Administrative Law Section Newsletter

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2013 Legislative Changes Impacting Government Contracting and Procurement

by Brittany Adams Long and Donna E. Blanton

The 2013 Legislature enacted a series of laws affecting government contracting and procurement, some of which may have a significant impact on both vendors and state agencies. The most consequential changes appear to be in the open government statutes, but lawmakers also substantially amended the Florida Transparency Act and made a number of changes to chapter 287, Florida Statutes.

Public Records

The law that likely has the most direct impact on government contractors is chapter 2013-154, which creates section 119.0701, Florida Statutes. This section requires that every "public agency contract for services must include a provision that requires the contractor to comply with public records laws."[1] The contractor must maintain records related to a public contract as a public agency does, it must provide access to public records, and it must ensure that exempt and confidential records are not disclosed. This last requirement, in particular, may create a substantial burden on individual contractors, especially for contractors who may be unfamiliar with the intricacies of the public records statutes. Section 119.071 includes a long list of exemptions, and additional confidential information is protected

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From the Chair

by Amy W. Schrader

Let me begin by saying how thrilled I am to be a part of our Section and how humbled I am to be stepping into the shoes of immediate past chair Judge Scott Boyd. Scott is the type of person who has always been quick to jump in and help or kindly lend an ear. I am very thankful for his wise and invaluable guidance over the years. Scott initiated the first phase of an important Section project to increase access to agency orders, which we will be continuing this year.

Before I discuss the exciting events we have on the horizon, however, I would like to thank our esteemed outgoing Executive Council members for their years of valuable service to the Section: Judge Li Nelson; Judge Linda Rigot; Judge Elizabeth McArthur; and Paul Amundsen. I have been privileged to work with each of you and thankful that with the exception of Paul Amundsen, who has accepted a job out-of-state, these former members are continuing to serve our Section. Li Nelson is serving as co-chair for the upcoming Practice Before DOAH CLE; Linda Rigot will continue to perform legislative

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tracking for bills affecting administrative law; and Elizabeth McArthur will continue to serve as co-editor of the Section Newsletter. We are very lucky indeed to have the talents of our Administrative Law Judges at work for the Section! We will also sadly be losing our dear friend and invaluable Section Administrator Jackie Werndli, as she sets sail off into the sunset and enjoys a much deserved retirement in December. We wish Jackie the best and I personally cannot fathom how we will survive without her. Those of us who have had the pleasure of working with Jackie know that she has been the heart and soul of our Section and she will be sorely missed.

As we wish those well who are leaving the Section, and do not wish to see them go, we also very fortunate to welcome some new faces (and welcome back one familiar face) to the Executive Council: past chair, Andy Bertron; Judge Suzanne Van Wyk; Robert Hosay; Frederick Springer; and Brent McNeal. I look forward to working with all of you and sincerely appreciate you sharing your unique talents and perspectives with the Section. We have a busy year ahead of us and I believe the right crew to move us forward. Now, let's get down to business!

This year, building on the excellent work of our "Phase I" Orders Access Committee, we will be moving forward and continuing to work toward improved access to agency final orders. A huge "thank you" to Jowanna Oates and Patty Nelson for creating an invaluable resource for administrative law practitioners, which provides information regarding accessing final orders for a majority of state agencies and other local agencies that enter final orders. The "Agency Final Order Indexing" chart can be accessed via the Section website (http://www.flaadminlaw.org/). After surveying a majority of agencies, it quickly became apparent that there is a lack of uniformity as to how final orders are maintained. In many instances, there is no real indexing or easy access. It was especially surprising for me to learn that many agencies require a public records request to obtain final orders. I cannot fathom how an attorney, let alone a member of the public, would be able to determine if the agency had entered a final order dealing with a particular topic or situation if there is no searchable database for this information. This is not to say that agencies are neglecting the requirement to maintain and index final orders; however, with no real legislative guidance and oftentimes no technical support, this can be a daunting task. Our goal in "Phase II" is to utilize the information collected in Phase I and develop proposals for how agencies can ensure the best access to oftentimes valuable final orders. Executive Council secretary Richard Shoop, who is also AHCA's Agency Clerk, will be chairing this effort. I hope to bring you updates as the work of this committee progresses and welcome any suggestions you may have to increase real and meaningful access to agency final orders.

As always, the Section will be presenting quality CLE programming to keep you up-to-date and "in the know" about all things administrative law this year. Coming to you live next month is the ever-popular Practice Before DOAH CLE. On October 4, 2013, you will have the opportunity to hear from our esteemed panel of speakers regarding best practices in appearing before the Division of Administrative Hearings and litigating administrative law cases. Be sure to register early to reserve your seat as space is limited and this CLE is only presented every other year. This year we will also be presenting a series of webinars on administrative law topics that can be covered over a lunch hour. Please contact CLE chair, Bruce Lamb (blamb@gunster.com) if you have ideas for webinar topics or if you would be interested in doing a presentation. We hope to provide an easy and inexpensive way for Section members to get needed CLE credits while covering topics that are of interest to you. Please help us make this a success by giving us feedback on what topics and speakers you would like to see.

Also, this year we are continuing the Section's outreach efforts to law students and young lawyers who are interested in learning more about administrative law and interacting with veteran attorneys. Last spring, Patty Nelson organized a seminar on legal research for administrative law topics in conjunction with FSU's Administrative Law class, which was very well received by the law students. We hope to continue working with FSU this year in addition to presenting the seminar at other law schools. If you are interested in participating in this outreach effort, please contact Law School Liaison chair, Patty Nelson (patricia.nelson@laspbs.state.fl.us). Additionally, we are currently working to organize a Section young lawyers group. If

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you are a Young Lawyer who would like to become more involved in the Administrative Law Section—here is your chance! Richard Shoop recently emailed many of you, and I was very pleased to hear positive feedback and interest in what should be an excellent opportunity for our newer practitioners. If you are interested and have not already contacted Richard, please be sure to email and let him know (Richard.shoop@ahca.myflorida.com).

I am very excited by the new energy in our Section and looking forward to the challenges and accomplishments we will all share in the upcoming year. If you have ideas or just want to chat about administrative law, please do not hesitate to send me an email (aschrader@gray-robinson.com). We have so many opportunities for you to get involved this year—write a newsletter or Bar Journal article; attend or speak at a Section CLE; participate in our Young Lawyers group; attend a Section meeting; share your ideas—add your voice to the conversation!

The Non-Delegation Doctrine in Public Utility Law: Lessons from the Supreme Court's Recent Decision on Florida's Nuclear Cost Recovery Statute

by D. Bruce May, Jr.

Introduction

The Florida Supreme Court recently addressed the constitutionality of section 366.93, Florida Statutes, which delegated to the Florida Public Service Commission ("FPSC") the authority to adopt by rule alternative mechanisms for investor-owned electric utilities to recover their costs of developing nuclear power plant projects. *See Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742 (Fla. 2013). The statute was challenged as violating the non-delegation doctrine by Southern Alliance for Clean Energy ("SACE"). Although the Court found that section 366.93 did not violate Florida's non-delegation doctrine, its analysis reminds practitioners of the limits by which the Legislature may delegate functions to an administrative agency, and the importance of legislative intent.

The Non-Delegation Doctrine

The non-delegation doctrine arises from the separation of powers principles in Article II, Section 3 of the Florida Constitution, which states:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The doctrine cautions that "the legislature is not free to re-delegate to an administrative body so much of its lawmaking power as it may deem expedient." *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978). Although the Legislature must be afforded some flexibility in allowing an agency to administer an articulated legislative policy, the Court has made it clear that such "flexibility in the administration of a legislative

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program is essentially different from reposing in an administrative body the power to establish fundamental policy." *Id.* The non-delegation doctrine thus requires that if the Legislature intends for an agency to administer a legislative program, then it must also supply the agency with "some minimal standards and guidelines ascertainable by reference to the enactment establishing the program." *Id.* at 925. Just how specific those statutory standards and guidelines need to be often will "depend on the subject matter dealt with and the degree of difficulty involved in articulating finite standards." *In re Advisory Opinion,* 509 So. 2d 292, 311-12 (Fla. 1987). At minimum, those standards and guidelines must be specific enough to enable the court to determine if the agency is carrying out the intent of the Legislature. *Cross Key Waterways*, 372 So. 2d at 918-19 ("When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law"). Moreover, the statute itself "must so clearly define the power delegated that the administrative agency is precluded from acting through whim, showing favoritism, or exercising unbridled discretion." *Lewis v. Bank of Pasco County,* 346 So. 2d 53, 55-56 (Fla. 1976).

Florida courts routinely rely on *Cross Key Waterways* when reviewing a statute under the non-delegation doctrine. The Supreme Court, in that case, struck down a statute that was drafted to give the executive branch discretion to unilaterally preserve up to 5% of the state's land mass under agency control as areas of critical state concern without "establishing priorities or other means for identifying and choosing among the resources the Act is intended to preserve." *Id.* at 920. Although *Cross Key Waterways* is widely considered to be a seminal Supreme Court case on the non-delegation doctrine, much of the Court's case law in this area actually comes out of its review of legislative delegations of authority to the FPSC. Indeed, the non-delegation doctrine was explained by the Supreme Court as far back as 1908 when the Court was asked to review a statute creating the Florida Railroad Commission — the predecessor agency to the FPSC:

> The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.

State v. Atl. Coast Line R.R. Co., 47 So. 967, 974 (Fla. 1908). *See also Fla. Gas Transmission v. Pub. Serv. Comm'n*, 635 So. 2d 941 (Fla. 1994); *AT&T Commc'ns of the S. States, Inc. v. Marks,* 515 So. 2d 741 (Fla. 1987); *Microtel, Inc. v. Fla. Pub. Serv. Comm'n,* 464 So. 2d 1189 (Fla. 1985).

The Background of the Challenged Statute

Ordinarily, electric utilities are not allowed to recover their costs of building a power plant until after construction has been completed and after the plant is operational. *S. Alliance for Clean Energy,* 113 So. 3d at 745. According to some nuclear energy proponents, the delay inherent in this traditional cost recovery model can present obstacles for nuclear power projects because those projects are massive in scope and have much longer construction lead-times than other types of power plants. In 2006, the Legislature enacted section 366.93 and amended section 403.519, to allow for more expedited recovery of nuclear plant development costs for the express purpose of promoting electric utility investment in nuclear power projects. *See* Ch. 2006-230, Laws of Fla. Subsection (2) of section 366.93 directed the FPSC to establish by rule "alternative cost recovery mechanisms" that would permit a utility to recover certain "prudently incurred" nuclear plant development costs. § 366.93(2), Fla. Stat. (2006). Subsection (4)(e) of section 403.519 confirmed that those costs could be recovered by the utility as the plant is developed rather than after the plant goes on line. § 409.519(4)(e), Fla. Stat. (2006) ("After a petition for determination of need for a nuclear power plant has been granted, the right of a utility to recover any cost incurred prior to commercial operation, including, but not limited to, costs associated with the siting, design, licensing, or construction of the plant, shall not be subject to challenge unless and only to the extent that the [FPSC] finds . . . that certain cost were imprudently incurred.").

