judge’s recommended decision granting a protest. The appellate court held that, at most, the administrative law judge found the DOT had made an honest mistake in its prebid estimate of the cost of the procurement, which does not establish that the DOT acted fraudulently, arbitrarily, illegally, or dishonestly. Thus, the court found that the DOT lawfully rejected all bids submitted on a highway construction project as too high and properly directed that the project be rebid where the protester’s low bid was still twenty-nine percent higher than estimated.

Examples abound of decisions rejecting challenges to an agency’s decision to reject all bids. For instance, protests have been unsuccessful when an agency rejected all bids due to potentially restrictive specifications.

265. A decision is arbitrary if it is not supported by facts or logic, or is despotic. E.g., Agrico Chem. Co. v. Dep’t of Envtl. Regulation, 365 So. 2d 759, 763 (Fla. 1st Dist. Ct. App. 1978).

266. “In any bid-protest proceeding contesting an intended agency action to reject all bids, the standard of review by an administrative law judge shall be whether the agency’s intended action is illegal, arbitrary, dishonest, or fraudulent.” FLA. STAT. § 120.57(3)(f) (2000). On the other hand, in other bid protests: [T]he administrative law judge shall conduct a de novo proceeding to determine whether the agency’s proposed action is contrary to the agency’s governing statutes, the agency’s rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

267. 530 So. 2d 912 (Fla. 1988).

268. Id. at 913.

269. Id. at 914.

270. Id. at 915.

271. Neel Mech. Contractors, Inc. v. Fla. Agric. & Mech. Univ., No. 99-3424BID (Fla. Div. Admin. Hr’gs Nov. 12, 1999) (reasoning that rebid was appropriate where the agency either intended to restrict the specifications to one product without complying with the requirements for a sole-source procurement or intended to permit more than one product, but such intent was frustrated by the specification); see also Caber Sys., Inc. v. Dep’t of Gen. Servs., 530 So. 2d 325 (Fla. 1st Dist. Ct. App. 1988) (affirming the denial of a bid protest when, based on information learned during a protest, the agency decided to reject all bids because the ITB was ambiguous and flawed due, in part, because it was based on unwritten specifications not known by some bidders).
unclear instructions to bidders, the receipt of only a few responses to the solicitation, the existence of only one responsive bidder, or a change in the agency’s needs after the issuance of the solicitation. An agency’s decisions not to reject all bids, however, will not be overturned where the agency received more than two bids, but only one responsive bid.

Not all uncertainty in the specifications, however, demands a rebid. In Capeletti Bros. v. Department of General Services, which involved a procurement for site preparation and grading for a Dade County prison, the specifications showed a public road bordering the site, which was only an access road. Capeletti, however, actually privately owned the road. Capeletti brought the issue to the attention of the Department, but received no response, and no other bidders complained. The Department announced its intent to award another bidder, and Capeletti protested. Initially, the Department decided to reject all of the bids, but after the

272. Contemporary Constr. Southeast, Inc. v. Dep’t of Transp., No. 98-5018BID (Fla. Div. Admin. Hr’gs Mar. 1, 1999) (affirming decision to reject all bids, despite the fact that petitioner submitted a responsive bid, where there were inconsistencies regarding the due date for a particular form and the agency failed to provide an addendum to all the bidders); Felker v. Dep’t of Bus. & Prof’l. Regulation, No. 98-1985BID ¶ 15 (Fla. Div. Admin. Hr’gs Aug. 11, 1998) (holding that it was proper to reject all bids and readvertise because the RFP was unclear as to certain restroom requirements and it provided the current landlord with an unfair advantage).

273. Atl. Inv. of Broward v. Dep’t of Transp., No. 00-224BID (Fla. Div. Admin. Hr’gs Apr. 14, 2000) (denying protest where an agency only received one quotation regarding the leasing of real property).


275. Gulf Real Props., Inc. v. Dep’t of Health & Rehab. Servs., 687 So. 2d 1336, 1338 (Fla. 1st Dist. Ct. App. 1997) (affirming denial of protest where the agency rejected all bids because space became available that was owned by a local government).

276. Satellite Television Eng’g, Inc. v. Dep’t of Gen. Servs., 522 So. 2d 440 (Fla. 1st Dist. Ct. App. 1988) (affirming denial of protest where the Department refused to reject all bids and negotiated contract with the sole responsive bidder for purchase of satellite television network).


