



Administrative Law Section Newsletter

Vol. XXIX, No. 3

Donna E. Blanton, Editor

March 2008

Congratulations! You Won Your Bid Protest Appeal . . . Now What?

by Toni A. Egan

Once a final order in a bid protest is entered, the automatic stay imposed by section 120.57(3)(c), Florida Statutes, is lifted.¹ Without the stay, the agency is free to enter into a contract with the winning bidder even if the losing bidder decides to appeal the final order to a District Court of Appeal. The appellant can move for a stay pending appeal; however, such motions are usually denied.

If the protestor prevails on appeal, the usual remedies are an award of the contract or a rebidding. However,

where the contract award has not been stayed and the agency elects to proceed with the contract while the appeal progresses, the protester's remedies may be more limited.² Some cases suggest that the court can award a contract to a specific bidder who prevails on appeal, despite the earlier execution of a contract with another bidder.³ However, some courts have found that the remedies available to a successful protestor are limited to bid preparation and/or protest costs once a contract has been executed.⁴

If the contract has been fully or substantially performed before the appeal is resolved, the protester cannot be awarded the contract or a rebidding because the contract has been fulfilled.⁵ In this situation, the protester's only remedy is the recovery of its bid preparation costs and certain litigation expenses (although one court has suggested the possibility that the protester could be awarded a future comparable contract).⁶ Notably, the courts have unanimously concluded that the disappointed

See "Bid Protest," page 10

From the Chair

by Andy Bertron



Many administrative lawyers take for granted the ability to find and cite to decisions of Florida agencies. Like all attorneys, I usually know where to find the law in my own area of practice.

When I run into trouble, I know attorneys at the agencies with whom I deal regularly and call them when I need help with a particular issue. And I am extremely grateful to them for

their knowledge and willingness to help. But what about attorneys who don't regularly practice administrative law or don't live in Tallahassee? For them, finding and citing to agency precedents can be taxing.

Let's start with citation. Florida Rule of Appellate Procedure 9.800 establishes a uniform citation system for appellate pleadings. Subsections (d)(1) and (2) specify citation forms for decisions of the Public Employees Relations Commission and the Public Service Commission. Subsection (d)(3) concludes by requiring citation

to the Florida Administrative Law Reporter ("FALR") for "decisions of all other agencies." However, the FALR

See "Chair's Message," page 2

INSIDE:

Appellate Case Notes.....	3
Agency Snapshot Office of Program Policy Analysis and Government Accountability.....	5
Minutes – October 26, 2007	7
Minutes – January 9, 2008	9

CHAIR'S MESSAGE*from page 1*

does not publish the decisions of "all other agencies."

How then, does one cite to a final order of an agency that does not publish its decisions in the FALR, such as the Department of Transportation ("DOT"), which publishes its final orders through Municipal Code Corporation? The rule points us to the Bluebook, and then to the Florida Style Manual. The 17th edition of the Bluebook provides citation forms for the Florida Administrative Code, but gives no guidance for final orders. The sixth edition (2003) of the Florida Style Manual provides citation forms for decisions published in the FALR, the Florida Public Employee Reporter, Florida Career Service Reporter, Florida Public Service Commission Reporter and Florida Environment and Land Use Reporter, but no guidance for DOT or other agencies not published in these reporters. Rule 9.800 also does not address citation to conclusions of law or fact in a DOAH recommended order that were adopted by reference in an agency final order. The lack of specificity in the

rule and fact that many final orders are not published in the FALR have led, in my experience, to administrative law practitioners adopting a variety of methods to cite to recommended and final orders.

While the rule could stand updating, the problem may lie as much with how and where agency final orders are published. Many agencies have chosen to publish their final orders in the FALR. However, my own very informal survey indicates that a number of law firms, agencies, and courts no longer subscribe to the FALR (e.g., the Division of Administrative Hearings ("DOAH") does not subscribe to the FALR). Reduced subscriptions to the FALR are likely the result of increased reliance on electronic databases, such as Westlaw and Lexis-Nexis.

Agencies are not required to publish through FALR. Rule 1S-6.002(2), Florida Administrative Code, requires each agency to "maintain an alphabetical subject matter index or an electronic data base of final orders required to be indexed." Thus, DOT has chosen to make its orders available through Municipal Code Corporation. Some agencies, such as the Department of Management Services and the Office of Insurance Regulation,

maintain their own subject matter indexes and final orders that are available for review at the agency. And other agencies have chosen similar courses. That raises the question, if you need to research decisions by an agency you do not regularly practice before, where do you go? It may exist, but I have been unable to locate one source that lists where final orders by all agencies can be found.

Agencies take actions every day that profoundly impact the public. They grant or deny permits for projects that impact our neighborhoods. They revoke the licenses of professionals who may be a danger to the public. They approve rate changes for insurance companies. Finding the precedents set by Florida agencies should not be the exclusive domain of a few specialized practitioners in Tallahassee. Administrative law should be easy to find and cite. The Administrative Law Section Executive Council is studying these issues and looking for ways to improve the ability of attorneys to find and cite administrative decisions, and we welcome your input. If you have thoughts, ideas, suggestions or criticisms, please contact any member of the Executive Council or send them to me at andy.bertron@sablav.com.

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APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

K.J.S. v. Department of Children and Family Services, 33 Fla. L. Weekly 94 (Fla. 1st DCA 2007) (Opinion filed December 31, 2007)

K.J.S. sought an exemption from a disqualification prohibiting him from residing in his wife's home where she provided day-care services. The prohibition was the result of K.J.S.'s conviction for second degree felony murder based on his involvement in driving a get-away car for a robbery of a convenience store where the robber fatally shot a clerk. He ultimately served 13 years for his part in the crime. The Department denied the request for an exemption on the grounds that K.J.S. had downplayed his involvement in the matter and did not appear to have accepted his responsibility. After an administrative hearing, the administrative law judge entered a recommended order finding that K.J.S. had completely rehabilitated himself. The judge heard testimony from numerous witnesses regarding his responsibility, his involvement in outreach ministry activities, his commitment to his family and other redeeming features. The judge also heard testimony from members of the exemption committee regarding their concerns about his failure to accept responsibility for his involvement in the crime. The Department rejected the recommended order and denied the request for an exemption.