In 2007, the FPSC implemented section 366.93 by adopting Rule 25-6.0423, Florida Administrative Code. The rule established "alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing and construction of nuclear . . . plants in order to promote electric utility investment in nuclear . . . plants and allow for the recovery in rates of all such prudently incurred cost." Fla. Admin. Code R. 25-6.0423(1). The rule also established a formal evidentiary process whereby the FPSC conducts annual hearings to review the prudence of nuclear power plant development costs, and ultimately determines whether such costs are eligible for recovery under section 366.93. Fla. Admin. Code R. 25-6.0423(5).

SACE did not challenge Rule 25-6.0423. Instead, it appealed from final FPSC orders issued in 2011 that approved the cost-recovery petitions of two investor-owned electric utilities, and authorized the recovery of preconstruction costs associated with their nuclear power plant projects pursuant to section 366.93 and Rule 25-6.0423. In its appeal, SACE argued that section 366.93 violated the non-delegation doctrine because it did not articulate any meaningful standards to guide the FPSC in administering the nuclear cost recovery program.[1]

The Supreme Court's Analysis Under The Non-Delegation Doctrine

The Court began its constitutional analysis of section 366.93 by confirming that separation of powers principles (and the non-delegation doctrine) can apply to legislative delegations to the FPSC even though the FPSC is a legislative agency:

> Technically speaking, the Legislature in this case has not delegated its power to another branch, as the [PSC] "has been and shall continue to be, an arm of the legislative branch of government," § 350.001, Fla. Stat. (2010). But "some of the functions given the [PSC] are executive in nature… [and it] also performs quasi-judicial functions." *Chiles v. Pub. Serv. Comm'n Nominating Council,* 573 So. 2d 829, 832 (Fla.1991). As its latter function is at issue here, separation of powers principles apply despite the fact the PSC is a legislative agency. *See Fla. Gas Transmission v. Pub. Serv. Comm'n,* 635 So. 2d 941, 944 (Fla. 1994) (recognizing in the PSC context that "a legislative delegation of power to a legislative or executive agency permitting an agency to declare what the law is violates Florida's separation of powers doctrine.").

S. Alliance for Clean Energy, 113 So. 3d at 748 n.3.

The Court then addressed the substance of SACE's constitutional argument starting with the description of the non-delegation doctrine in *Cross Key Waterways*:

> Under the separation of powers clause, the non-delegation doctrine requires that "fundamental and primary policy decisions . . . be made by members of the legislature who are elected to perform those tasks, and [that the] administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program."

Id. at 748 (quoting *Cross Key Waterways*, 372 So. 2d at 925).

In reviewing whether section 366.93 violated the non-delegation doctrine, the Supreme Court appears to have followed a two-step analytical process taken from its decision in *Cross Key Waterways.* First, the Court looked at whether the statute articulated a legislative policy and confirmed that it had -- "the legislature in section 366.93 made the fundamental and primary policy decision to 'promote utility investment in nuclear or integrated gasification combined cycle power plants and allow for the recovery in rates of all prudently incurred costs.'" *S. Alliance for Clean Energy,* 113 So. 3d at 748 (quoting § 366.93(2), Fla. Stat.). The Supreme Court went on to discuss the inner-workings of the statute and noted that the expedited cost-recovery provisions applied not only to preconstruction activities associated with new nuclear plants but also to "uprate activities at … existing nuclear plants." *Id.* at 745 n.2. The Court also made it clear that it understood that subsection (6) of section 366.93 allowed a utility to recover certain "prudent" preconstruction and construction costs even though "the utility elects not to complete or is precluded from completing construction of the nuclear power plant." *Id*. at 745, 747. The Court, however, refused to quarrel with the merits of this legislative policy, stating instead that "[a]uthorizing recovery of preconstruction costs through customer rates in order to promote utility company investment in new nuclear power plants, even though those plants might never be built, is a policy decision for the Legislature, not this Court." *Id*. at 745.

Having found that section 366.93 articulated a fundamental legislative policy on nuclear cost recovery, the Court next analyzed whether the Legislature provided the FPSC with adequate standards to guide in the proper administration of the Legislature's nuclear cost recovery program. The Court prefaced its analysis by explaining that, under the non-delegation doctrine, the level of "specificity with which the legislature must set out statutory standards and guidelines may depend on the subject matter dealt with and the degree of difficulty involved in articulating finite standards." *Id*. at 750 (quoting *In re Advisory Opinion,* 509 So. 2d 292, 311-12 (Fla. 1987)). The Court also implied that the level of specificity required of legislative delegations to the FPSC may be less than that required of delegations to other agencies because of the "arcane complexities of utility ratemaking." *Id*. at 750 (quoting *Fla. Power & Light Co. v. Albert Litter Studios, Inc.*, 896 So. 2d 891, 896 (Fla. 3rd DCA 2005)). Nonetheless, the Court devoted close attention to the language of section 366.93 in addressing the allegations that the statute violated the non-delegation doctrine.

The Court initially considered SACE's argument that the Legislature had given the FPSC too much discretion when it used the phrase "shall include but not be limited to" in directing the FPSC to adopt alternative recovery mechanisms. The Court explained that subsection (2) of section 366.93 expressly instructed the FPSC to establish two definitive types of alternative cost recovery mechanisms: one that allowed expedited "recovery through the capacity cost recovery clause of any preconstruction cost"; and another that allowed expedited recovery of the "carrying costs of the utility's projected construction cost balance." *S. Alliance for Clean Energy,* 113 So. 3d at 749 (quoting § 366.93(2)(a)-(b), Fla. Stat.). The Court rejected the notion that the phrase "shall include but not be limited to" would authorize the FPSC to adopt potentially limitless recovery mechanisms beyond the two mechanisms specified in the statute. The Court reasoned that the FPSC's authority to adopt other alternative recovery mechanisms was not open-ended; rather, it was circumscribed by "very specific and mandatory guidelines" which showed that the Legislature had not abdicated its "constitutional lawmaking responsibilities." *Id.* (quoting *Fla. Gas Transmission v. Pub. Serv. Comm'n*, 635 So. 2d 941, 944 (Fla. 1994)).[2] Although the Supreme Court was not troubled by the mandatory "shall include but not be limited to" clause in section 366.93, practitioners should be aware that Florida's First District Court of Appeal has found a permissive "may include but are not be limited to" clause to be impermissibly broad under the non-delegation doctrine. *See Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 30 (Fla. 1st DCA 2008).

The Court also addressed SACE's argument that there was not adequate statutory guidance regarding

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which "costs" are to be recoverable under the alternative cost recovery mechanisms referenced in section 366.93. Having recited its earlier admonition in *Lewis v. Bank of Pasco County* that a statute must "clearly define" the power delegated to the agency, it is not surprising that the Court looked closely at the definitions in section 366.93. The Court concluded the statute did not repose in the FPSC unlimited authority to determine what kind of "costs" could be recovered through these alternative recovery mechanisms because the Legislature had specifically defined the terms "cost" and "preconstruction" in the statute. *S. Alliance for Clean Energy,* 113 So. 3d at 749.

In addition, the Court explained that section 366.93 only allowed utilities to recover those defined costs that were determined by the FPSC to have been "prudently incurred." *Id.* at 749 (quoting § 366.93(2), Fla. Stat.). Although the Court acknowledged that the Legislature had not statutorily defined "prudently incurred," it found that those terms had a commonly understood meaning in the utility regulatory context, and that the "prudency" standard had long been a cornerstone of public utility regulation in Florida. *Id.* at 750. In fact, the Court endorsed the FPSC's prior regulatory pronouncements on the "prudency" standard, noting that the standard for determining prudence in the regulatory arena is "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should [have] been known, at the time the decision was made." *Id.*

Conclusion

The Court's opinion in *Southern Alliance for Clean Energy* reaffirmed many of its prior pronouncements regarding the non-delegation doctrine. However, it also provides at least four important reminders to practitioners regarding the parameters within which the Florida Legislature can lawfully delegate power to an agency like the FPSC.

First, the Court continues to rely extensively on its decision in *Cross Key Waterways* in reviewing legislation under the non-delegation doctrine. In fact, the Court seems to have adopted a two-step analysis gleaned from *Cross Key Waterways* that focuses first on whether the statute has articulated a fundamental legislative policy, and then on whether the statute has provided the agency with sufficient standards to guide the agency in its implementation of that policy. This analytical approach reminds those who design legislation of the importance of clearly articulating the legislative policy that an agency is expected to administer, as well as including adequate standards and guidelines.

Second, the opinion confirms that separation of powers principles (and the non-delegation doctrine) likely will apply to the Legislature's "intra-branch" delegations of authority to the FPSC and other legislative agencies like the Office of Public Counsel and the Florida Commission on Ethics.

Third, the Court suggested that it will give the Legislature more flexibility in delegating administrative responsibilities to the FPSC "given the arcane complexities of utility ratemaking" and the practical difficulty in establishing precise directives for the FPSC to implement its legislative policies. This rationale reaffirms the Court's previous position in *Microtel, Inc. v. Fla. Pub. Serv. Comm'n,* 464 So. 2d 1189, 1191 (Fla. 1985) that rigid application of the non-delegation doctrine in complex regulatory areas would force the Legislature "to remain in perpetual session and devote a large portion of its time to regulation."

Finally, although the Court may extend additional flexibility to the Legislature when it comes to statutory delegations to the FPSC, it will closely review the language of the statute to determine whether it is sufficiently specific to preclude the unbridled delegation of authority. Indeed, the Court's opinion suggests that in order to pass constitutional muster under the non-delegation doctrine, a statute delegating authority to a legislative agency like the FPSC still must articulate a fundamental legislative policy, provide meaningful guidance on how the agency is expected to implement that policy, and employ operative terms that are either clearly defined in the statutes or have commonly understood meanings.

Endnotes:

[1] In the alternative, SACE argued that the FPSC's order approving the cost-recovery petitions was arbitrary and unsupported by competent, substantial evidence. The Court rejected those arguments, and that portion of the Court's opinion is not addressed in this article. This article focuses exclusively on the Court's analysis of section 366.93 under the non-delegation doctrine.

[2] Although not mentioned in the Court's opinion, it is worth noting that the FPSC did not attempt to adopt rules that went beyond the two specific cost recovery mechanisms delineated in section 366.93(2)(a) and (b). *See* Fla. Admin. Code R. 25-6.0423(5)(providing for recovery of preconstruction cost through the capacity cost recovery clause); and Fla. Admin. Code R. 25-6.0423(5)(b) (providing for expedited recovery of carrying costs on construction cost balances).

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APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Save Our Creeks v. Florida Fish and Wildlife Conservation Commission, 112 So. 3d 128 (Fla. 1st DCA 2013) (Opinion filed May 9, 2013).

Save Our Creeks and the Environmental Confederation of Southwest Florida filed a petition for hearing challenging an alleged final action of the Commission to backfill a navigation channel in Fisheating Creek. The Commission manages the land surrounding Fisheating Creek under a lease from the Trustees of the Internal Improvement Trust Fund. The petition alleged that the Commission's action was both "proposed agency action" and a "decision."

The Commission dismissed the petition with prejudice on the grounds that no final agency action had occurred. In dismissing the petition, the Commission stated that it was engaged in ongoing planning as a result of an enforcement action by the Department of Environmental Protection.

