

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: SB 1942

INTRODUCER: Senator Clary

SUBJECT: Bid Protest Standards

DATE: March 16, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson	GO	Favorable
2.	_____	_____	JU	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill provides that in a competitive procurement protest involving the Department of the Lottery, including the rejection of all bids, that the administrative law judge may not conduct a de novo proceeding, but must review the intended agency action to determine if the action is illegal, arbitrary, dishonest, or fraudulent.

This bill substantially amends section 24.109 of the Florida Statutes.

II. Present Situation:

Agency Procurement of Commodities and Services: The comprehensive process contained in ch. 287, F.S., for the procurement of commodities and contractual services by executive agencies¹ sets forth numerous requirements for fair and open competition among vendors, agency maintenance of written documentation that supports procurement decisions, and implementation of monitoring mechanisms. Legislative intent language for the chapter explains that the process is necessary in order to:

- Reduce improprieties and opportunities for favoritism;
- Ensure the equitable and economical award of public contracts; and
- Inspire public confidence in state procurement.²

¹ Section 287.012(1), F.S., provides that the term “agency” for purposes of ch. 287, F.S., “. . . means any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. ‘Agency’ does not include the university and college boards of trustees or the state universities and colleges.”

² Section 287.001, F.S.

The Department of Management Services (DMS) is statutorily designated as the central executive agency procurement authority and its responsibilities include: overseeing agency implementation of the ch. 287, F.S., competitive procurement process;³ creating uniform agency procurement rules;⁴ implementing the online procurement program;⁵ and establishing state term contracts.⁶ The agency procurement process is partly decentralized in that agencies, except in the case of state term contracts, may procure goods and services themselves in accordance with requirements set forth in statute and rule, rather than placing orders through the DMS.

Unless otherwise authorized by law, the Department of the Lottery must award contracts for the purchase of commodities or contractual services in excess of \$25,000 by competitive sealed bidding,⁷ with some exceptions as provided in s. 287.057(5), F.S.

Procurement Protests Generally: Section 120.57(3), F.S., specifies the procedures applicable to protesting a contract solicitation or award. An adversely affected person wishing to challenge a decision or intended decision by an agency in the procurement process must file their notice of protest within 72 hours after the posting of the notice of decision or intended decision. If protesting the terms, conditions, and specifications contained in a solicitation, the notice of protest must be filed in writing within 72 hours after the posting of the solicitation. The formal written protest must be filed within 10 days after a notice of protest is filed.⁸ Additionally, a protestor must file a bond in the amount of 1 percent of the agency's estimated amount of the contract amount.⁹ Upon receipt of a timely filed formal written protest, the agency must stop the procurement or contract award process until the protest is resolved by final agency action, unless, pursuant to s. 120.57(3)(c), F.S., the agency determines in writing that the continuance of the procurement or contract award process is necessary to avoid an immediate and serious danger to the public health, safety, or welfare.

Pursuant to s. 120.57(3)(d), F.S., after receipt of a formal written protest, the agency has 7 days to try to resolve the protest with the protesting party. If the protest is not resolved within the 7 days, and there *is not* a disputed issue of material fact, the agency may conduct an informal proceeding pursuant to s. 120.57(2). If the protest is not resolved within the 7 days, and there *is* a disputed issue of material fact, the protest is referred to the Division of Administrative Hearings (DOAH) for proceedings consistent with hearings involving disputed issues of material fact.

For procurement protests of agency action other than a rejection of all bids, the administrative law judge at the DOAH is required to conduct a *de novo* proceeding to determine if the agency's proposed action is contrary to statute, rule or policy, or the solicitation specifications.¹⁰ In the context of a solicitation protest, "the phrase '*de novo* hearing' is used to describe a form of inter-agency review. The judge may receive evidence, as with any formal hearing under

³ Sections 287.032 and 287.042, F.S.

⁴ Sections 287.032(2) and 287.042(3), (4), and (12), F.S.

⁵ Section 287.057(23), F.S.

⁶ Sections 287.042(2), F.S.; 287.056 and 287.1345, F.S.

⁷ Section 287.057(1)(a), F.S.

⁸ Section 120.57(3)(b), F.S.

⁹ Section 287.042(2)(c), F.S.