On appeal, the court reversed and remanded. While the court recognized that the Department had wide discretion in granting or denying exemptions under the statute, it held that the Department erred in rejecting the judge's findings of fact in this case. In that respect, it noted that the Department had acted without having a copy of the transcript from the hearing or making specific findings as to why the findings of fact were not supported by competent substantial evidence. The court further noted that the administrative law judge was best able to evaluate the credibility of the many witnesses who testified.

Licensing

Henson v. Department of Health, 32 Fla. L. Weekly 2516 (Fla. 1st DCA 2007) (Opinion filed October 24, 2007)

Dr. Henson, a D.O., appealed an emergency order of the Department of Health suspending his license. The District Court had previously reversed an emergency suspension on the grounds that it was too broad. The Department had revised the order and restricted Henson's right to prescribe narcotic pain relievers as the allegations of misconduct had related to excessive prescription of such drugs. Following entry of that order, Henson violated its conditions by writing a prescription for a narcotic. The Department issued another emergency order suspending his license that was the subject of this appeal. The second emergency order of suspension stated that the suspension was necessary as Henson had failed to comply with other orders of the Department and demonstrated a disregard for his duties and responsibilities. The court affirmed.

Doll v. Department of Health, 32 Fla. L. Weekly 2620 (Fla. 1st DCA 2007) (Opinion filed November 6, 2007)

Doll, a chiropractor, plead guilty to federal criminal charges of conspiracy to defraud a health beneficiary program. The Department of Health subsequently revoked his chiropractic license pursuant to Section 456.072(1)(c), Florida Statutes, on the grounds that he had plead guilty to a crime "which relates to the practice of ... a licensee's profession."

On appeal, Doll argued that the charges of defrauding a health beneficiary program did not relate to his practice. The court affirmed the revocation. It held that although the definition of a particular profession may not refer to acts involved in a crime, the crime may still relate to the profession.

Rule Challenges

Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region, 32 Fla. L. Weekly 2798 (Fla. 1st DCA 2007) (Opinion filed November 26, 2007)

The Capital Collateral Regional

continued...

Administrative Law Section Convention Activities

Thursday, June 19

6:30 p.m. - 7:30 p.m.

Section Reception

Friday, June 20

10:00 a.m. - 12:30 p.m.

Executive Council/Section Annual Meeting

CASE NOTES*from page 3*

Counsel-Middle (“CCRC-M”) and its regional counsel filed a petition asserting that the Department of Financial Services had an unadopted rule construing section 11.062, Florida Statutes, to treat CCRC-M as an executive branch agency. The case arose from an investigation by the Department’s Office of Fiscal Integrity (“OFI”) into the use of state funds by both CCRC-M and CCRC-South and their respective regional counsels to hire a legislative lobbyist. The OFI report recommended that the Department seek to recover the funds expended from the two regional counsels. However, no such action was ever taken.

The administrative law judge held that the Department had an unadopted rule based on the OFI report and a legal opinion of the Department, cited in the report, which stated that CCRC-M was an executive branch agency.

On appeal, the court reversed. It concluded that the Department’s construction of the rule did not meet the

definition of a rule because the OFI report was merely a recommendation. The court held that conducting an investigation preceding an enforcement action does not constitute adopting a rule. If the Department had implemented the recommendations in the report, the affected party would have had a point of entry. In addition, the court held that the legal opinion was not a rule as legal memoranda are not rules unless used in connection with an agency action.

Emergency Final Orders

Kodsy v. Department of Financial Services, 33 Fla. L. Weekly 128 (Fla. 4th DCA 2008) (Opinion filed January 2, 2008)

The Department of Financial Services issued an emergency final order pursuant to section 120.569(2), Florida Statutes, ordering Kodsy to cease engaging in the unlicensed business of analyzing homeowner’s insurance policies. The order stated that several homeowners had provided affidavits stating that Kodsy, a licensed contractor with a mold remediation business, had reviewed their insurance policies and offered the opinion that the policies would cover the cost

of mold remediation. When the insurance companies refused to pay, Kodsy filed suit seeking to obtain payment from the homeowners.

On appeal, the court reversed. It held that the emergency order failed to state facts demonstrating that the activities would continue to occur. The court noted that of the situations cited by the order, the most recent one was more than a year prior to issuance of the order. In addition, the court noted that the Department had separate authority under Chapter 624, Florida Statutes, to issue emergency orders after a hearing; however, in this case, the Department did not address why it needed to issue such an order under Chapter 120 without a hearing.

Mary F. Smallwood is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is a Past Chair of the Administrative Law Section and a Past Chair of the Environmental and Land Use Law Section of The Florida Bar. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to Mary. Smallwood@Ruden.com.

Agency Snapshot

Office of Program Policy Analysis and Government Accountability

The Office of Program Policy Analysis and Government Accountability (OPPAGA) was established as a separate unit of the Florida Legislature under the Office of the Auditor General in 1994 by chapter 94-249, Laws of Florida, The “Government Performance and Accountability Act.” Prior to 1994, policy analysis was conducted by the program audit staff of the Office of the Auditor General. The office is established in section 11.51, Florida Statutes. The office is independent of the Auditor General as provided in section 11.51(2).

OPPAGA is under the oversight of the Joint Legislative Auditing Committee. OPPAGA examines agencies

and programs to improve services and cut costs when directed by state law, the presiding officers, or the Joint Legislative Auditing Committee. The office is charged with establishing a schedule to examine state programs and is authorized to examine all entities and records as listed in section 11.45(3), Florida Statutes. These are the same entities that the Auditor General is authorized to investigate and audit. The office’s website can be found at <http://www.oppaga.state.fl.us/default.asp>.