On appeal, the court reversed the dismissal with prejudice and remanded the matter to the Commission. The court agreed with the Commission that the petition did not meet the requirements of Chapter 120, Fla. Stat., for the sufficiency of petitions. However, the court noted that petitioners were entitled to at least one opportunity to amend the petition. As to the dismissal with prejudice, the court held that the Commission had erred in relying on information outside the boundaries of the four corners of the petition such as the existence of an alleged enforcement action.

J.D. v. Florida Department of Children and Families, 114 So. 3d 1127 (Fla. 1st DCA 2013) (Opinion filed June 24, 2013)

The Department of Children and Families ("DCF") informed J.D. that she was ineligible to work in a program where she had contact with children or vulnerable adults because of prior convictions for child abuse and cocaine possession. J.D. sought an exemption from the disqualification which DCF denied, citing anger management issues and lack of treatment.

J.D. challenged the determination before the Division of Administrative Hearings. The ALJ recommended that the exemption be granted, finding that J.D. had learned to control her anger and had received successful drug treatment. The ALJ concluded J.D. had provided clear and convincing evidence that demonstrated rehabilitation.

DCF issued a final order adopting the ALJ's findings of fact and conclusions of law except for the conclusion that J.D. had overcome her anger management problems and demonstrated successful rehabilitation.

On appeal, J.D. and DCF disagreed on the applicability of provisions in Chapter 120, Fla. Stat., and the role of the ALJ. DCF maintained that the ALJ's role was to conduct a quasi-appellate review of the agency's action while J.D. argued that the ALJ's role was to determine whether the applicant demonstrated entitlement to an exemption.

The court upheld DCF's final order. Although the court held that an applicant is entitled to a de novo evidentiary hearing, the court concluded that under section 435.07, Fla. Stat., an applicant is not entitled to an exemption, even if an ALJ determines that the applicant is eligible for one. The court held that DCF had erred in rejecting certain "conclusions of law" related to J.D.'s demonstration of rehabilitation since the determinations were actually findings of fact. However, so long as DCF explained its rationale, it was free to reject the ALJ's conclusion that rejection of the exemption was arbitrary and an abuse of discretion.

Emergency Orders

Cocores v. Dep't of Health, 111 So. 3d 971 (Fla. 1st DCA 2013) (Opinion filed April 30, 2013)

The Department of Health suspended Cocores' license to practice medicine under an emergency order after an undercover investigation by the sheriff's office determined the physician had improperly prescribed controlled substances. The emergency order alleged that the physician prescribed a number of drugs to an undercover officer without conducting a medical examination or reviewing prior medical records and without documenting the medicines prescribed on a number of occasions.

On appeal, Cocores sought an automatic stay. The court denied the request for the stay. The court cited to statements made to the undercover officer during the investigation that indicated a conscious disregard for the statutory requirements for prescribing controlled substances. The statements demonstrated intent to conceal violations. Therefore, the court agreed with the Department that Cocores' attitude constituted a probable danger to health and safety.

Public Records

Lee v. Bd. of Trustees, Jacksonville Police & Fire Pension Plan, 113 So. 3d 110 (Fla. 1st DCA 2013) (Opinion filed April 22, 2013)

Appellant sought attorney's fees under Chapter 119, Fla. Stat., after the Board failed to produce records requested by Appellant. The lower court held that the Board had violated Chapter 119, Fla. Stat., by refusing to disclose certain records. However, it concluded Appellant was not entitled to attorney's fees as the refusal was not knowing, willful, or done with malicious intent.

The district court reversed and remanded for an award of attorney's

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fees. It held that an agency is not liable for attorney's fees where it is reasonably and understandably unsure of its status as an agency under state law. However, under all other circumstances, refusal to produce records by an entity that is clearly an agency under Chapter 119, Fla. Stat., will always constitute unlawful refusal. In this case, the Board was clearly an agency subject to Chapter 119, Fla. Stat.

Licensing

McCloskey v. Department of Financial Services, 115 So. 3d 441 (Fla. 5th DCA 2013) (Opinion filed June 21, 2013)

The Department of Financial Services filed an administrative complaint against McCloskey, an insurance agent, alleging that he sold viatical settlement agreements in 2003 and 2004 that were not registered as securities. The ALJ determined that McCloskey sold unregistered securities and recommended a two-month suspension of his license for each of the three violations.

On appeal, the court reversed. The court rejected the ALJ's determination that the viatical settlements were securities. The court noted that viatical settlements were not subject to securities law until the statute was amended in 2005 by the Legislature. It held that a licensing statute which imposed penalties must be strictly construed in favor of the licensee.

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DOAH CASE NOTES

Substantial Interest Hearings

Technology Ins. Co. v. Dep't of Fin. Servs., Div. of Workers' Comp., DOAH Case No. 12-3834 (Recommended Order May 7, 2013).

FACTS: Technology Insurance Company ("TIC") notified Prescription Partners, LLC ("Prescription Partners"), the assignee of a reimbursement claim, that it would be disallowing a dispensing fee and adjusting the reimbursement amount for prescription medication provided to a workers' compensation claimant. Prescription Partners filed a Petition for Resolution of Reimbursement Dispute with the Department of Financial Services, Division of Workers' Compensation's Office of Medical Services ("OMS"), and TIC filed a response. OMS ruled in Prescription Partners' favor. TIC timely exercised its right to request an administrative hearing.

OUTCOME: The ALJ recommended entry of a final order dismissing Prescription Partners' petition. In the course of doing so, the ALJ set forth a comprehensive review and analysis of burden of proof issues in the administrative arena. The ALJ concluded that a determination of which party is asserting the affirmative of the issue must be made at the outset by who initiates the agency action, rather than at the later point based on who challenges the proposed agency action. The ALJ concluded that because Prescription Partners initiated the agency action by filing a petition to resolve its reimbursement dispute, Prescription Partners bore the burden of proof. This conclusion is directly contrary to In re: FFVA Mutual Ins. Co., Case No. 12-2499 (Fla. DOAH Nov. 16, 2012, Fla. DFS Feb. 1, 2013). The FFVA Order concluded that the burden of proof is on the party challenging the proposed agency action, rather than on the party who initiates agency action by filing a petition for resolution of a reimbursement dispute.

Save Our Creeks, Inc., et al. v. Fla. Fish & Wildlife Conserv. Comm'n and Dep't of Envtl. Prot., DOAH Case No. 12-3427 (Recommended Order July 3, 2013)

FACTS: In May 2011, the Department of Environmental Protection ("DEP") issued permits to the Florida Fish and Wildlife Conservation Commission ("Commission") authorizing the installation of six earthen check dams on Fisheating Creek to prevent the over-draining of Cowbone Marsh. In September 2012, DEP approved the Commission's application to modify the initial permits so that approximately two miles of Fisheating Creek could be backfilled as part of a restoration project. Petitioners challenged DEP's intent to approve the permit modification. During the hearing, Petitioners filed a motion in limine, invoking the doctrine of judicial estoppel to prevent DEP and the Commission from presenting evidence inconsistent with evidence presented by the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") during a 1998 circuit court case which determined that Fisheating Creek is navigable. The doctrine of judicial estoppel bars litigants and their privies from asserting inconsistent positions in a subsequent judicial proceeding when doing so would prejudice an adverse party.

OUTCOME: The ALJ recommended that DEP deny the requested modification. However, the ALJ concluded that judicial estoppel would not be applied, even though the Commission and DEP were privies of the Board of Trustees, because the Petitioners failed to credibly establish what evidence the Board of Trustees presented during the 1998 case. "It is not enough for Petitioners' counsel to make general statements in this proceeding about the contrary testimony that was offered in the circuit court case. Among other reasons, that is too self-serving to support a motion to exclude credible evidence about the natural conditions of Fisheating Creek." The ALJ also concluded that the lack of written findings of fact from the circuit court regarding the alleged testimony made it "impossible to know whether any particular evidence was accepted as true by a court . . ."

Conserv. Alliance of St. Lucie Cnty., et al. v. Ft. Pierce Util. Auth. and Dep't of Envtl. Prot., DOAH Case Number 09-1588 (Recommended Order May 24, 2013), OGC Case No. 09-0225 (Final Order July 8, 2013).

FACTS: In September 2008, the Ruden McClosky law firm requested that the Department of Environmental Protection ("DEP") notify it of any actions regarding an injection well operated by the Fort Pierce Utilities Authority (FPUA). At the time of this request, Ruden McClosky did not represent any of the Petitioners in this case. On January 9, 2009, DEP published notice of a minor modification to the FPUA injection well permit. The published notice stated, as per Rule 62-110.106(7)(d), Florida Administrative Code, that challenges to the permit modification must be "received by DEP within 14 days of publication or, for persons that requested actual notice, within 14 days of receipt of such actual notice." Therefore, parties receiving notice via publication had until January 23, 2009, to petition for an administrative hearing. DEP provided actual notice of the permit modification to Ruden McClosky on January 21, 2009. No earlier than January 21, 2009, Ruden McClosky began representing the Conservation Alliance of St. Lucie County, Inc. ("the Conservation Alliance") in this matter. On February 4, 2009, the Conservation Alliance filed a petition challenging the permit modification. An amended petition was filed on February 12, 2009, to add Elaine Romano as a petitioner. DEP asserted both petitions should be dismissed based on untimeliness. Because the Petitioners were clients of Ruden McClosky, they argued that they had 21 days from January 21, 2009, when Ruden McClosky received actual notice, within which to file their petition.

OUTCOME: The ALJ recommended that DEP enter a final order of dismissal. When the DEP notice was published, the Petitioners had not requested actual notice. As a result, January 23, 2009, was their deadline for challenging the permit modification. The ALJ rejected the Petitioners' argument that the subsequently-formed relationship between the Petitioners and Ruden McClosky extended the Petitioners' time to challenge the permit modification. "Ruden McClosky did not represent Petitioners and was not acting on behalf of Petitioners at the time it requested notice of the Permit Modification from the DEP. Ruden McClosky did not represent Petitioners and was not acting on behalf of Petitioners at the time the notice of the Permit Modification was published. The 'clear point of entry' provided by the published notice became effective as to Petitioners on January 9, 2009, and was not modified or extended as a result of its subsequently-created relationship with Ruden McClosky." DEP adopted the ALJ's recommendation in a Final Order of dismissal.

Dayna Prevost v. Dep't of Children & Families, DOAH Case Nos. 12-3964 & 13-1641 (Order Rejecting Remand May 10, 2013).

FACTS: In September 2012, the Department of Children and Families ("DCF") terminated Dayna Prevost from her position as a child protective investigator due to her inability to perform assigned duties. Ms. Prevost appealed her dismissal to the Public Employees Relations Commission ("PERC") alleging DCF violated the Americans with Disabilities Act by not providing a reasonable accommodation. A PERC hearing officer issued a Recommended Order in DCF's favor, finding that Prevost could not perform the essential functions of her job, with or without a reasonable accommodation, and so was ineligible for ADA protection. PERC's Final Order adopted the Recommended Order on December 11, 2012.