278. Id. at 1361.

279. Id.

280. Id.

281. Id.
hearing it changed its mind. The court reasoned that the uncertainty in the specifications was not sufficiently material to require a rebid.

The blurred line between the standard of review in the rejection of all bids and in a protest challenging one bidder’s evaluation is demonstrated in *Knaus Systems, Inc.* which granted the protest of the third ranked offeror, but recommended rejection of all bids. In *Knaus Systems, Inc.*, the administrative law judge found that lack of qualifications of evaluators, along with grave deficiencies in results of scoring of one of the evaluation criteria, and the material impact on the outcome of the relative scoring, rendered the evaluation process clearly erroneous, contrary to competition, arbitrary, and capricious. While the administrative law judge referred to the standard of proof for protests other than the rejection of all bids, the judge recommended the rejection of all bids, rather than award the contract to the protestor or the revaluation of all bids.

**VIII. WOMAN-OWNED AND DISADVANTAGED BUSINESS ENTERPRISE ISSUES**

Some procurements are set aside or contain goals for companies owned by women, minorities, or other “disadvantaged” businesses. The latest appellate decision regarding compliance with the Disadvantaged Business Enterprise (“DBE”) rules held that a bidder has to only facially comply with such requirements in its bid or proposal and actual compliance is a contract administration issue. In *State Contracting & Engineering Corp. v. Department of Transportation*, involving a procurement for the replacement of tollbooths on a state road, the protester contended that the low bidder was nonresponsive because its proposed DBE subcontractors did not actually qualify as DBE’s because they had to purchase materials from non-DBE’s. The DOT contended that the low bidder was responsive because it properly completed its DBE form, and its ability to actually

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282. *Capeletti Bros.*, 432 So. 2d at 1361.
283. *Id.* at 1362.
285. *Id.* ¶ 61.
286. *Id.*
287. *State Contracting & Eng’g Corp. v. Dep’t of Transp.*, 709 So. 2d 607 (Fla. 1st Dist. Ct App. 1998) (affirming agency’s rejection of hearing officer’s decision granting protest).
288. 709 So. 2d 607 (Fla. 1st Dist. Ct App. 1998).
289. *Id.* at 608.
comply was a performance issue, not a responsiveness issue. The hearing officer disagreed, and the DOT rejected the decision. The protester appealed, but the appellate court affirmed the DOT's final order.

Despite the decision in State Contracting, one administrative law judge still continued to conduct a broad analysis of a bidder's actual ability to comply with the established DBE goals for the procurement. The DOT, however, rejected the administrative law judge's analysis based on State Contracting. In this procurement for the rehabilitation of the Jewfish Creek Bridge in Monroe County, the protester submitted the lowest priced bid of five bidders. The ITB established two DBE goals: eight percent for non-minority female DBE's and four percent for African-American DBE's. The DOT, however, rejected the protester's bid because it failed to meet the DBE goals.

The protester challenged the agency's rejection of its bid and the ability of the intended awardee to meet DBE goals. The administrative law judge found that the intended award was improper because the intended awardee could not actually meet DBE goals, although it submitted all materials required by the ITB to determine such compliance. The administrative law judge reasoned that the DBE subcontractors proposed by the awardee did not comply with the DBE requirements because it was not clear that they could perform the work. Moreover, the administrative law judge found that the DOT improperly evaluated the protester's good faith effort to comply with applicable DBE goals.

The DOT, however, rejected the administrative law judge's decision in part. The DOT stated that its regulations only require bidders to identify their DBE's, the description of work to be performed, the dollar amount of

290. Id.
291. Id. at 609.
292. Id. at 610.
294. Id.
295. Id. ¶ 4.
296. Id. ¶ 15.
297. Id. ¶ 20.
299. Id. ¶ 27.
300. Id. ¶ 67.
301. Id. ¶ 68.
302. Id. ¶¶ 70–71.
such work, any other documentation required by contract or bidding documents, the signature of the proposed DBEs, and evidence that the goal has been met.\textsuperscript{303} The DOT argued all other materials are performance issues, not responsiveness issues, relying on \textit{State Contracting}, which the DOT determined that the hearing officer ignored and failed to distinguish.\textsuperscript{304} Nonetheless, although the evidence presented at the hearing regarding the protester’s good faith compliance with the DBE requirements was not included with its bid, the DOT would consider the material now because the protester already had one DBE, and the DOT should have known about the severe limitation on certified painters, which rendered it meaningless to contact more.\textsuperscript{305} Thus, the DOT accepted the hearing officer’s recommendation regarding the protester’s good faith efforts to comply with the DBE goals, and that the protester should receive the contract.