OPPAGA also has responsibilities under The Florida Government Accountability Act (sections 11.901-11.920, Florida Statutes), which establishes a legislative process to de-

termine if a public need exists for the continuation of a state agency and its advisory committees. Section 11.904 designates OPPAGA as the primary provider of research services to support the process. In addition, section 11.907 authorizes the Legislature to direct OPPAGA to review the agencies and advisory committees undergoing “sunset” review.

OPPAGA’s mission is to support the Florida Legislature by providing evaluative research and objective analyses to promote government accountability and the efficient and effective use of public resources.

Research conducted by OPPAGA is guided by *The Program Evaluation Standards, 2nd Edition*, which

is issued by The Joint Committee on Standards for Educational Evaluation and published by SAGE Publications.

The *Standards* are segregated into four categories: Utility, Feasibility, Propriety, and Accuracy. OPPAGA uses the *Standards* to ensure the quality, usefulness, and timeliness of all published products. See <http://www.eval.org/EvaluationDocuments/standards.html> for a summary of the *Standards*.

In addition to program reviews, the office provides research and technical assistance to legislators and legislative committees and provides follow-up reviews that assess whether agencies have resolved problems identified in earlier studies. The office also maintains the Florida Government Accountability Report, an electronic encyclopedia containing descriptive and evaluative information on all major state programs. It also provides the Florida Monitor Weekly, a weekly electronic newsletter of policy research of interest to Florida policymakers.

The office is organized with a director, deputy director, general counsel, and staff directors in charge of the various policy areas and support areas.

Head of the Department - Director:

Gary R. VanLandingham, Ph. D., vanlandingham.gary@oppaga.fl.gov
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(850) 488-0021
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(850) 487-9083 (fax)

The director of OPPAGA is appointed by a majority vote of the Joint Legislative Auditing Committee, subject to confirmation by a majority vote of both the Senate and the House of Representatives. At the time of appointment, the director must have had 10 years' experience in policy analysis and program evaluation. The reappointment of a director is subject to confirmation by a majority vote of the Senate and the House of Representatives. The director is required to take the oath of office

required of all state officers under the Florida Constitution. The director is in charge of the office's operating budget and is authorized to hire and set compensation for the professional staff employed by the office.

The director manages OPPAGA's operations to ensure that the office's products meet the Legislature's information needs. This includes coordinating office-wide activities and resources; strategic planning; monitoring project progress; reviewing reports and related products; mentoring management staff; overseeing staff hiring, training, and evaluation; identifying and resolving organizational problems; and maintaining active liaison with the Legislature.

Dr. VanLandingham was nominated as OPPAGA's director by the Joint Legislative Auditing Committee and confirmed by the Legislature in 2005, after serving as interim director since July 2003. Prior to that date, he served as OPPAGA's deputy director for seven years. Before becoming deputy director, he served as lead analyst for OPPAGA's general government policy area. His areas of expertise include privatization, project management, strategic planning, and performance management. His evaluation experience also includes work in the Governor's Office, the former Department of Health and Rehabilitative Services, and a school district.

He is currently serving as national staff vice-chair of the National Conference of State Legislatures (NCSL). He has also served as President of the Southeast Evaluation Association; as Chair of the National Legislative Program Evaluation Society, and staff vice-chair of the NCSL Assembly on State Issues. He has a Ph. D. in Public Administration and Policy from the Florida State University and is a certified internal auditor.

Deputy Director:

Kathy McGuire, mcguire.kathy@oppaga.fl.gov
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The deputy director assists the director in managing OPPAGA's operations to ensure that the office's products meet the Legislature's information needs. This includes coordinating office-wide activities and resources; strategic planning; monitoring project progress; reviewing reports and related products; mentoring management staff; overseeing staff evaluation; and identifying and resolving organizational problems.

Ms. McGuire became deputy director in February 2005. Prior to that date, she served as staff director for criminal justice. In that role she led teams reviewing programs relating to juvenile justice programs and the court system. Other recent projects focused on the Department of Corrections and PRIDE. For more than 15 years she has conducted and led a wide variety of program evaluations and policy analyses, including Violent Sexual Predators and the Statewide Law Enforcement Radio System. McGuire also assists with OPPAGA's staff training program and has attended the Legislative Staff Management Institute at the University of Minnesota.

General Counsel:

Jan Bush, bush.jan@oppaga.fl.gov
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The general counsel serves as the chief legal advisor for OPPAGA. The general counsel plans, organizes, and directs all legal activities involving OPPAGA; conducts highly technical, varied and complex legal research in connection with OPPAGA's functions; and serves as the liaison between OPPAGA and other entities. The general counsel advises OPPAGA's senior management on matters relating to the operation and management of the organization, including personnel issues.

Jan Bush has served as general counsel to OPPAGA since its creation in 1994. She works with legislators, legislative staff, and other OPPAGA constituents on issues that arise in

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AGENCY SNAPSHOT*from page 5*

the legislative process. An attorney for 27 years, Bush has worked in the legislative and executive branches of government and spent five years in private practice. Bush also attended the Legislative Staff Management Institute at the University of Minnesota in 1991.

The Office of General Counsel handles a wide variety of matters, including state and federal employment law, and other substantive and procedural legal issues. The office oversees the contracting process for OPPAGA and provides legal support and guidance to the director and staff on legal issues that arise during projects in all policy areas.

Number of Lawyers on Staff: 1**Economic Development, Environment, and Transportation Policy Area**

Tom Roth, Staff Director, *roth.tom@oppaga.fl.gov*

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Mr. Roth serves as staff director for the Economic Development, Environment, and Transportation policy area. Since 1979, he has overseen many evaluations of state government support, employee benefit, economic development, environment, and transportation programs for OPPAGA and its predecessor. Most recently, he has overseen reviews of the Florida Black Business Investment Board, the Scripps Florida Funding Corporation, and state biotechnology initiatives.