On December 7, 2012, Ms. Prevost filed a Petition for Relief from an Unlawful Employment Practice with the Florida Commission on Human Relations ("FCHR"), alleging DCF refused to provide a reasonable accommodation in violation of the ADA and the Florida Civil Rights Act of 1992. FCHR referred the case to DOAH, and DCF moved to dismiss, asserting Ms. Prevost's claims were barred by res judicata and collateral estoppel. DOAH issued an "Order Closing File and Relinquishing Jurisdiction," concluding that "collateral estoppel precludes DOAH from revisiting issues that were litigated before PERC." The DOAH order recommended that FCHR dismiss the case for lack of jurisdiction.

However, FCHR issued an order remanding the case to DOAH. FCHR's order concluded neither res judicata nor collateral estoppel applied, because Ms. Prevost's allegations that DCF "refused to provide a reasonable accommodation are being used for different purposes in the matter before PERC than in the matter before FCHR. In the matter before PERC the allegations are being used as an affirmative defense to the termination of [Ms. Prevost], whereas in the instant matter the allegations are themselves an affirmative allegation of unlawful discrimination under the Florida Civil Rights Act of 1992."

OUTCOME: On May 10, 2013, DOAH issued an Order rejecting the remand, relinquishing jurisdiction, and closing the file. Citing to section 120.57(1)(*l*), Florida Statutes, the ALJ stated "FCHR does not have substantive jurisdiction over matters related to the applicability of the doctrine of collateral estoppel."

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Disciplinary/Enforcement Actions

Crim. Justice Standards & Training Comm'n v. Perrella, DOAH Case No. 12-2891PL (Recommended Order June 11, 2013).

FACTS: Pursuant to Chapter 943, Florida Statutes, the Criminal Justice Standards and Training Commission ("Commission") is responsible for certification and discipline of law enforcement officers. Joshua Perrella, a certified law enforcement officer, was driving outside the city limits of Lakeland, Florida, when he was detained by a Lakeland City police officer for driving in a manner that indicated impairment, and subsequently was arrested for DUI. The Commission issued an Administrative Complaint against Perrella for allegedly failing to maintain good moral character by driving under the influence.

Perrella requested an administrative hearing, and moved to strike all evidence obtained from the Lakeland police officer's pursuit, stop, and investigation, as the product of an unlawful search and seizure. The evidence established that the police officer lacked jurisdiction to pursue, stop, and investigate Perrella outside city limits, and that the officer knew that his actions were outside his jurisdiction. As such, the determinative issue was whether to apply the "exclusionary rule" recognized under the U.S. Constitution and in the Florida Constitution to strike testimony and exhibits obtained as a result of the unauthorized stop.

OUTCOME: While recognizing that administrative tribunals do not usually apply the exclusionary rule, the ALJ applied the rule, struck the testimony and exhibits from the unauthorized stop, and dismissed the Administrative Complaint. The ALJ cited *Valdez v. Dep't of Rev.*, 622 So. 2d 62 (Fla. 1st DCA 1993), for the proposition that administrative tribunals apply the exclusionary rule when the Fourth Amendment violations are egregious or law enforcement actions transgress notions of fundamental fairness. Here, the ALJ concluded that the exclusionary rule should apply for three reasons: (1) the officer's conduct was sufficiently outrageous; (2) application of the exclusionary rule would have a sufficient deterrent effect; and (3) the Commission has a closer nexus with law enforcement than the non-law enforcement agencies typically involved in cases in which the exclusionary rule is not applied.

Dep't of Bus. & Prof'l Reg., State Boxing Comm'n v. Amer. Amateur Mixed Martial Arts, Inc., DOAH Case No. 12-0142 (Recommended Order June 20, 2013).

FACTS: The State Boxing Commission, through the Department of Business and Professional Regulation ("the Department"), filed an Administrative Complaint alleging in part that the Respondent violated Florida Administrative Code Rule 61K1-1.0031(1)(c) by permitting fighters under 18 years old to compete in amateur mixed martial arts matches. The cited rule incorporated by reference the "health and safety standards" in the International Sport Kickboxing Association's ("ISKA") Amateur Rules Overview. However, none of the sections in the ISKA Overview are specifically identified as health and safety standards.

OUTCOME: The ALJ recommended that the Administrative Complaint be dismissed. Because rule 61K1-1.0031(1)(c) fails to identify which portions of the ISKA Overview are health and safety standards, the ALJ concluded that "the Commission's carte blanche incorporation of the ISKA Overview and lack of official policy on the issue made it impossible for a reasonable person to determine whether the ISKA age restriction was a health or safety requirement in amateur MMA events and left interpretation of such requirements open to varying interpretations . . ." The ALJ noted that "[w]hile this case is not a rule challenge, an agency must have rules which are intelligible and not subject to varying interpretations." The ALJ also noted the disciplinary subsection of rule 61K1-1.0031 referred to violations of section 578.041, Florida Statutes, but chapter 578 is entitled "Florida Seed Law," and section 578.041 does not exist. The ALJ pointed to this error as an example that "serves to highlight the problems the Commission has in its regulatory rules and their enforcement."

Note: The Commission's rules were substantially amended in March, 2013. For example, rule 61K1-4.025(4) now mandates that "[n]o one under the age of 18 years old shall be permitted to participate in amateur mixed martial arts."

Rule Challenges

Fla. Quarter Horse Racing Ass'n, Inc., et al. v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering, et al., DOAH Case No. 11-5796RU (Final Order May 6, 2013).

FACTS: Pari-mutuel wagering is a form of gambling in which bets placed on the outcome of a race or game are pooled, and the payout to the winners is drawn from that pool. Under the Florida Constitution, lotteries such as pari-mutuel pools are prohibited, except for "the types of pari-mutuel pools authorized by law as of the effective date" of the 1968 Constitution. Art. X, § 7, Fla. Const. (1968). The Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering ("Division") implements and enforces Florida's pari-mutuel laws, which legalize and regulate pari-mutuel wagering on dog racing, jai-alai, harness racing, thoroughbred horse racing, and quarter horse racing. Anyone who desires to conduct pari-mutuel wagering must first obtain a permit from the Division, which must be ratified by the local electorate. Thereafter, the permitholder must obtain an annual operating license from the Division to conduct pari-mutuel activities at the location specified in the permit for a specific type of pari-mutuel

event specified in the permit.

Gretna Racing ("Gretna") obtained a permit in 2008 to conduct pari-mutuel wagering in Gadsden County, Florida, where Gretna was authorized to "operate a quarter horse racetrack." Traditional quarter horse racing in Florida involved eight to ten horses sprinting side-by-side on a flat, oval racetrack toward a common finish line, and Gretna's permit application proposed this kind of flat, oval racetrack, modified to a J-loop racetrack that was still consistent with traditional quarter horse racing.

In the process of applying for an annual operating license in 2011, Gretna advised the Division that it wanted to replace the plans for traditional quarter horse racing contests on a quarter horse racetrack with a variation of traditional, rodeo-style barrel racing, in which a horse races against the clock in an individual arena, maneuvering around barrels placed in a cloverleaf pattern. Gretna's proposal ("barrel match racing") was for two adjacent arenas, with two horses released at the same time to race against the clock in their separate barrel courses. With the knowledge that Gretna intended to conduct barrel match racing, the Division issued an annual operating license authorizing Gretna to conduct 41 total performances under its quarter horse racing permit during the 2011-2012 season. This was unprecedented because governmentally sanctioned pari-mutuel wagering on barrel racing had never occurred in the United States until Gretna began doing so in December 2011. Shortly thereafter, the Division issued an annual license to Hamilton Downs, another quarter horse racing permitholder, authorizing pari-mutuel wagering operations on barrel match racing similar to Gretna's. In March 2012, the Division renewed Gretna's license, authorizing 38 pari-mutuel barrel match racing events for the 2012-2013 season.

PROCEDURAL HISTORY: The Florida Quarter Horse Racing Association ("FQHRA") and the Florida Quarter Horse Breeders and Owners Association ("FQHBOA"), nonprofit corporations with statutorily-designated duties related to pari-mutuel quarter horse racing, and Gerald Keesling, an owner, breeder, and trainer of quarter horses, filed an unadopted rule challenge, alleging that the Division's approval of barrel match racing amounted to an unadopted rule. The Florida Quarter Horse Track Association, Inc., an organization formed to advocate for the elimination of restrictions preventing new quarter horse permitholders from securing the gaming rights possessed by all other pari-mutuel wagering permitholders in Florida, intervened in support of the Division.

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OUTCOME: The ALJ concluded that the Division's licensing actions that authorized barrel match racing as the legal equivalent of traditional quarter horse racing constituted an unadopted rule. At the outset of his analysis, the ALJ rejected the contention that the Petitioners lacked standing. The ALJ noted that FQHRA and FQHBOA are "statutorily recognized participants in the conduct of pari-mutuel wagering on quarter horse racing in this state." Also, the Petitioners' business interests made them sensitive to any changes in the regulation of pari-mutuel quarter horse racing. The Petitioners had economic interests at stake, in that barrel match racing requires fewer horses, presenting fewer opportunities to race and smaller purses. In addition, Petitioners had non-economic interests at stake, such as protecting what they believed to be real quarter horse racing against intrusion of what is, in their view, "an inferior product that threatens to diminish and demean the traditional contest."

Even though the Division never publicly announced that barrel match racing was a type of quarter horse racing, the ALJ rejected any assertion that issuing a license could not be a statement of general applicability (and thus a rule) within the meaning of section 120.52(16), Florida Statutes. According to the ALJ, if "the Division decides to issue a license authorizing the permitholder to conduct performances of a type of contest involving horses that has never before been the subject of lawful pari-mutuel wagering, then – merely by issuing the license – the Division has served notice that the contest in question is a horse race under the Act as the Division interprets the Act. Such an action is consequential because the same contest must also be a horse race for anyone else who applies for a license to conduct pari-mutuel wagering on such contest." The ALJ further concluded that "[a] policy which allows pari-mutuel wagering to be conducted on a previously unrecognized activity by deeming that activity to be 'quarter horse racing' is without question a statement of general applicability having the force and effect of law. Florida administrative law does not allow an agency to establish such a policy stealthily by the issuance of expedient licenses . . ."

As for the Division's assertion that barrel match racing was encompassed by Chapter 550's references to "horseracing," the ALJ noted the Legislature and the Division operate within certain constraints imposed by the Florida Constitution when approving pari-mutuel wagering events. In contrast to harness racing, thoroughbred horse racing, and quarter horse racing which the 1968 Constitution "grandfathered in" as exceptions to the prohibition against pari-mutuel wagering, barrel match racing was not in existence as a pari-mutuel event in 1968. Thus, it "can hardly be said that the electors had such contests in mind when they voted to grandfather-in existing horseracing contests as exceptions to the [pari-mutuel wagering] ban." The electors "reasonably would have understood and expected 'horseracing' to mean the particular types of horse races on which betting, at that time, was legal." While barrel match racing "can be located within the genus of horseracing, it nevertheless seems to be as distinct from thoroughbred horse racing, harness horse racing, and traditional quarter horse racing as each of those types of horseracing is distinct from the other." Therefore, "the term 'horseracing' as used in chapter 550 should be understood, in its plain and literal sense, to refer only to those types of horse races that the electors of 1968 would readily have recognized as horse races on which pari-mutuel wagering was allowed." The ALJ also pointed to the Division's rule definitions of "race" (a contest for purse on an approved course) and "contest" (a race or game between horses, greyhounds, or players). In contrast to traditional quarter horse racing, barrel match racing was not a race between horses on an approved course, but rather, a race between a horse and the clock on a separate course. As such, the Division's new interpretation was an unadopted amendment to its existing rule definitions.