In \textit{Overstreet Paving Co. v. Department of Transportation},\textsuperscript{306} an agency had to waive a bidder’s failure to include its DBE form where evidence in the record demonstrated that it had been included with its bid, but that the agency lost it.\textsuperscript{307} The DOT found the low bid nonresponsive due to Overstreet’s failure to include its DBE utilization form with its bid.\textsuperscript{308} The DOT dismissed the protest, and the low bidder appealed.\textsuperscript{309} The appellate court held that the bid should not have been declared nonresponsive for a technical omission that was not material to the bid, that did not result in competitive advantage, and that was a matter the DOT had discretion to overlook, in view of the hearing officer’s findings establishing an unrefuted, prima facie case that the low bidder included the document in question in its sealed bid.\textsuperscript{310} The decision in \textit{Overstreet Paving Co.} should not be taken as firm precedent that an agency must waive an offeror’s failure to include its

\textsuperscript{303} \textit{Quinn Constr., Inc.}, No. 99-2277BID ¶ 67.

\textsuperscript{304} \textit{See also} Old Tampa Bay Enters., Inc. v. Dep’t of Transp., No. 99-0120BID (Fla. Div. Admin. Hr’gs May 27, 1999) (denying protest challenging evaluation of awardee in a procurement for bridge tending, maintenance, and repair services where protester failed to prove that proposed DBE could not perform the work and the work of the DBE was a matter of contract performance, not responsiveness).

\textsuperscript{305} \textit{Quinn Constr., Inc.}, No. 99-2277BID ¶ 58.

\textsuperscript{306} 608 So. 2d 851 (Fla. 2d Dist. Ct. App. 1992) (reversing final order finding contractor nonresponsive).

\textsuperscript{307} \textit{Id.} at 852.

\textsuperscript{308} \textit{Id.}

\textsuperscript{309} \textit{Id.}

\textsuperscript{310} \textit{Id.} at 853.
DBE firm because of the finding that the agency had lost the documentation. The Division of Administrative Hearings has accepted this distinction.\footnote{311}

In \textit{City of Wildwood v. Gibbs \& Register, Inc.},\footnote{312} the court held a contractor cannot use its failure to comply with a solicitation’s DBE requirements to withdraw a bid.\footnote{313} In \textit{Gibbs \& Register, Inc.}, the city brought an action against the low bidder for a wastewater system reuse storage pond construction contract, seeking damages stemming from a bidder’s withdrawal of its bid in an ITB.\footnote{314} The bidder claimed that it could not meet the DBE participation requirements.\footnote{315} The bidder and its surety that had issued the bid bond counterclaimed for damages resulting from the city’s refusal to return the bid bond.\footnote{316} All the parties moved for summary judgment, and the trial court granted the bidder’s motion and denied the city’s motion.\footnote{317} The city appealed, and the appellate court held that the bidder breached the agreements in its bid by refusing to provide post-award information necessary to comply with the DBE participation goal requirements as required for a contract, thus triggering forfeiture of the bidder’s bid bond to the city.\footnote{318}

\section*{IX. Responsibility}

It is very difficult for a bidder to successfully challenge the agency’s determination that the bidder is not responsible. A responsible bidder is one who “has the capability in all respects to perform fully the contract requirements and has the integrity and reliability which will assure good faith performance.”\footnote{319} In one recent decision, a city manager found a bidder not responsible based on his performance during a previous contract in

\footnotesize{311. \textit{See Hubbard Constr. Co. v. Dep’t of Transp., No. 98-0749BID (Fla. Div. Admin. Hr’gs May 1, 1998) (denying protest challenging agency’s determination that proposals were nonresponsive where one offeror failed to include its DBE form and another did not meet DBE goals when the proposed DBE was not certified).}
312. 694 So. 2d 763 (Fla. 5th Dist. Ct. App. 1997).
313. \textit{Id.} at 766 (reversing summary judgment for contractor who attempted to withdraw bid).
314. \textit{Id.} at 764.
315. \textit{Id.} at 765.
316. \textit{Id.}
317. \textit{Gibbs \& Register, Inc.}, 694 So. 2d at 765.
318. \textit{Id.} at 766.
319. \textit{FLA. STAT. § 287.012(13) (2000); see also Broward Co. Procurement Code § 21.8 (b)(60).}
which the bidder billed the city for work that it had not performed. A hearing officer disagreed with the city manager’s conclusion, reasoning that the city manager did not know all of the pertinent facts. The city commission, however, rejected the decision of the hearing officer, and still rejected the bid. In an order affirming the denial of a temporary injunction sought by the purported nonresponsible bidder, the appellate court held that the bidder was not likely to succeed on the merits because, based on the bidder’s performance under previous contract, it did not appear to be arbitrary to find the bidder nonresponsible.