The Economic Development, Environment, and Transportation policy group conducts reviews involving the following state agencies and boards: Agency for Workforce Innovation, Department of Community Affairs, Department of Environmental Pro-

tection, Department of Highway Safety and Motor Vehicles, Department of Transportation, Fish and Wildlife Conservation Commission, Governor's Office of Tourism, Trade, and Economic Development, including public-private partnerships, such as Enterprise Florida and the Florida Commission on Tourism, and Water Management Districts.

Education Policy Area

Jane Fletcher, Staff Director, *fletcher.jane@oppaga.fl.gov*

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Jane Fletcher has been conducting and leading program evaluations and policy analyses for 24 years. Since 1991 she has served as staff director for the policy area dealing with Florida's K-20 education system.

This policy area reviews many different programs, including charter schools, workforce development, early education and child care, student transportation, exceptional student education, gifted programs, community colleges and the state university system and the state's education finance system. Recently the policy area has reviewed the state's remediation program, reviewed the state's higher education articulation policies and a reviewed K-12 teacher retention. Currently the policy group is reviewing the gifted program, a review of the Department of Lottery, and a continuing review of the state's higher education policies.

The education policy group conducts reviews involving the following state agencies and boards: Board of Governors, Community Colleges, Department of Education, K-20 education programs, Department of Lottery, School Districts, State Universities, and Workforce Education Programs.

Government Operations Policy Area

Kara Collins-Gomez, Staff Director, *collins-gomez.kara@oppaga.fl.gov*

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Kara Collins-Gomez serves as staff director for the Government Operations policy area. Since 1998, she has conducted and led program evaluations and policy analyses in a variety of areas, including children and family services, business and professional regulation, insurance regulation, and special district governance and administration. Collins-Gomez also assists with the maintenance of OPPAGA electronic products, such as the Florida Monitor Weekly and Florida Government Accountability Report and is a member of OPPAGA's external relations workgroup. In 2003, she received her Public Manager certification from Florida State University, and she attended the Legislative Staff Management Institute at the University of Minnesota in 2004.

The Government Operations policy group conducts reviews involving the following state agencies and boards: Department of Agriculture and Consumer Services, Department of Business and Professional Regulation, Department of Citrus, Department of Financial Services, Department of Management Services, Department of Military Affairs, Department of Revenue, Department of State, Public Service Commission, and State Board of Administration.

Health and Human Services Policy Area

Becky Vickers, Staff Director, mail: *becky@oppaga.fl.gov*

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Becky Vickers became staff director for the Health and Human Services policy area in July 2004. For over 20 years she has conducted program evaluations and policy analyses in many policy areas, including govern-

ment operations, transportation, and education.

The policy group is currently directing the health and human services policy area in reviews and reports dealing with issues such as adult protection, elder services, mental health, child protection, health care programs and regulation, developmental disabilities, and Medicaid.

The Health and Human Services policy group conducts reviews involving the following state agencies; Agency for Health Care Administration, Agency for Persons With Disabilities, Department of Children and Families, Department of Elder Affairs, Department of Health, and Department of Veterans Affairs.

Criminal Justice Policy Area

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Marti Harkness serves as Staff Director for Criminal Justice policy area. Since 1992 he has led numerous teams in reviewing programs throughout state government including corrections, health and human services and education. Harkness also assists with recruitment activities and has attended the Legislative Staff Management Institute at the University of Minnesota. He has served in numerous roles in the National Conference of State Legislatures (NCSL), most recently as Staff Chair of the Standing Committees. He currently serves as a director on the Research and Committee Staff Section (RACSS) Executive Committee.

The Criminal Justice policy group conducts reviews involving the following state agencies, commissions, programs and constitutional offices: Capital Collateral Regional Councils, Correctional Medical Authority, Department of Corrections, Department of Juvenile Justice, Department

of Legal Affairs (Office of Attorney General), Florida Department of Law Enforcement, Guardian Ad Litem Programs, Justice Administrative Commission, Parole Commission, PRIDE, Public Defenders, State Attorneys, and the State Courts System.

Hours of Operation:

8:00 a.m.-5:00 p.m.
Monday-Friday

APA Interaction:

None.

Practice Tip:

OPPAGA encourages telephone communication to resolve questions or concerns that may arise during the course of a project. Although OPPAGA does not discuss ongoing projects with external parties until each report is final, persons representing project stakeholders are invited to call the General Counsel or the Staff Director for the policy area involved to inquire.

Minutes — Administrative Law Section Executive Council Meeting October 26, 2007

Approved by the Executive Council at its February 21, 2008, meeting.

I. CALL TO ORDER: The following participated in the ALS Executive Council meeting on October 26, 2007 at 2:00 p.m.:

Present in person: Jackie Wernkli, David Watkins, Andy Bertron, Clark Jennings, T.K. Wetherell, II, Daniel Nordby, F. Scott Boyd, Donna Blanton, Allen Grossman, Amy Schrader, Bill Williams, Lisa Nelson, Debby Kearney, Shaw Stiller.

Present via telephone: Linda Rigo, Cathy Sellers, Bruce Lamb, Elizabeth McArthur, Seann Frazier, Wellington Meffert, Lawrence Sellers.

Absent: Michael Cooke.

II. PRELIMINARY MATTERS

A. Minutes - June 28, 2007

The minutes of the June 28, 2007 Executive Council meeting were approved.

B. Treasurer's Report – Cathy M. Sellers

Jackie Wernkli discussed the October 19, 2007 Detailed Statement of Operations for the Section and the Florida Bar Cost Allocation System.

C. Chair's Report – J. Andrew Bertron, Jr.

Andy Bertron provided the Chair's Report. He reported that officials from

Florida's Children First and Florida Legal Services had contacted him seeking the Section's assistance for clients of the Agency for Persons with Disabilities in DOAH hearings. These organizations are seeking volunteers to represent people who have been denied benefits by the Agency for Persons with Disabilities and/or training for other practitioners who do not have experience in DOAH hearings. Council members discussed the merits of finding a pro bono opportunity and the type of work that would be entailed. Debby Kearney noted that many state agencies would benefit from volunteers from the private bar, and that it might not be appropriate

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MINUTES - OCTOBER 26, 2007*from page 7*

to solicit this type of help for persons who are adverse to an agency. Allen Grossman expressed interest in following up on the request.