Intervenor Florida Quarter Horse Track Association has appealed to the First District Court of Appeal; the Division did not file a separate notice of appeal, nor did the Division file a notice of joinder in the appeal as an additional appellant. See Fla. R. App. P. 9.360.

Bid Protests

Little Havana Activities and Nutrition Ctrs. of Dade Cnty. v. AHCA, et al., DOAH Case No. 13-0706BID (Recommended Order May 15, 2013), AHCA No. 13-0565-FOF-BID (Final Order June 7, 2013)

FACTS: AHCA issued an Invitation to Negotiate ("ITN"), soliciting responses from qualified vendors to provide long-term managed care services to Medicaid enrollees in Miami-Dade and Monroe Counties. The ITN provided that "responses failing to comply with all mandatory criteria will not be considered for further evaluation" and would be considered non-responsive. One of those mandatory criteria required vendors to certify they were currently operating as a health maintenance organization ("HMO") or other insurer that meets the ownership and financial requirements of a long-term care provider service network. The ITN also required vendors to use forms provided by AHCA and to attest that their responses did not utilize modified versions of the AHCA forms. Little Havana Activities and Nutrition Centers of Dade County, Inc. ("Little Havana") responded to the ITN and certified that it was currently operating as an HMO. In fact, Little Havana was authorized to operate, but had not actually begun operating, as an HMO. Little Havana also attested in its ITN response that it did not modify or alter the AHCA forms when, in fact, Little Havana developed its own forms that omitted some of the information called for by the required forms. AHCA did not include Little Havana among the seven vendors

selected to negotiate for a contract, and Little Havana timely protested.

OUTCOME: The ALJ recommended dismissal of Little Havana's bid protest petition. The ALJ found that in order to have standing, Little Havana's ITN response had to be responsive, but it was non-responsive because Little Havana was not "currently operating" as an HMO at the time of the submittal. The ALJ noted that this requirement was important to the ITN's purpose, given the contract timing and demands, to ensure that selected vendors were experienced enough to hit the ground running and avoid start-up issues. AHCA did not initially disqualify Little Havana's submittal as non-responsive only because AHCA relied on Little Havana's false certification. As the ALJ concluded, "AHCA must be able to rely on the certifications made by its contractors, and Little Havana's failure to make truthful certifications demonstrates that Little Havana is not a responsible vendor." AHCA adopted the ALJ's recommendation in its Final Order dismissing Little Havana's bid protest petition.

Trimble Navigation Limited Corp. v. Dep't of Transp., et al., DOAH Case No. 12-3862BID (Recommended Order May 28, 2013)

FACTS: The Department of Transportation ("DOT") sought proposals to upgrade the Florida Permanent Reference Network, a GPS data system. DOT's request for proposals ("RFP") required bidders to provide three letters of reference from customers who received services similar to those being sought by DOT. The RFP provided that failure to submit the letters of reference would result in a proposal being deemed nonresponsive, and that non-responsive proposals would not be considered. Leica Geosystems, Inc. ("Leica") and Trimble Navigation Limited Corp. ("Trimble") were the only bidders. While Trimble provided three letters of reference, Leica only provided two. Nevertheless, DOT announced on September 6, 2012 that it intended to award the contract to Leica.

OUTCOME: Trimble protested the award and argued in part that Leica's failure to provide three reference letters was a material deviation that DOT could not waive. However, the ALJ concluded DOT's waiver "did not provide a substantial competitive advantage to Leica." In doing so, the ALJ distinguished Pro-Tech Monitoring, Inc. v. Dep't of Corr., Case No. 11-5794BID (Fla. DOAH Apr. 4, 2012; Fla. DOC May 10, 2012). The ALJ in Pro-Tech found that the Department of Corrections had conferred a substantial competitive advantage on a bidder by waiving an RFP requirement that bidders identify and summarize their performance in contracts for similar projects within the previous three years. The ALJ in Pro-Tech found that a bidder's selective disclosure of its contracts could hide evidence of problems with those contracts, and also gained the advantage of not having invest the tremendous time, effort, and expense that the competing bidder established was necessary to provide full disclosure. In contrast, "[t]he evidence in the case at hand did not demonstrate any such competitive advantage [was] conferred on Leica from its failure to provide one of three required letters of reference of most applicable projects. No Trimble witness testified that the time undertaken to obtain three letters of reference was protracted or that extra personnel were required for the job. There is no basis to conclude that the amount of time required to obtain a third reference was significant such that Leica gained a time advantage in preparation of its proposal by its failure to comply." In addition, there was no selective disclosure concern, because Leica identified all of its contracts and gave contact information for each contract.

James Hinson Electrical Contracting, Inc. v. Dep't of Transp., DOAH Case No. 13-685BID (Recommended Order June 21, 2013), modified (Final Order July 16, 2013)

FACTS: The Department of Transportation ("DOT") advertised a bid solicitation notice for Intelligent Transportation System improvements ("Project"). Bidders were required to attend a mandatory pre-bid meeting. A Hinson Electrical representative attended the pre-bid meeting. Thereafter, Hinson Electrical accessed DOT's computerized system to order the bid documents for the Project the day before the September 25, 10:30 a.m. deadline for doing so. Almost immediately, Hinson Electrical received a "Prequalification Failure Notice" erroneously stating that bid documents could not be transmitted because Hinson Electrical did not attend the pre-bid meeting. The Failure Notice also stated that Hinson Electrical would be contacted as soon as possible by email or phone regarding requirements to obtain the bid documents. A copy of the Failure Notice was sent with a high-importance tag to the DOT employee responsible for following up on failure notices, but that employee never read or followed up on this notice. Hinson Electrical discovered the Failure Notice late on September 25, 2012, and sent an email to DOT asking why Hinson Electrical was being excluded from the bidding when its representative had attended the pre-bid meeting. The next morning, DOT verified that Hinson Electrical had attended the pre-bid meeting and sent the bid documents one hour and 54 minutes before the bid submission deadline. Upon receiving the bid documents, Hinson Electrical requested additional time to complete its electronic bid submission, which DOT refused. Hinson Electrical then sent an email to DOT, stating that there was insufficient time to prepare a bid by the submission deadline. Thereafter, DOT posted notice of its intent to award the contract to another bidder, and Hinson Electrical timely protested.

OUTCOME: The ALJ agreed with Hinson Electrical that DOT should have extended the bid deadline when it became aware that it withheld the bid documents in error. The ALJ found that even if, as DOT argued, Hinson Electrical could have completed and submitted its bid with less than two hours remaining, it would have been at a disadvantage competing against other bidders who were able to download the bid documents. The ALJ found that DOT has

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discretion to extend bid deadlines, which it has exercised regularly for various reasons, and that DOT should have exercised that discretion here to accommodate a bidder denied a sufficient opportunity to bid due to DOT's error or an irregularity in the bid procurement process. The ALJ also noted that "[t]he absence of regulations, policies, or even guidelines to govern the decision whether to postpone a bid deadline or reject all bids under circumstances like this, is problematic. Important decisions should not be made on 'the personal whim of a bureaucrat.' DOT is entrusted with millions of dollars of taxpayer funding. The public trust demands appropriate policies, procedures, and decision-making to ensure procedural and substantive fairness in the bid procurement process and the use of this funding." (citation omitted). The ALJ concluded that DOT's decision not to extend the bid deadline for the Project was clearly erroneous, contrary to competition, arbitrary and capricious, in violation of section 120.57(3)(f), and recommended that DOT enter a final order rescinding the Notice of Intent to award the contract to another bidder.

DOT's Final Order accepted the ALJ's recommendation, and left intact the conclusions that DOT's failure to extend the deadline was clearly erroneous and contrary to competition. However, DOT rejected the conclusion that its refusal to provide any accommodation to Hinson Electrical was arbitrary and capricious, because "the record will not permit a conclusion that [DOT]'s decision was illogical, despotic, unreasoned, or irrational."

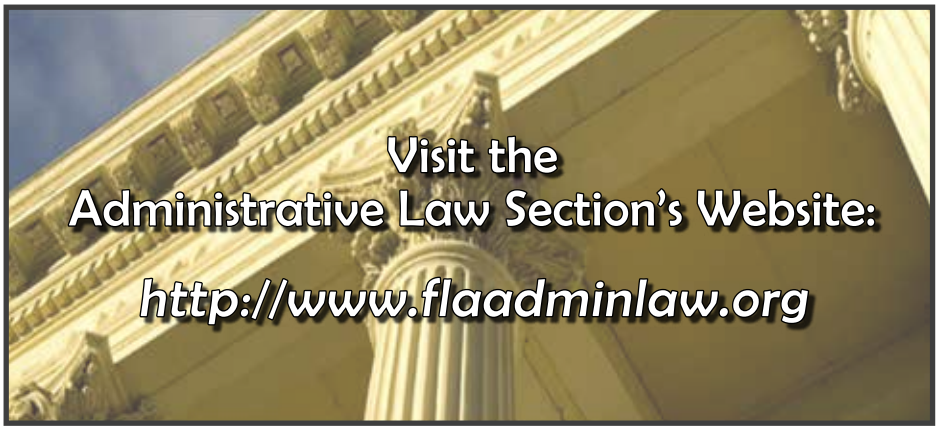
CCA of Tennessee, LLC v. Dep't of Mgmt. Servs., DOAH Case No. 13-880 (Recommended Order July 12, 2013).

FACTS: As a prerequisite to contracting with a private entity to operate a State correctional facility, the Department of Management Services ("DMS") must find that the contract will result in a 7% cost savings over public operation of a substantially similar facility. § 957.07(1), Fla. Stat. The Department of Corrections ("DOC") is responsible for calculating the cost per inmate per day ("the per diem rate") for the State to operate correctional facilities substantially similar to those sought to be privatized.

Pursuant to a 2010 procurement, CCA of Tennessee, LLC ("CCA") operates the Moore Haven, Graceville, and Bay Correctional Facilities under a contract that expires in 2013. In October 2012, DMS issued an Invitation to Negotiate ("ITN") for the operation and management of those facilities. The ITN did not initially contain the per diem rates for facilities substantially similar to Moore Haven, Bay, and Graceville. As required by section 957.07(1), Florida Statutes, DOC issued a letter asking the Auditor General to certify per diem rates for the three facilities, and DMS published that letter on the Vendor Bid System ("VBS") on October 26, 2012. The per diem rates DOC sought to have certified were 17% lower than the per diem rates CCA is currently paid to operate the three facilities. The Auditor General ultimately approved and certified slightly higher rates after a DOC adjustment, and DMS posted the certified rates as Amendment 11 to the ITN.

CCA challenged the ITN after Amendment 11 was posted. CCA argued that DMS was required to use Requests for Proposal to procure contracts to operate private correctional facilities. CCA also argued that the per diem rates were too low because the facilities on which DOC based its calculations were not substantially similar, and because DOC did not accurately adjust the base per diem rates to fairly account for differences in public and private correctional facility operations.