X. SUNSHINE LAW

Florida has a statutory requirement granting a broad right of access to public records and meetings of public boards and commissions. This law, known as the Sunshine Law, is a potentially powerful weapon that may be unleashed by a disappointed bidder to upset a procurement. Several recent decisions have considered the application of the Sunshine Law within a government procurement.

In Silver Express Co. v. District Board of Lower Tribunal Trustees of Miami-Dade Community College, a contractor that had submitted an unsuccessful proposal to the college to provide flight training services brought an action in circuit court seeking to enjoin the college from awarding a two-year contract to another contractor, alleging a violation of the Sunshine Law. The circuit court denied the motion for a temporary injunction, and the contractor appealed. On appeal, the appellate court held that the committee appointed by the college’s purchasing director to consider proposals was subject to the Sunshine Law. The court further held

321. Id. at 1085.
322. Id. at 1086.
323. Id. at 1091 (affirming denial of a temporary injunction because no substantial likelihood to prevail on the merits existed); see also Culpepper v. Moore, 40 So. 2d 366, 370 (Fla. 1949) (affirming the agency’s decision that the low bidder was not responsible in part because of mistakes in the bid).
325. 691 So. 2d 1099 (Fla. 3d Dist. Ct. App. 1997).
326. Id. at 1100–01.
327. Id. at 1100.
that the committee's violation of the law caused irreparable public injury, warranting a temporary injunction prohibiting the college from entering into the contract based on the ranking established by the committee. \(^3\) The appellate court also held that the plaintiff did not waive its Sunshine Law claim by failing to raise it in the chapter 120 bid protest. \(^3\)

Other decisions, while confirming that procurements are subject to the Sunshine Law, did not provide similar relief to disappointed bidders. For instance, in \textit{Leach-Wells v. City of Bradenton}, \(^3\) the appellate court held that the city violated the Sunshine Law when an ad hoc committee failed to hold a meeting regarding the short-listing of bidders for a construction contract for a municipal complex. \(^3\) The city had appointed a selection committee comprised of the city clerk, a local engineer, the public works director, and a city councilman to review the six proposals submitted in response to the RFP. \(^3\) These committee members were then required to rank the proposals, with the top three being permitted to make presentations to the city council, and then select one. \(^3\) Because all of the committee members had found the same three bidders to be the highest rated, the city did not hold a meeting to discuss who the top three should be. \(^3\) The appellate court reasoned that the ranking, which in essence eliminated three bidders from the process, was a "formal action" that was required to be done at a public meeting. \(^3\) Although a violation had occurred, the city had not been enjoined (the plaintiff had not appealed the denial of the temporary injunction), therefore the action was moot. \(^3\)

The Sunshine Law does not prohibit all private discussions within the context of a procurement. In \textit{Humana Medical Plan, Inc. v. School Board of...
Broward County, Humana claimed that three meetings violated the Sunshine Law. The administrative law judge ruled, however, that the individual committee members were free to meet with a consultant retained to assist with the procurement. Further, while two other meetings were violations of the Sunshine Law, the administrative law judge found that those violations were cured by holding a subsequent full and open public hearing on the same issues.

XI. REMEDIES

Although Florida courts have awarded attorneys' fees and bid preparation costs to successful protestors, lost profits have not been held to be recoverable. In City of Cape Coral v. Water Services of America, Inc., ("WSA"), the city informed bidders that they did not have to be licensed as a general contractor under chapter 489 of the Florida Statutes in order to bid on the water treatment facility. A bidder complained that it should receive the contract award because the other bidders were not licensed as general contractors. The city agreed, and WSA protested, seeking an injunction and damages. The request for an injunction was denied in another decision, but the trial court awarded lost profits, bid preparation costs, prejudgment interest, and attorneys' fees. Thereafter, the appellate court reversed as to lost profits only.