Andy Bertron also reported on a potential new initiative to review citation forms for administrative order, including possible suggested amendments to Florida Rule of Appellate Procedure 9.800. Council members discussed the formation of a committee to make a recommendation to the Appellate Rules Committee.

III. COMMITTEE/LIAISON REPORTS**A. Continuing Legal Education – F. Scott Boyd****1. Practice Before DOAH**

Wellington Meffert discussed efforts to conduct the Practice Before DOAH seminar to be held on November 16, 2007 in Tallahassee.

2. Practice Before the PSC

Michael G. Cooke – no report.

B. Publications – Elizabeth W. McArthur**1. Newsletter**

Donna Blanton reported that Amy Schrader is preparing an agency snapshot.

2. TFB Journal

Deborah K. Kearney provided an update on upcoming Bar Journal articles scheduled for publication.

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C. Legislative – Wellington H. Meffert/Linda M. Rigot/ William E. Williams

Judge Rigot reviewed the 2006 – 2008 Biennium Legislative Positions.

D. Public Utilities Law

Michael Cooke was absent from the meeting.

E. Membership – T. Kent Wetherell, II

Judge Wetherell provided an update on membership numbers.

F. Webpage

Daniel Nordby provided an update on the webpage. Daniel is looking as potential upgrades to the webpage hosting software that would enable future updates to be performed more quickly.

G. Uniform Rules of Procedure

Judge Rigot

H. Board of Governors Liaison

Larry Sellers provided a report on activities at the Board of Governors meeting held August 17, 2007.

I. Law School Liaison

Bruce Lamb provided an update on the program. He will contact Stetson about hosting student attendance at a DOAH hearing.

J. CLE Committee Liaison

No report.

K. Council of Sections

Allen Grossman and Clark Jennings provided a report. The most recent meeting focused on financial review.

L. Section/Division Liaison**1. Environmental and Land Use Law**

Cathy Sellers provided a report on initiatives by the Environmental Law Section.

2. Health Law

Allen Grossman provided an update on the Health Law Section activities and upcoming CLEs.

3. YLD Liaison**M. DOAH Update – Lisa S. Nelson/ Linda M. Rigot/T. Kent Wetherell, II****IV. OLD BUSINESS**

SFGAP Certification Update. Eleven people sat for the exam on 10/1. There should be 50-60 certified in the 1st cycle. Then next exam is scheduled for May 2008.

V. NEW BUSINESS**A. Executive Council Member Nomination/Election**

The nominating committee proposed Shaw Stiller for the vacant Executive Council position. A motion was made, seconded and approved to accept the committee’s recommendation.

B. Executive Council Meeting/ Long Range Planning Retreat

Elizabeth McArthur is planning the Council’s long range planning retreat. The next Council meeting and the retreat will be held on February 21-22, 2008. Jackie Werndli is negotiating a reduced rate at the WaterColor Inn.

C. Purchase of Broadband Air-card for Section Administrator

The council approved the purchase of a broadband card for the Section Administrator to enable her to work more efficiently while traveling. The cost will be split with the Environmental and Land Use Law Section.

VI. INFORMATIONAL**A. Executive Council List****B. 2007-08 Committee List****VII. TIME AND PLACE OF NEXT MEETING****A. February 21-22, 2008 – Water-Color Inn in conjunction with the LRP Retreat.****B. Spring 2008 – TBD/As Needed****C. June 20, 2008 – Boca Raton Resort & Club, in conjunction with The Florida Bar Annual Convention****VIII. ADJOURNMENT**

On motion, duly seconded, the meeting was adjourned.

Minutes — Administrative Law Section Executive Council Meeting January 9, 2008

Approved by the Executive Council at its February 21, 2008, meeting.

I. CALL TO ORDER: The following participated in the ALS conference call on January 9, 2008 at 9:00 a.m.:

Present: Andy Bertron, F. Scott Boyd, Seann Frazier, Allen Grossman, Patrick “Booter” Imhof, Clark Jennings, Deborah Kearney, Elizabeth McArthur, Wellington Meffert, Lisa Nelson, Daniel Nordby, Linda Rigot, Lawrence Sellers, Jr., Shaw Stiller, David Watkins, Jackie Werndli, T.K. Wetherell, II.

Absent: Cathy Sellers, Michael Cooke, Bruce Lamb, Donna Blanton.

II. REVIEW OF 2008/2009 BUDGET: The Administrative Law Section Executive Council gathered to review the 2008/2009 proposed budget, and to compare the original 2007/2008 budget with an updated projection of that year’s expected revenues and expenses.

In general, updated projections of revenues for 2007/2008 show slightly higher revenues than expected and slightly lower expenses than expected. The latest projections of 2007/2008 revenues stand at \$35,335 versus an original budget of \$31,216. The 2007/2008 updated projections place expenses at \$43,493 against an earlier budget of \$47,718. These figures still amount to a projected loss of more than \$8,000 for the year. However, many expense items which remain within the budget are not expected to be spent.

Jackie Werndli provided an overview of the latest projected budget for 2007/2008 and the proposed budget for 2008/2009. Jackie made note of certain line items.

Revenues

The CLE Courses line item is projected to include income of \$7,000 for the 2007/2008 year. However, the current figure for CLE courses is \$5,752. Revenues for this item may be affected by a recording malfunction during

a recent CLE. The audio portion of the recent “Practice Before DOAH” seminar wasn’t recorded properly. Thus, no sales of audio tapes can be expected for that CLE course.