OUTCOME: The ALJ recommended that DMS issue a final order withdrawing the ITN. Because DMS issued the ITN on October 10, 2012 and CCA did not challenge it until January 30, 2013, the ALJ agreed with DMS that CCA waived the right to challenge the method of procurement. However, the ALJ rejected DMS' argument that CCA waived its right to challenge virtually every aspect of the per diem rate calculations by not filing a challenge after DOC's letter to the Auditor General was published on the VBS. The ALJ pointed out that the letter was not posted as an ITN amendment, nor was it accompanied by a notice of rights and clear point of entry into Ch. 120 proceedings. The ALJ observed that the DOC letter was "far removed from [DMS]'s final decision to incorporate the DOC per diem rates, as certified by the Auditor General and as further adjusted by DOC, as a term of the ITN. . . . It is disingenuous for [DMS] to argue that [CCA]'s only opportunity to challenge the per diem rates was when the letter was posted on October 22, 2012, although the final decision on per diem rates was not made until three months later." As for the challenge to the per diem rates, the ALJ found that there were a number of calculation errors, and concluded that the resulting rates were "clearly erroneous."



Agency Snapshot

Public Employees Relations Commission

by Gregg Morton

Background

In 1974, the legislature passed the Public Employees Relations Act in order to lay out the process for public employee collective bargaining guaranteed in Article I, Section 6 of the Florida Constitution. The Act also established the Public Employees Relations Commission (PERC or the Commission), which has jurisdiction over various cases involving public sector labor and employment issues. In addition to hearing cases involving unfair labor practices and certain employee disciplinary procedures, PERC is also responsible for registering employee organizations that would like to represent public employees. PERC's elections division conducts on-site and mail ballot elections for public employees who have expressed the desire to be represented by an employee organization. PERC also coordinates proceedings involving mediators and privately employed arbitrators to resolve impasses in labor negotiations.

The Commission is composed of three commissioners who are appointed by the Governor, subject to confirmation by the Florida Senate, and serve overlapping four-year terms. One of the commissioner positions is designated as chair. By statute, the chair of PERC serves as chief executive and administrative officer of the agency. PERC is administratively housed in the Department of Management Services (DMS), but is not subject to the control, supervision, or direction of DMS and operates as an autonomous agency. PERC employs eight hearing officers who are licensed attorneys with more than five years of experience. The hearing officers hold hearings throughout the state on labor and employment disputes and issue recommended orders that are then reviewed by the Commission and its staff. PERC issues a final order in each of its cases, which can be appealed directly to the district courts of appeal.

Contact Information:

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Hours for filings are Monday through Friday from 8:00 a.m. to 5:00 p.m. In addition to filings by mail, PERC allows parties to file certain documents in their cases and to access their active case list and associated dockets through an electronic portal. This secure web-based application, called ePERC, is optional and is provided as a convenience and cost-saving measure for the state and registered users. Filings through ePERC that come in after 5:00 p.m. on weekdays or that come in on weekends will be stamped as received the next business day. PERC also allows parties to file documents by fax during business hours.

General Counsel:

Stephen A. Meck received his J.D. with honors from Florida State University College of Law in 1980, and his B.S. magna cum laude from Florida State University in 1975. Mr. Meck was admitted to The Florida Bar in 1980 and is a past Chair of the Executive Council of The Florida Bar Labor and Employment Law Section. Mr. Meck has been with PERC since 1980, serving as general counsel since 1993. While at PERC, he has presided over numerous unfair labor practice and representation proceedings and presented cases in the Florida Supreme Court and each of the district courts of appeal.

Types of Cases:

The cases that come before PERC can be broadly divided into labor disputes and employment disputes. In the current fiscal year, over a thousand cases have been filed with the Commission. In addition to having its decisions published in the Florida Public Employee Reporter and the Florida Career Service Reporter, PERC offers various publications at its website (http://perc.myflorida.com) to explain areas of practice and substantive law applicable in PERC cases. PERC also publishes a quarterly newsletter that contains synopses of cases decided by the Commission along with articles about important developments in public labor and employment law.

Labor Cases

The Commission's jurisdiction in labor cases stems from the constitutional right of public employees in the State of Florida to collectively bargain. In representation cases, PERC is responsible for defining bargaining units associated with public employers and determining which public employees should be included or excluded from the bargaining units. "Public employees" include employees of the state, counties, school boards, municipalities and special taxing districts.

While not an exhaustive list, this includes all fire fighters, police officers, corrections officers, school teachers and support personnel, attorneys, medical personnel, state troopers, toll collectors, sanitation employees, and clerical employees. It is estimated that there are over 600,000 public employees in various bargaining units throughout the State of Florida. The Commission holds hearings and resolves disputes about the composition of bargaining units.

Once a bargaining unit has been defined and an employee organization has been certified by the Commission to represent the employees in the bargaining unit, the employee organization and public employer will enter into negotiations to form a collective bargaining agreement. If negotiations break down or one side accuses the other of bad faith in negotiations, either the public employer or the employee organization can file an unfair labor practice pursuant to the provisions of section 447.501(1) and (2), Florida Statutes. In some circumstances, individual members of the bargaining unit can also file unfair labor practices, particularly in instances where they are accusing the employee organization of breaching its duty of fair representation. When an unfair labor practice is filed, it is initially reviewed by the general counsel who determines whether it is sufficient to proceed to hearing. If sufficient, the Commission will appoint a hearing officer to hold an evidentiary hearing to determine if an unfair labor practice was committed. The labor decisions of the Commission and dismissals by the general counsel are reported in the Florida Public Employee Reporter, which also includes important state and federal cases.

Employment Cases

The main type of employment case that PERC hears involves appeals of employees that have career service rights pursuant to section 110.227, Florida Statutes. The right to appeal to the Commission is triggered when a public employee with career service rights has his or her pay reduced or is suspended, demoted, involuntarily transferred more than fifty miles, or dismissed. After receiving notice of one of these actions, the employee has twenty-one calendar days to file an appeal with the Commission. Upon receipt of a timely appeal, the Commission appoints a hearing officer to hold an evidentiary hearing to determine if there was cause for the discipline and, in certain cases, whether the discipline should be mitigated. The career service decisions of the Commission are reported in the Florida Career Service Reporter.

In addition to career service appeals, PERC exercises jurisdiction over a number of other employment cases. When veterans feel aggrieved under chapter 295, Florida Statutes, they are entitled to file a written complaint to the Department of Veterans' Affairs (DVA), which in turn issues an opinion to PERC on the merit or lack of merit in each complaint. After the DVA renders its decision, the veteran may file a complaint with PERC seeking a hearing. The Commission's jurisdiction also includes appeals by public employees who are disciplined under the Drug-Free Workplace Act; age discrimination appeals pursuant to section 112.044, Florida Statutes; Whistle-Blower's Act appeals; and appeals regarding the termination or transfer of employees aged 65 or older pursuant to section 110.124, Florida Statutes.

Law School Liaison

Fall 2013 Update from the Florida State University College of Law

by David Markell, Associate Dean for Environmental Programs and Steven M. Goldstein Professor

The Florida State University College of Law is delighted that the latest U.S. News & World Report ranked our Environmental Program in the top 20 nationwide again this year, for the ninth consecutive year. It has been a busy and productive year for our students, faculty, and alumni; we are pleased to provide this update for the Administrative Law Section Newsletter.

Students Working in Administrative Law-Related Positions during the 2013 Summer

This summer, our students are working in a wide variety of administrative law-related positions in Florida and throughout the rest of the country. To provide a sampling of the range of work in Florida, students are working with the following entities: Department of Corrections; Department of Environmental Protection; Florida Commission on Human Relations; Florida Housing Finance Corporation; Environmental Protection Commission of Hillsborough County; U.S. Securities and Exchange Commission;and the First District Court of Appeal. College of Law students are also working with the U.S. Environmental Protection Agency (New York City), the U.S. Attorney's Office (San Diego), and Earthjustice (Seattle).

Student Honors

Several students were honored during the College of Law's first Environmental Colloquium held in April. Steven J. Kimpland presented his paper, *Spill History Substantively Informs Florida's Oil and Gas Statutes and Regulations.* Kelly Samek presented *Public Trust Doctrine as a Foundation for Wildlife Protection in Oil Spill Compensation.* In addition, several students were honored for their outstanding papers, including: Kristen Franke, *The Role of Agency Threats in Pennsylvania's Natural Gas Dilemma;* Forrest S. Pittman, *The Forgotten Quarter: How Smarter Farm Bills Can Quickly Achieve Greenhouse Gas Emission Reductions*; James Flynn, *Misrepresentation Nation: Why the United States Allows the Reckless Distortion of Climate Science*; Andrew R. Missel, *Uncertainty, Cost-Benefit Analysis, and Climate Change: Toward a Smarter, Safer Policymaking Framework to Address Greenhouse Gas Emissions* and Evan J. Rosenthal, *Letting the Sunshine in: Protecting Residential Access to Solar Energy in Common Interest Developments*.

Alumni Take the Reins as Agency General Counsel

We are delighted to recognize two of our alumni, each of whom has recently been named General Counsel for a Florida Department. L. Mary Thomas is the new General Counsel with the Department of Elder Affairs. Matthew Leopold is the new General Counsel with the Department of Environmental Protection.

Faculty Updates

Professor Hannah Wiseman has co-authored a new report from Resources for the Future (RFF) entitled *The State of State Shale Gas Regulation*. The report describes, analyzes, and compares 25 regulatory elements related to shale gas development across 31 states. It is the most comprehensive review to date of state shale gas regulations. The regulatory maps, which allow viewers to quickly compare regulations among states, an executive summary of the report, and the full report are available at http://www.rff.org/shalemaps.

Professor David Markell's article *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 Fla. L. Rev. 15 (2012, has been selected as among the best environmental and land use law articles published in 2012 and will be republished in the *Land Use and Environmental Law Review*.

For more information, please consult our web site at: http://*www.law.fsu.edu*, or please feel free to contact Prof. David Markell, at dmarkell@law.fsu.edu.

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under other state and federal laws.[2] State agencies hire full-time lawyers to deal with public record issues, and contractors are likely to be surprised by the extent of the knowledge they need to have to comply with the new statute.

The new statute states that if a contractor does not comply with a public records request, the agency "shall enforce the contract provisions in accordance with the contract." This appears to give the agencies some flexibility in how to handle a contractor's violation. Unfortunately for contractors, the issue does not end there. Section 119.10(2) provides criminal penalties for "any person" who willfully and knowingly violates chapter 119. This is not an issue contractors should take lightly.

Before chapter 2013-154 was enacted, private entity contractors were required to comply with the public records laws if they were "acting on behalf of any public agency."[3] This broad language led to much litigation over the years, and eventually the Florida Supreme Court adopted a "totality of factors" test to determine whether a private entity was acting on behalf of the public agency.[4] In general, contractors merely providing a service to an agency typically have not been subject to the Public Records Act. However, when a contractor essentially stepped in the shoes of the agency and performed a public operation for the agency, the Public Records Act was likely to apply.[5] The language in section 119.0701 states that <u>all</u> contractors with a contract for services with a public agency will be subject to the Public Records Act. The definition of "contractor," however, suggests that the Legislature's intent may have not been so sweeping. A contractor is defined as an "individual, partnership, corporation, or business entity that enters into a contract for services with a public agency and is acting on behalf of the public agency as provided under s. 119.011(2)."[6] Reading the statutes together, it is possible that this statute is merely codifying the existing law and only those contractors acting on behalf of the state are required to comply with the public records laws. This law took effect on July 1, 2013. It is likely that Florida courts will ultimately decide whether the new statutory provision provides broader public access to contractors' records than current law or whether the statute essentially codifies current caselaw.