338. Id. ¶ 121.
339. Id. (citing Sch. Bd. of Duval County v. Fla. Publ'g Co., 670 So. 2d 99, 101 (Fla. 1st Dist. Ct. App. 1996)) (holding that the Sunshine Law does not prevent private meetings between individual committee members and staff members or consultants). But see Blackford v. Sch. Bd. of Orange County, 375 So. 2d 578, 581 (Fla. 5th Dist. Ct. App. 1979) (finding that meetings between one subject to the Sunshine Law and one not subject to the Sunshine Law would be subject to Sunshine Law if the other person was acting as a liaison between persons subject to the Sunshine Law). See also Office of the Attorney General, supra note 324, at 18–19.
342. Id. at 511.
343. Id.
344. Id. at 512.
345. Id.
346. City of Cape Coral, 567 So. 2d at 514.
In contrast, in City of Tallahassee v. Blankenship & Lee, a disappointed bidder on a natural gas line project sued the city for disqualification from bidding, in which the trial court had found that the city's decision had come too late. The circuit court ordered the city to pay bid preparation costs, including attorneys' fees, incurred in pursuing the bid protest, but the district court of appeal held that attorneys' fees were not recoverable. Although there is a limited exception that attorneys' fees are available where the wrongful act involved a party in litigation against others, it was found to be inapplicable.

In Procacci Commercial Realty, Inc. v. Department of Health & Rehabilitative Services, the agency was awarded sanctions against the protester and attorneys' fees and costs for having to defend a frivolous appeal regarding a bid protest.

XII. HEARING OFFICER'S DECISION

A. Rejection of Hearing Officer's Legal Conclusion

Decisions of the administrative law judges are only recommended decisions and the agencies may reject the decisions, subject to judicial review, though such rejections are rare. In L.B. Bryan & Co. v. School Board of Broward County, the appellate court held that the school board, in a procurement for insurance, properly rejected the administrative law judge's conclusions of law that the board had acted illegally by awarding the contract to the intended awardee. The protester claimed that the school board could not award the contract to the intended awardee because it was in violation of the surplus lines insurance statute. The administrative law judge agreed in its conclusions of law. The school board rejected these
two conclusions of law, and on appeal, the protester challenged the school board’s authority to reject the judge’s legal conclusions, contending that the school board could not reject such findings because it did not have “substantive jurisdiction” over the surplus lines statute.\(^{357}\)

At the time, an agency could “reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction.”\(^{358}\) The First District held that the phrase “over which it has substantive jurisdiction” only applied to “administrative rules,” not to “conclusions of law.”\(^{359}\) The appellate court reasoned that it has been the longstanding rule in Florida that an agency could reject any conclusion of law, but as to administrative rules, only those over which the agency has substantive jurisdiction.\(^{360}\) However, the district court noted that the recent amendment to section 120.57(1)(d) of the Florida Statutes has departed from long standing law, and now agencies may only reject or modify conclusions of law and administrative rules over which they have substantive jurisdiction.\(^{361}\)

In *State Contracting & Engineering Corp. v. Department of Transportation*,\(^{362}\) a contractor challenged a final order of the DOT approving the acceptance of a competitive bid for construction work on a state road project.\(^{363}\) The district court of appeal held that the competing contractor’s bid for replacement of tollbooths on a state road was only required to facially comply with the rule’s requirements for subcontract work by disadvantaged businesses.\(^{364}\) The protester contended that the low bidder was nonresponsive because its DBE subcontractors intended to purchase goods from non-DBEs.\(^{365}\) The DOT contended that the low bidder’s completed DBE form and actual compliance was a performance

\(^{357}\) *Id.*

\(^{358}\) *L.B. Bryan & Co.*, 746 So. 2d at 1197 (citing *Fla. Stat.* § 120.57(1)(d) (Supp. 1996)).

\(^{359}\) *Id.*

\(^{360}\) *Id.*

\(^{361}\) *Id.* In pertinent part, the section states as follows: “[t]he agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.” *Fla. Stat.* § 120.57(1)(d) (2000).

\(^{362}\) 709 So. 2d 607 (Fla. 1st Dist. Ct. App. 1998) (affirming agency’s rejection of hearing officer’s decision granting protest).

\(^{363}\) *Id.* at 608.

\(^{364}\) *Id.* at 610.