Clark Jennings questioned the \$5,000 revenues projected within the budget in both 2007/2008 and 2008/2009 for “Member Services Programs.” He noted that, in the past, revenues projected under this line item were not achieved. Jackie Werndli reported that this line item relates to a Public Utility Law program that was to be held on January 15, 2008. Approximately 40 - 50 lawyers were expected to attend the program. So, some revenues should be expected for this seminar in the 2007/2008 year.

Expenses

Jackie Werndli next provided an overview of particular line items for expenses contained in the proposed budget for 2008/2009.

Due to new allocations of costs to sections and a general reorganization by the Florida Bar, certain line items have been moved. The changes have made it more cumbersome to compare past expenses with current budgets. Expenses for certain line items were no longer comparable. For example, mailing overhead costs were moved to the postage cost line item. Printing overhead has been moved to a general line item for printing expenses.

Jackie reviewed some line item expenses in order to determine whether they overstate costs that may be expected in the 2007/2008 year. The “Newsletter” expenses were on budget and were not expected to exceed projected expenses. Line items for office travel, budgeted at \$2,500, are expected to be much lower than budgeted, perhaps amounting to only a few hundred dollars. The line item for a “Law School Liaison,” budgeted for \$4,900, is expected to total less than \$1,500. Additionally, the website

line item budgeted for \$3,000 was not expected to exceed \$500. Finally, the line item for legislative consultant budgeted at \$5,000 is not expected to be spent.

Net Gain or Loss

Seann Frazier noted that when overstated expenses are removed, a net gain can be expected for 2007/2008. The gain may show the Section “in the black” by a few thousand dollars, rather than at a loss of \$8,000 for 2007/2008.

The Section budget for 2008/2009 projects a loss of \$10,505 for the year. However, the budget contains many overstated projections of expenses, along with conservative, achievable projections of revenue. If history holds true, expenses will be less than expected and a net gain may be achieved.

T. Kent Wetherell, II moved to approve the budget. Allen Grossman seconded the motion. The Council voted unanimously to approve the 2008/2009 Budget.

On motion, duly seconded, the meeting adjourned.

Respectfully submitted,

Seann Frazier
Secretary

Moving? Need to update your address?

The Florida Bar’s website (www.FLORIDABAR.org) offers members the ability to update their address and/or other member information. The online form can be found on the web site under “Member Profile.”

BID PROTEST*from page 1*

bidder is not entitled to lost profits under these circumstances.⁷

The law is less clear where the contract has been signed but not performed, or the performance has been minimal. A number of cases suggest that the mere signing of a contract precludes an award of the contract to the protester or a rebidding.⁸ On the other hand, in at least one case, the appellate court awarded the contract to the protester even though the contract had been signed and performance started just prior to the decision on appeal.⁹

If performance of a contract on appeal has reached the point where the taxpayer would be penalized if the contract is awarded to another vendor, the court appears more likely to conclude that a disappointed bidder can only recover limited damages. Factors relevant to whether a taxpayer would be penalized might include, for instance, how much money the agency has paid the existing vendor that cannot be recouped, and whether the state would lose the benefit of the goods or services already provided so that the state would have to pay twice for the same thing.

The court in *Courtenay v. Department of Health & Rehabilitative Services*, 581 So. 2d 621, 624 (Fla. 5th DCA 1991), recognized the frustration and unfairness experienced by a successful protestor who bears the expense of the administrative process only to find that its relief is limited:

The best that this court can do is to award attorney's fees to the challenging bidder who must have more courage than a Mississippi riverboat gambler. The bidder must gamble on winning during the original bidding procedure, but if he loses as a result of an unfair bid procedure, he must then gamble that he will prevail in a three-stage procedure—once before the hearing officer, once before the agency, and, finally, before the appellate court. The stakes of the gamble are that he will be reimbursed the costs and attorney's fees to obtain that which

he was originally guaranteed statutorily—an opportunity to obtain an award in a fair arena.

The court noted that a “bidder should have incentive to challenge the bidding procedure in the face of bureaucratic abuse . . . but this is a problem to be addressed by the legislature.¹⁰ Unfortunately, the legislature has not addressed the issue since the court in *Courtenay* issued its opinion. Therefore, we are left with a number of cases that fail to provide conclusive guidance on the remedies available to a successful protestor on appeal once a contract has been executed.

The case law on this issue can be loosely broken down into two categories: (A) cases suggesting that the court cannot award a contract to a specific bidder once a contract is executed with another bidder and awarding bid preparation costs and protest costs to the successful protestor (some of these cases suggest that an injunction/stay pending appeal is therefore proper); and (B) cases awarding a contract to a specific bidder, despite the execution of a contract with another bidder, and directing the agency to reevaluate or relet the bids.

A. Once Contract is Entered, Damages are Limited

Some Florida courts have found that once a contract has been executed, a protestor no longer has a meaningful remedy by administrative hearing to receive the award of the bid. Therefore, the protestor is limited to ancillary relief pursuant to section 120.68(6)(a)2., Florida Statutes, in an appropriate circuit court.¹¹ In line with these opinions, other Florida courts have suggested that once a contract is executed, an action for injunctive relief becomes moot; therefore, a stay or injunctive relief may be appropriate to preserve the rights of the appellant on appeal.¹²

The damages available to a successful appellant in a bid protest may include bid preparation costs and protests costs, but not lost profits.¹³ However, in many cases where the remedy was limited to bid preparation and protest costs, the contract had been fully performed by the time the decision was rendered on appeal. Therefore, it is arguable that reliance damages should be limited to cases where the contract has been fully or

substantially performed by another bidder.

B. Agency Proceeds at its Peril

Despite the opinions cited above, there is a line of cases suggesting that an agency, like any other litigant, proceeds at its peril when its authority to act has been challenged and is presently under review.¹⁴ For example, in *Groves-Watkins Constructors v. Department of Transportation*, 511 So. 2d 323 (Fla. 1st DCA 1987), *quashed on other grounds*, 530 So. 2d 912 (Fla. 1988), the court rejected the agency's argument that any practical relief to the contesting bidder is precluded when the contract has already been executed and ultimately ordered the award of the contract to the appellants.