<u>Public Meetings</u>

The Legislature also passed a law relating to public meetings that likely will affect state agency procurements. Chapter 2013-227 creates section 286.0114 (part of Florida's Government-in-the-Sunshine Law), which requires boards and commissions[7] to allow members of the public the opportunity to be heard at public meetings.[8] The law likely applies to certain agency procurement team meetings, as courts have found these to be public meetings.[9] This law takes effect October 1, 2013.

The law clarifies that the opportunity to be heard does not need to occur at the same meeting at which the board or commission takes the final action as long as the opportunity to be heard occurs at a meeting that is held during the decision-making process and is within reasonable proximity in time before the meeting at which the board or commission takes final action. This language raises questions of what opportunities to be heard will be sufficient during procurement team meetings. For example, vendors sometimes have an opportunity to give oral presentations or to negotiate during the course of a procurement, but it is not clear if presentations or negotiations would satisfy the opportunity to be heard, especially because those meetings are temporarily exempt from the Sunshine Law and primarily occur only in the context of an Invitation to Negotiate (ITN) procurement, which is the only kind of solicitation that involves negotiations with the procurement team.[10] The mere opportunity for presentations or negotiations by some vendors also would not afford the opportunity to be heard to those vendors not selected for negotiations or presentations.

It also is unclear if agencies need to provide an opportunity to be heard before determining who to negotiate with, after negotiations, or both. Procurement teams meet for various purposes, depending on the nature of the procurement and the structure of the agency. Sometimes an agency's negotiation team will meet in a public meeting to vote on the vendor to recommend for a contract award after "shaded" negotiation sessions have occurred with each vendor. It is not unusual in such public meetings for the procurement officer to announce that the public will not be permitted to speak before or after the votes have been publicly cast. It is not clear that such practices will still be permitted under the new law, given that some vendors participating in the procurement may never have had any opportunity to speak to the procurement team members in any public meeting.

The new law allows a board or commission to adopt limited rules and procedures regarding the opportunity to be heard.[11] For example, the board or commission can specifically limit the amount of time an individual has to address the board or commission. It would be helpful if a governmental entity would include in its procurement solicitation an explanation of the procedures it will use to ensure the opportunity to be heard. The new law does provide some good news for governmental entities in that a violation of this new provision does not void the action taken, as is the case with other public meeting law violations.[12] Instead, agencies found to have violated the law will be responsible for paying attorneys' fees for any action taken to enforce the law. A circuit court can issue an injunction to enforce the statute when a citizen applies for an injunction.

It is not immediately clear if a violation of the right to be heard at a public procurement team meeting will be an issue that can be raised in a bid protest[13] or what effect it might have on the case. Generally, Sunshine Law violations are heard in circuit court, as the public meeting statutes provide that circuit courts have jurisdiction to issue injunctions to enforce the Sunshine laws.[14] Nonetheless, some Administrative Law Judges

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at the Division of Administrative Hearings ("DOAH") have considered Sunshine Law issues in bid protest cases.[15]

The Florida Transparency Act

Another new law that impacts businesses contracting with governmental entities is chapter 2013-54, Laws of Florida, which substantially amends the Florida Transparency Act (Act). This Act was created in 2009, and originally contained only requirements for public electronic posting of information relating to agency expenditures.[16] In 2011, the Legislature amended the statute to require the Chief Financial Officer (CFO) to provide public access to information and documentation relating to contracts procured by governmental entities (which includes all branches of government, state and local governmental entities, and colleges and universities).[17] The CFO created the Florida Accountability Contract Tracking System (FACTS) and currently posts some information about public contracts on the internet through FACTS. The new law requires the CFO to post additional information about each agency contract, and it requires the contract itself be posted.

Agencies are required to redact confidential and exempt information, and there is a process for contractors to notify agencies if confidential information is mistakenly posted. Despite these protections, it would be prudent for contractors to proactively contact an agency it contracts with to ensure that trade secret information is not posted. It is typically not sufficient to label an entire document "confidential"; a contractor will need to redact only the information that is a trade secret under Florida law.[18] The law does not relieve the agency from the duty to respond to a public records request or a subpoena for the information. This law took effect on July 1, 2013.

Public-Private Partnerships

Chapter 2013-223, Laws of Florida, adds an entirely new section to chapter 287 that allows public entities to enter into public-private partnerships for qualifying public-purpose projects. Public-private partnerships allow public entities to contract with private entities to deliver and finance public building and infrastructure projects. The private entity may take the risk and responsibility for delivering the project and then be paid through some type of revenue stream generated by the project. "Public entities" include counties, municipalities, school boards, or any other political subdivision of the state, a public body corporate and politic, or a regional entity that serves a public purpose. This definition does not appear to include state agencies, although the Department of Transportation is already permitted to enter into public-private partnerships for the building, operation, ownership, or financing of transportation facilities under section 334.30, Florida Statutes.

The law creates section 287.05712 and provides a detailed process allowing public-private partnerships to develop and construct public facilities and infrastructure, such as parking facilities, airport facilities, and recreational facilities. The law creates the Public-Private Partnership Guidelines Task Force, and directs the Task Force to develop guidelines for the Legislature to consider in creating uniform processes for establishing public-private partnerships. The law includes procurement procedures, project approval requirements, project qualifications and process, provisions regulating interim and comprehensive agreements, fees charged to the public, financing agreements, and expiration and termination of the agreements. The law imposes specific powers and duties for the private entity and it provides guidance for construing the law. The law requires notice to affected local jurisdictions. Finally, the law specifically states that sovereign immunity is not waived. This act took effect on July 1, 2013.

General Changes to Chapter 287

Chapter 287, Florida Statutes, governs state agency procurements and contracts for commodities and contractual services and provides authority for the Department of Management Services (DMS) to establish policies and procedures related to procurements. Local governments, non-executive branch agencies, and universities and colleges are not required to follow chapter 287, but many adopt chapter 287 or use it as a model for their procurement policies and procedures. Chapter 2013-154 amends chapter 287, among other laws relating to "governmental accountability." Most of this law took effect on July 1, 2013, but the bill has some exceptions. While many of the changes simply clarify the laws or clean up antiquated language,[19] some substantive changes are worth noting.

• The law amends section 287.042(1)(a). Prior to the amendment, DMS had the duty to establish and maintain a vendor list. Pursuant to that duty, DMS could remove from its vendor list any source of supply (i.e., vendor) that failed to fulfill any of its duties specified in a contract with a state agency.[20] In reality, rather than removing vendors from a vendor list, DMS instead maintained a suspended vendor list.[21] The 2013 amendment removes DMS's duty to maintain a list of vendors, but it does not change the provision about removing vendors from the vendor list. The original bill passed by the House also deleted DMS's duty to maintain a vendor list, but it would have added a provision that an agency could suspend a vendor by following DMS's procedure for suspension and reinstatement. As that provision did not make the final version of the bill, the statute currently allows DMS to remove vendors from the list, but DMS does not have the duty to maintain a list. Nowhere in the statute is there direct authority allowing DMS to maintain a suspended vendor list.

• The new law specifically allows agencies to negotiate lower pricing at renewal of a contract. There is no language allowing contractors to negotiate higher prices.[22] This is consistent with recent attempts by both the Legislature and the Governor's office to obtain savings through the state contracts. For example, in 2010,

the Legislature passed a law mandating that agencies seek to reduce contract payments by at least 3%.[23] In 2012, the Governor's office requested agencies under the Governor's control to seek better prices at contract renewal.

• The law adds a provision that when an Invitation to Bid is used as the method of procurement, the contract must be awarded to the responsible and responsive vendor who submits the lowest bid. This provision had been in the statutes for many years before it was removed when section 287.057 was revised and reorganized in 2010.[24]

• DMS is no longer is required to approve or disapprove sole source purchases. When an agency believes a service or commodity is available from only one source, the agency is required to electronically post a description of the commodity or service for seven days and request prospective vendors to provide information about their ability to supply the commodity or service. If the agency determines that the commodity or service is available only from one source, it provides notice of its intended decision and vendors have an opportunity to protest the determination. Before the new enactment, if the amount of the contract was more than $195,000, the agency also had to seek approval from DMS before entering into the contract, although if DMS failed to approve or disapprove the request in 21 days, the contract was deemed approved. In a rule, DMS states that it shall approve all requests if the agency has submitted all required documentation, but states that the agency retains all responsibility for determining whether a single source is justified.[25] So in actuality, DMS approval was merely a formality. DMS did not actually review requests to determine whether other vendors existed who could provide the service or if the procurement was an appropriate use of the sole source process. Thus, the change merely removes an inefficient process of little value. In addition, last year DMS made changes to its electronic notifications so that single source postings would automatically be sent to vendors instead of merely being posted on a web page. Thus, with this notice vendors can, in essence, police their own industries by submitting information or protesting a single source purchase.

The law creates more stringent training and certification requirements for contract managers and grant managers with responsibility for contracts in excess of $100,000 annually. The training and certification is to be conducted jointly by DMS and the Department of Financial Services.[26] These provisions go into effect on December 1, 2014.

• The new law also creates additional requirements for agreements funded with state or federal funds, including a provision specifying financial consequences if the recipient fails to perform the minimum level of service required by the agreement. This mirrors a similar requirement for state contracts, which was added to the statutes only a few years ago.[27] "Financial consequence" is not a defined term, and it is sometimes difficult to determine whether a financial consequence is valid or whether it crosses the line and becomes an unenforceable penalty.[28] Agencies are increasingly adding stiff "financial consequences" to their contracts penalizing contractors for any noncompliance with contract terms. Although some of these financial consequences might be legally unenforceable, vendors tend to pay them rather than risk having their contract terminated. Contractors should review the financial consequences before executing any agreement with a state agency.

Several other amendments to chapter 287 were proposed in the 2013 legislative session, but did not make the final cut. The House bill, as originally passed, would have allowed DMS to avoid a stay during a bid protest of a contract award if the contract was awarded to multiple vendors unless the vendor demonstrated in writing a reasonable basis for protesting the award.[29] If the vendor ultimately prevailed in the protest, the vendor would have been added to the contract at the same terms and conditions as the other vendors. This provision proved controversial, as it is a departure from the usual practice that an agency must stop activity in connection with a solicitation or contract award once a bid protest is filed.[30] Additionally, pending bid protests at DMS in connection with a state term contract procurement[31] may have played a role in removal of the proposed language. DMS has historically entered into state term contracts with dozens of vendors for such services as management, consulting, auditing, and information technology. Shortly before the legislative session, DMS announced its intent to negotiate with only a handful of vendors in connection with a procurement for a new state term contract that currently includes approximately 70 vendors. Numerous vendors protested, and the protests were pending at DMS during the legislative session.[32] Thus, proposed revisions to protest procedures relating to state term contracts drew the attention of attorneys and lobbyists in Tallahassee.