\(^{365}\) *Id.* at 608.
issue, not a responsiveness issue. 366 The hearing officer disagreed, but the agency rejected this argument. 367 The appellate court affirmed and held that the burden is on the party protesting the award of the bid to establish the ground(s) for invalidating the award. 368 Moreover, the appellate court held that an agency may reject a hearing officer's findings of fact only if not supported by competent and substantial evidence, but can reject or modify conclusions of law and interpretations of administrative rules over which the agency has substantive jurisdiction. 369 Here, the court's review of the agency's decision is limited to whether it is correct as a matter of law, which is certainly not clearly erroneous. 370

B. Administrative Law Judge's Decision is Binding in a Chapter 120 Challenge if Supported by Substantial and Competent Evidence

In Hubbard Construction Co. v. Department of Transportation, 371 the appellant/bidder challenged a final order in which the DOT rejected certain findings of fact and conclusions of law of the hearing officer that the bidder's discrepancy was a minor irregularity (no discussion of issue) and, thereby, denied the appellant's bid protest. 372 Because the hearing officer's recommended order was supported by competent substantial evidence and did not involve a misapplication of law, the appellate court reversed. 373

In Asphalt Pavers, Inc. v. Department of Transportation, 374 a chapter 120 case, a final order of the DOT dismissed a contractor's protest to the disqualification of its bid and the intended award of the project to the next lowest bidder. 375 The contractor appealed. 376 The contractor's bid was missing the disadvantaged business form, which was required to be

366. Id.
367. State Contracting & Eng'g, 709 So. 2d at 608.
368. Id. at 609.
369. Id. at 610.
370. See id.
372. Id. at 1192.
373. Id. (stating no beneficial facts, but providing just another example of reversal of agency rejection of hearing officer's determination).
374. 602 So. 2d 558 (Fla. 1st Dist. Ct. App. 1992) (reversing agency's rejection of hearing officer's decision upholding protest that bidder was responsive).
375. Id. at 558.
376. Id. at 559.
responsive. The hearing officer found that the bidder included the form in its bid, but the DOT lost it. Thus, the protest was upheld. The DOT rejected the hearing officer’s decision. The district court of appeal held that the hearing officer’s findings of fact after an evidentiary hearing were supported by competent, substantial evidence, and the DOT’s decision to reject the lowest bid was clearly arbitrary.

C. Nonchapter 120 Procurements

In Miami-Dade County v. Church & Tower, Inc., (“C & T”), a case applying Dade County Procurement Code 2-8.4, the court held that the county commission is not bound by the hearing examiner’s recommendation, but still must not exercise its discretion arbitrarily or capriciously. The city manager found C & T nonresponsible based upon findings of previous contracts where C & T billed for work not performed. However, the hearing officer disagreed because the city manager did not know all the pertinent facts (although there were no findings that any allegations were false) and recommended the award go to C & T. The city commission rejected the decision and the bid. The appellate court held that the trial court improperly entered a temporary injunction because C & T failed to establish the likelihood of success on the merits and was therefore not entitled to an injunction. The Dade County Code permitted the commission to reject the hearing officer’s decision (by a two-thirds requirement if it is the same as the manager), as long as the decision was not arbitrary or capricious. Here, based upon the facts under the previous contract, it was not found to be arbitrary.

377. Id.
378. Id. at 560.
379. Asphalt Pavers, Inc., 602 So. 2d at 560.
380. Id.
381. Id. at 562; see also Overstreet Paving Co. v. Dep’t of Transp., 608 So. 2d 851 (Fla. 2d Dist. Ct. App. 1992).
382. 715 So. 2d 1084 (Fla. 3d Dist. Ct. App. 1998) (affirming denial of a temporary injunction because protestor did not show a substantial likelihood of prevailing on the merits).
383. Id. at 1089–90.
384. Id. at 1086.
385. Id.
386. Id.
387. Church & Tower, Inc., 715 So. 2d at 1089.
388. Id. at 1088.
389. Id. at 1091.
XIV. CONCLUSION

The rules governing contracting with the government are intended to ensure the fair and equitable treatment of all persons who seek such contracts. While often these rules make it more difficult to obtain government contracts, as compared to private contracts, such rules provide all potential contractors with an equal opportunity. Despite this level playing field among contractors, the government is given a firm advantage. Governmental entities are provided with broad discretion as to the decisions they make regarding the evaluation of bids and proposals and the award of contracts for goods and services. Thus, potential government contractors, and their counsel, need to pay special attention to the unique rules governing the process, as discussed in this article.