¹⁰ Section 120.57(3)(f), F.S.

section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency.”¹¹ The standard of proof in these proceedings is whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. A finding is “clearly erroneous” if the reviewing court has a “definite and firm conviction that a mistake has been committed.”¹² The contrary to competition standard requires a showing that the action complained of: (a) creates favoritism; (b) erodes public confidence that contracts are awarded equitably and economically; (c) causes the procurement process to be genuinely unfair or unreasonable; or (d) is unethical, dishonest, illegal, or fraudulent.¹³ An arbitrary decision is one not supported by facts or logic, or is despotic. A capricious action is one which is taken without thought or reason or irrationally.¹⁴

The standard of review for bid protests of the rejection of all bids is lower because such action treats all bidders equally and is thus subject to less scrutiny than when an agency treats bidders differently. An agency’s decision to reject all bids will only be overturned if the agency’s action is illegal, arbitrary, dishonest, or fraudulent.

Procurement Protests and the Department of the Lottery: Pursuant to s. 24.109, F.S., the provisions of s. 120.57(2), F.S., above, apply to the Department of the Lottery with the following exceptions:

- A formal written protest of any decision, intended decision, or other action subject to protest shall be filed within 72 hours after receipt of notice of the decision, intended decision, or other action.
- As an alternative to any provision in s. 120.57(3)(c), F.S., the Department of the Lottery may proceed with the bid solicitation or contract award process when the secretary of the department sets forth in writing particular facts and circumstances which require the continuance of the bid solicitation process or the contract award process in order to avoid a substantial loss of funding to the state or to avoid substantial disruption of the timetable for any scheduled lottery game.

III. Effect of Proposed Changes:

The bill adds to s. 24.109(2), F.S., a new paragraph (b), which provides that in a competitive procurement protest involving the Department of the Lottery, including the rejection of all bids, that the administrative law judge may not conduct a de novo proceeding, but must review the intended agency action to determine if the action is illegal, arbitrary, dishonest, or fraudulent.

The change raises the standard of review for protests of procurements undertaken by the Department of the Lottery from the higher standard applicable to all agencies (“clearly erroneous, contrary to competition, arbitrary, or capricious”), to the lower standard currently

¹¹ *State Contracting and Engineering Corporation v. Department of Transportation*, 709 So.2d 607, 609 (Fla. 1st DCA 1998), citing *Intercontinental Properties, Inc. v. State Department of Health and Rehabilitative Services*, 606 So.2d 380 (Fla. 3^d DCA 1992).

¹² *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

¹³ *Education And Youth Services v. Department Of Juvenile Justice*, Case No. 05-2447BID, 2005 WL 3733797, (Fla. Div. Admin. Hrgs. Dec. 12, 2005).

¹⁴ *Agrico Chemical Co. v. State Department of Environmental Regulation*, 365 So.2d 759, 793 (Fla. 1st DCA 1978)

applicable in reviews of agency rejection of all bids (“illegal, arbitrary, dishonest, or fraudulent”).

The effect of the change means that in a solicitation protest in which the actions taken by the Department of Lottery are found by an administrative law judge to be contrary to competition or clearly erroneous, but not illegal, arbitrary, dishonest, or fraudulent, the actions taken by the Department of the Lottery would be affirmed.

It is unclear how an administrative law judge at the DOAH will make findings of fact in procurement protests without conducting a *de novo* proceeding. Conducting such a proceeding is precisely what the DOAH is generally charged with doing in procurement protests, as this excerpt from a recent DOAH recommended order illustrates:

Because administrative law judges are the triers of fact charged with resolving disputed issues of material fact based upon the evidence presented at hearing, and because bid protests are fundamentally *de novo* proceedings, the undersigned is not required to defer to the letting authority in regard to any findings of objective historical fact that might have been made in the run-up to preliminary agency action. It is exclusively the administrative law judge's responsibility, as the trier of fact, to ascertain from the competent, substantial evidence in the record what actually happened in the past or what reality presently exists, as if no findings previously had been made.¹⁵

The bill would take effect July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

¹⁵ Supply Chain Concepts v. Miami-Dade County School Board and School Food Service Systems, Inc., Case No. 05-4571BID, 2006 WL 352220, (Fla. Div. Admin. Hrgs. Feb. 13, 2006).

B. Private Sector Impact:

None.

C. Government Sector Impact:

The higher standard of review applicable to procurement protests may reduce legal costs for the Department of the Lottery.¹⁶

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

¹⁶ According to OPPAGA Report No. 02-11, *Justification Review: Sale of Lottery Products Program, Department of the Lottery*, the Department of the Lottery estimates small procurement protests typically cost \$6,000, medium \$23,000 and large procurement protests may cost over \$100,000.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