Furthermore, arguments can be made that once the appellate court overturns a final order, an agency has no authority to continue to operate under a contract for which there is no underlying valid final order.¹⁵ Therefore, despite the execution of a contract, an agency may be required to discontinue performance under such contract and take further action consistent with the appellate court's determination.

The court in *Courtenay* recognized that fashioning a remedy is “fraught with problems” and noted two possible solutions: beginning the bidding process anew or reevaluation of the original bids. The court noted that the latter solution would be impractical under the facts of that particular case because the bids were two years out of date, the financial data upon which the bids were submitted was stale, and there was no assurance that the other bidders could perform under the terms of their original bids. While the *Courtenay* court ordered a reletting of the bids for the remaining portion of the original lease period, most courts have been reluctant to order an agency to take a particular course of action, leaving the choice of remedy to the sound discretion of the agency.

C. What's the Remedy?

While it is unclear whether the court may order the award of a contract to a specified bidder if the contract has been executed but not fully performed, it appears that a

successful bidder's remedy is limited to bid preparation costs and/or protest costs if the contract has been fully performed while the case was on appeal. If the contract has been executed but not fully performed, a court may find in accordance with *Hubbard Construction Co. v. Department of Transportation*, 642 So. 2d 1192 (Fla. 1st DCA 1994) and *Overstreet Paving Co. v. Department of Transportation*, 608 So. 2d 851, 853 (Fla. 2d DCA 1992) Department and limit the successful protestor's damages to bid preparation costs and protest costs. Alternatively, a court may follow *Groves-Watkins*, find that the contract is invalid, and order the agency to award the contract to the successful protestor or to rebid the contract for the remaining contract term.

Realistically, an award to the successful protestor may be impractical at the conclusion of the appeal because the bids will likely be out of date, the financial and other data upon which the bids were submitted will likely be stale, and there is no assurance that the successful protestor or its subcontractors could perform under the terms of the original bid. Therefore, even if a protestor is successful on appeal and the court determines that an executed contract between the winning bidder and the agency is invalid, there is no guaranty that the successful protestor will be awarded the contract as the next responsible bidder or that the successful protestor would be willing and able to perform under the original contract terms.

Because of the problems associated with fashioning an appropriate remedy in a public procurement case under the current statutory scheme, the Florida Legislature should address this issue through statutory amendments, as suggested by the court in *Courtenay*.

Endnotes:

¹ The statute provides in relevant part:

Upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action

² See *Hubbard Construction Co. v. Dep't of Transp.*, 642 So. 2d 1192, 1192 (Fla. 1st DCA 1994) ("We remand this cause to the department for an order awarding the contract

to the appellant, if the contract has not already been awarded to a competitor. If the contract has already been awarded, the appellant may seek ancillary relief."); *Overstreet Paving Co. v. Dep't of Transp.*, 608 So. 2d 851, 853 (Fla. 2d DCA 1992) ("Because this bid has already been awarded and DOT did not agree to a stay pending appeal, Overstreet no longer has a meaningful remedy by administrative hearing to receive the award of this bid. Accordingly, we remand for 'ancillary relief' . . . in an appropriate circuit court.").

³ See *Groves-Watkins Constructors v. Dep't of Transp.*, 511 So. 2d 323, 335-36 (Fla. 1st DCA 1987) (ordering the award of the contract to a specific bidder despite the fact that a contract had been executed with another bidder on a reletting and performance had begun), *quashed on other grounds*, 530 So. 2d 912 (Fla. 1988) (issue of whether contract can be invalidated was not addressed); *First Nat'l Bank of Miramar v. Lewis*, 355 So. 2d 869 (Fla. 1st DCA 1978) (denying motion to stay order and authorizing bank to open branch in light of parties' recognition that bank might be forced to close branch in the event of an adverse decision by the appellate court).

⁴ *Miami-Dade County Sch. Bd. v. J. Ruiz Sch. Bus. Serv., Inc.*, 874 So. 2d 59, 65 (Fla. 3d DCA 2004) (finding that lost profits are not recoverable by a bidder who was wrongfully denied a public contract but bidder may be entitled to equitable relief in the form of future contracts, if possible, or in the alternative, bid preparation and/or protest costs); *City of Cape Coral v. Water Servs. of Am., Inc.*, 567 So. 2d 510, 511 (Fla. 2d DCA 1990) (reversing judgment for lost profits and attorneys' fees but affirming portion of judgment awarding bid preparation costs and interest thereon); *City of Tallahassee v. Blankenship & Lee*, 736 So. 2d 29 (Fla. 1st DCA 1999) (affirming award of bid preparation damages but reversing award of attorneys' fees).

⁵ *Baxter's Asphalt & Concrete, Inc. v. Liberty County*, 406 So. 2d 461, 466 (Fla. 1st DCA 1981)(winning protestor could not be awarded contract because Liberty County allowed the completion of the contract while the appeal was pending); *Wolf Ridge Plastics, Inc. v. Jacksonville Electric Auth.*, 388 So. 2d 1298 (Fla. 1st DCA 1980) (action to enjoin contract

for construction of thermal discharge unit moot where pipe had already been fabricated and installed); *Harry Pepper & Assoc., Inc. v. City of Cape Coral*, 429 So. 2d 97 (Fla. 2d DCA 1983) (where injunctive relief was moot because contract had already been completed and paid for, disappointed bidder could only seek damages).

⁶ *Ruiz*, 874 So. 2d at 65 (remanding for a factual determination of whether the School Board could rectify the losses caused by the wrongful denial of appellees' bids by simply awarding the appellees comparable or similar school bus routes in a future school year).