CFO's Authority to Audit Contracts and Grants

Chapter 2013-154 gives the CFO authority to audit grant agreements[33] and agency contracts[34] to ensure the adequacy of internal controls for complying with the terms of the agreement. Both provisions provide that the CFO shall perform an audit and discuss the audit with the official whose office is subject to the audit. The CFO will submit a final audit report to the agency head. The agency head or designee has 30 days after the receipt of the final audit report to provide an explanation or rebuttal concerning findings requiring corrective action. The statutes do not specify what happens if an agency head fails to provide an explanation or take corrective action.

Perhaps of more interest is what the new statute does not include concerning the CFO's authority to audit contracts. The version of the bill originally passed by the Senate included authority for the CFO to conduct an audit of a contract before the execution of the contract.[35] The language would have given the CFO broad power to determine whether the contract was legal and whether it

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included sufficient information such as a clear statement of work, deliverables, and performance measures. The CFO would have had the authority to return a contract to an agency if the CFO did not find it sufficient. The bill did not explain what would happen after the review or if the agency entered into the contract despite the audit findings.

CFO Jeff Atwater, an independently elected Cabinet officer who heads the Department of Financial Services, has sought in recent years to expand DFS' oversight of state contracting, which is now largely governed by DMS, an agency under the sole control of the Governor. In 2011, legislation was introduced that would have moved most of the responsibility for promulgating procurement rules from DMS to DFS.[36] It also would have given DFS the authority to monitor agencies' compliance with purchasing rules and would have required DFS approval of every contract funded by state or federal funds.

Citizens Property Insurance Corporation

Citizens Property Insurance Corporation ("Citizens") is a statutorily created entity that provides insurance for residential and commercial property pursuant to section 627.351(6), Florida Statutes. Citizens has never before been subject to chapter 287, but that will change—at least in part—beginning October 1, 2013. Specifically, chapter 2013-60, Laws of Florida, requires Citizens to comply with section 287.057, which governs the procurement of commodities and contractual services by state agencies. Citizens will be considered an "agency" under section 287.057, except for section 287.057(22), in which case it will be considered an "eligible user." This means that Citizens may, but is not required to, use DMS's online procurement systems.[37]

While the Legislature is requiring Citizens to comply with section 287.057, it did not go so far as to subject Citizens to section 120.57(3), relating to bid protests. Instead, the law includes language that essentially mirrors section 120.57(3), except that instead of a hearing at DOAH, a protest will be heard by Citizens' board of directors at the next regularly scheduled public meeting after a settlement conference, in accordance with procedures established by the board. There also does not appear to be a statutory bond requirement, as the protest bond is required by section 287.042, not section 287.057.[38]

Additionally, review of the Board's action is in the Circuit Court of Leon County, not a District Court of Appeal pursuant to section 120.68. Because the new language is so similar to section 120.57(3), it is likely that Citizens will follow District Court of Appeal cases that interpret bid protests under the Administrative Procedure Act. Citizens will not have to follow DOAH decisions, although they may be persuasive.

Conclusion

Although most of these changes are tweaks to the current system and not a major overhaul of contracting and procurement law, attorneys representing state contractors (and for the public records and transparency issues, all government contractors) should be aware of these laws. Contractors, in particular, need to be aware that their contracts will be posted on the CFO's website and that confidential information is required to be redacted. Contractors also need to be aware of their requirement to comply with public records laws, which can be complicated and burdensome.

Endnotes:

[1] "Public agency" under section 119.0701, Florida Statutes, is defined as "a state, county, district, authority, or municipal officer, or department, division, board, bureau, commission, or other separate unit of government created or established by law."

[2] For example, protected health information is confidential under the HIPPA Privacy Rule in 45 C.F.R. 160 and 45 C.F.R. 164, parts A and E. Education records are confidential and exempt from disclosure under section 1002.221(1), Florida Statutes.

[3] § 119.011(2), Fla. Stat. Additionally, section 287.058(1)(c), requires state agency contracts for services to include a provision in the contract that allows unilateral cancellation of a contract if the contractor fails to allow public access to records made or received in conjunction with the contract. The new law is much broader than section 287.058 and applies to all public agencies, not just the state.

[4] *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp.*, 596 So. 2d 1029 (Fla. 1992).

[5] *See id.* at 1033 (finding that an architectural firm hired to perform professional services for the construction of a school was not acting on behalf of a public agency). *Cf. Weekly Planet, Inc. v. Hillsborough Cnty. Aviation Auth.*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002) ("[W]hen a public entity delegates a statutorily authorized function to a private entity, the records generated by the private entity's performance of that duty become public records.").

[6] This language is in the new section 119.0701(1)(a).

[7] A board or commission includes "a board or commission of any state agency or authority or of any agency or authority of a county, municipal corporation, or political subdivision."

[8] This law appears to be in response to two recent cases in which the First and Fifth District Courts of Appeal found that the public did not have a right to speak at public meetings. *See* Staff Analysis of Senate Bill 50, http://www.flsenate.gov/Session/Bill/2013/0050 (addressing *Keesler v. Cmty. Maritime Park Assocs., Inc.*, 32 So. 3d 659 (Fla. 1st DCA 2010) (finding that the law did not require that the public have a right to comment at a public meeting) and *Kennedy v. St. Johns Water Mgmt. Dist.*, 2011 WL 5124949 (Fla. 5th DCA 2011) (affirming a trial court's order that cited *Keesler*)).

[9] *See Silver Express Co. v. Dist. Bd .of Lower Tribunal Trustees of Miami-Dade Cmty. College*, 691 So. 2d 1099, 1100-01 (Fla. 3d DCA 1997) (finding that a purchasing committee was subject to the Sunshine Law because it weeded through proposals and ranked them, which helped the College make a final decision).

[10] § 286.0113(2)(b), Fla. Stat. The new law does not apply to exempt meetings. Currently in a competitive solicitation, any meeting in which negotiations with a vendor are conducted, at which a vendor makes an oral presentation, or at which a vendor answers questions, is exempt from the public meeting law. However, the agency is required to record the meeting and the recording becomes public upon notice of intended decision or 30 days after the bids, proposals, or final replies are opened. § 286.0113(2)(b), Fla Stat.

[11] § 286.0114(4), Fla. Stat. (2013).

[12] § 286.011(1), Fla. Stat. A person who violates the public meeting laws also faces a fine and potential criminal penalties. § 286.011(3), Fla. Stat.

[13] Currently, some Administrative Law Judges will rule on claims of Sunshine Law violations in a bid protest, but some will not. *Compare Urban Bld. Sys., Inc. v. Martin Cnty. Sch. Bd.*, Case No. 10-1147BID, 2010 WL 3359420, (Fla. DOAH Aug. 23, 2010) (determining that DOAH did not have authority to enforce the Sunshine laws, but finding that the issue

could be raised to show that the petitioner was adversely affected by the violation) *with Affiliated Computer Servs., Inc. v. Agency for Health Care Admin.*, Case No. 05-3676BID, 2006 WL 261124 (Fla. DOAH Jan. 17, 2006) (refusing to address claims of a Sunshine Law violation in a bid protest case because DOAH has no "jurisdiction to dispose of disputes involving allegations of violations of Florida's Sunshine Law," and explaining that "[r]elief for any such violations must be sought elsewhere").

[14] § 286.011(2), Fla. Stat.

[15] *See* note 13, *supra*.

[16] Ch. 2009-74, § 1, Laws of Fla.

[17] Ch. 2011-49, § 1, Laws of Fla.

[18] Trade secret is defined in section 812.081(1)(c), Florida Statutes, and section 688.002(4), Florida Statutes.

[19] For example, the language "when let upon contract" in section 287.012(5) was changed to "if procured."

[20] § 287.042(1)(b), Fla. Stat. (2012). DMS established a procedure in rule 60A-1.006 for agencies to follow when a vendor is in default on any agency contract.

[21] *See* http://www.dms.myflorida.com/business_operations/state_purchasing (Under the heading "Vendor Information," click on the link "Convicted/Suspended/Discriminatory/Complaints Vendor Lists"). As of the date this article was submitted, DMS maintained the Suspended Vendor List. It is possible that DMS could discontinue this practice given the statutory changes.

[22] In fact, agencies are required to obtain renewal pricing during the initial procurement. § 287.057(1)(a)-(c), Fla. Stat.

[23] Ch. 2010-151, § 47, Laws of Fla. The law was not given a statute number and did not make it into the statutes as permanent law. Instead, the law is referenced as a footnote to section 216.0113, Florida Statutes.

[24] Ch. 2010-151, § 19, Laws of Fla.

[25] § 287.057(3)(c), Fla. Stat.; Fla. Admin. Code R. 60A-1.045.

[26] The law creates section 287.057(14)(b), relating to contract managers. Previously, contract managers were only required to complete a training conducted by the CFO for accountability in contracts and grant management. The law creates section 215.971(2)(a), relating to grant managers.

[27] Ch. 2010-151, § 25, Laws of Fla.

[28] It is well-established that a liquidated damages clause is unenforceable if it is actually a penalty clause. *See, e.g.*, *Mineo v .Lakeside Village of Davie, LLC*, 938 So. 2d 20, 21 (Fla. 4th DCA 2008). Although labeled in statute as a "financial consequence" rather than liquidated damages, the effect of the provision is the same; thus, it is likely a similar analysis would apply.

[29] HB 1309 (2013).

[30] § 120.57(3)(c), Fla. Stat.

[31] "State term contract" is defined in section 287.012(27) as "a term contract that is competitively procured by the department pursuant to s. 287.057 and that is used by agencies and eligible users pursuant to s. 287.056." Section 287.056 provides that agencies and eligible users may request quotes from multiple vendors approved by DMS under a state term contract in order to secure the most favorable price. The advantage of using an approved vendor on a state term contract is that the agency or eligible user does not have to conduct its own procurement. Eligible users include counties, cities, school boards, public colleges and universities, and independent, nonprofit colleges and universities. Fla. Admin. Code R. 60A-1.005.

[32] All parties had waived the statutory requirement that the protests be sent to DOAH within 15 days. § 120.569(2)(a), Fla. Stat. As of late July, the protests were still pending at DMS and settlement discussions were ongoing.

[33] The law creates section 215.971(3), Florida Statutes.

[34] The law creates section 287.136, Florida Statutes.

[35] CS/CS SB 1105 (2013).

[36] CS/HB 1409 (2012).

[37] If Citizens elects to use DMS's online procurement systems (the Vendor Bid System or MyFloridaMarketPlace), its contracts would be subject to the MyFloridaMarketPlace fee. *See* § 287.057(22), Fla. Stat.; Fla. Admin. Code R. 60A-1.030-1.033.

[38] Section 287.042(2)(c), Florida Statutes, requires any person who files an action protesting a decision or intended decision pertaining to contracts administered by DMS, a water management district, or an agency as defined in chapter 287 to post a bond at the time of filing the formal written protest. The bond amount must be one percent of the estimated contract amount. For large state contracts, the bond can be more than a million dollars. These large bond amounts tend to discourage protests.

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THE FLORIDA BAR

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