⁷ *Id.* (reversing the award of lost profits and limiting recovery to bid preparation and/or protest costs if the remedy of future contracts is not possible); *Sutron Corp. v. Lake County Water Auth.*, 870 So. 2d 930 (Fla. 5th DCA 2004) (finding that water authority was not required to award contract to contractor and stating that "[d]isappointed bidders in public works contracts cannot recover lost profits resulting from an award to another less responsive bidder."); *Cape Coral*, 567 So. 2d at 511 (reversing judgment for lost profits and attorneys' fees but affirming portion of judgment awarding bid preparation costs and interest thereon).

⁸ *Overstreet*, 608 So. 2d at 853 ("Because this bid has already been awarded and DOT did not agree to a stay pending appeal, Overstreet no longer has a meaningful remedy by administrative hearing to receive the award of this bid."); *Hubbard*, 642 So. 2d at 1192 ("If the contract has already been awarded, the appellant may seek ancillary relief pursuant to section 120.68(13)(a)2, Florida Statutes, in an appropriate circuit court); *Dedmond v. Escambia County*, 244 So. 2d 758, 761 (Fla. 1st DCA 1971) (stating that "appellant's remedy does not lie solely in the realm of mandamus and injunction" and concluding that "[d]amages for breach of contract are not foreclosed and inasmuch as appellee has rebid the lease on Johnson Beach, albeit erroneously, it would be less disruptive if appellant were permitted on remand to amend his complaint to allege a claim for such damages as he may have suffered as a result of the cancellation of the award.").

⁹ *Groves-Watkins*, 511 So. 2d 323.

¹⁰ *Courtenay*, 581 So. 2d at 623.

continued...

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BID PROTEST

from page 11

¹¹ *Overstreet*, 608 So. 2d at 853; *Hubbard*, 642 So. 2d at 1192 (“If the contract has already been awarded, the appellant may seek ancillary relief pursuant to section 120.68(13)(a)2., Florida Statutes, in an appropriate circuit court); *Dedmond v. Escambia County*, 244 So. 2d 758, 761 (Fla. 1st DCA 1971) (stating that “appellant’s remedy does not lie solely in the realm of mandamus and injunction” and concluding that “[d]amages for breach of contract are not foreclosed and inasmuch as appellee has rebid the lease on Johnson Beach, albeit erroneously, it would be less disruptive if appellant were permitted on remand to amend his complaint to allege a claim for such damages as he may have suffered as a result of the cancellation of the award.”).

¹² See *Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc.*, 354 So. 2d 446, 448 (Fla. 1st DCA 1978) (upholding award of injunctive relief and noting that had contractual relationship arisen between the entity and the accepted bidder, the rejected bidder may have been limited to his remedy at law for damages); *John G. Grubbs, Inc. v. Suncoast Excavating, Inc.*, 594 So. 2d 346, 348 (Fla. 5th DCA 1992) (stating that once a binding contract exists, no injunction can be issued and the rejected bidder is limited to a remedy at law for his damages); *Mid-American Waste Sys. of Fla., Inc. v. City of Jacksonville*, 596 So. 2d 1187, 1189 (Fla. 1st DCA 1992) (finding that suit for injunctive relief was proper because, as second

most responsible bidder, appellant did not have an available remedy for money damages).

¹³ *Ruiz*, 874 So. 2d at 65 (reversing the award of lost profits and limiting recovery to bid preparation and/or protest costs if the remedy of future contracts is not possible); *Sutron*, 870 So. 2d 930 (finding that water authority was not required to award contract to contractor and stating that “[d]isappointed bidders in public works contracts cannot recover lost profits resulting from an award to another less responsive bidder.”); *Cape Coral*, 567 So. 2d at 511 (reversing judgment for lost profits and attorneys’ fees but affirming portion of judgment awarding bid preparation costs and interest thereon).

¹⁴ *Groves-Watkins*, 511 So. 2d at 335 (stating that the court in *Baxter’s Asphalt* rejected the argument that in a bidding dispute, any practical relief to the contesting bidder is precluded when the contract has already been executed); *First Nat’l Bank of Miramar*, 355 So. 2d at 869 (stating that “the applicant bank should be privileged to make its own decision whether to open the branch without further delay, with knowledge that the Department’s favorable order is subject to review on the merits by this court.”); *City of Sweetwater v. Solo Construction Corp.*, 823 So. 2d 798, 803 (Fla. 3d DCA 2002) (upholding the issuance of a permanent injunction that enjoined the City from proceeding to contract with any entity other than Solo Construction Corporation for the Stormwater Improvements contract and awarding attorneys’ fees and costs to Solo Construction Corporation); *Miami Marinas Assoc., Inc. v. City of Miami*, 408 So. 2d 615, 617 (Fla. 3d DCA 1981) (reversing trial court order denying injunctive relief and remanding

for further proceedings consistent with court’s determination that the challenged management agreement was void); *Marriott Corp. v. Metropolitan Dade County*, 383 So. 2d 662, 668 (Fla. 3d DCA 1980) (finding that the Board exceeded its lawful authority and discretion, holding that the contract award was invalid and ordering the award to Marriott as the numerically superior bidder); *Moore v. Dep’t of Health & Rehab. Servs.*, 596 So. 2d 759, 761 (Fla. 1st DCA 1992) (finding that HRS incorrectly awarded lease to appellee and remanding to HRS for action consistent with the court’s findings).

¹⁵ Cf. *Boca Raton Artificial Kidney Center v. Dep’t of Health & Rehab. Servs.*, 475 So. 2d 260 (Fla. 1st DCA 1985) (applicant who has begun construction of a health care facility pursuant to a certificate of need issued on a preliminary determination is not equitably entitled to a final order granting a certificate of need).

Toni A. Egan is an associate attorney with Radey Thomas Yon & Clark, P.A. in Tallahassee. She earned her J.D., with high honors, from the Florida State University College of Law in 2003. She earned a Master of Accounting degree and a B.S. degree in Accounting from the University of Florida, Fisher School of Accounting, in 2000. Ms. Egan’s practice areas include administrative and insurance litigation, and she has been involved in a number of public procurement cases.



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