

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill reduces the scope of an administrative law judge’s ability to review Department of Lottery actions with regard to bid protests.

Safeguard individual liberty – The bill modifies the legal rights of private parties interacting with the Department of the Lottery.

B. EFFECT OF PROPOSED CHANGES:

Agency Procurement and Protests Generally

Chapter 287, F.S., governs agency¹ procurement of commodities and contractual services. The statute requires fair and open competition among vendors, as indicated in the legislative intent language contained in s. 287.001, F.S. In that section, the Legislature states that a fair and open process is necessary in order to “reduce the appearance and opportunity for favoritism and inspire... public confidence that contracts are awarded equitably and economically.”

The Department of Management Services (DMS) is statutorily designated as the central procurement authority for executive agencies. Its responsibilities include: overseeing agency implementation of procurement processes;² creating uniform agency procurement rules;³ implementing the online procurement program;⁴ and establishing state term contracts.⁵ 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.⁶

Unless otherwise authorized by law, the Department of the Lottery (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.

Bid protests are conducted in accordance with chapter 120, F.S., the Administrative Procedure Act. Specifically, s. 120.57(3), F.S., provides detailed provisions relating to bid protests. The section requires that the public be notified of agency actions regarding protests⁸ and that a 72-hour window of opportunity be provided for affected entities to file a notice of intent to protest.⁹ Upon receipt of such notice, the agency is typically required to stop the procurement process until the protest is resolved.¹⁰ If the protest is not resolved informally, it must be referred to the Division of Administrative Hearings

¹ For purposes of Chapter 287, F.S., “agency” 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 Sections 287.032 and 287.042, F.S.

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

⁴ Section 287.057(23), F.S.

⁵ Sections 287.042(2), 287.056, and 287.1345, F.S.

⁶ Section 287.056, F.S.

⁷ Section 287.057(1)(a), F.S.

⁸ Section 120.57(3)(a), F.S.

⁹ Section 120.57(3)(b), F.S.

¹⁰ Section 120.57(3)(c), F.S.

(DOAH) if there are disputed issues of material fact,¹¹ or an agency hearing officer if there are no disputes over material facts.¹²

When there are material facts in dispute and the case is referred to DOAH, the administrative law judge serves as the trier of fact.¹³ That is, the DOAH judge receives evidence from all parties and makes a determination of the facts. This process is detailed in s. 120.57(1), F.S., entitled "Additional Procedures Applicable to Hearings Involving Disputed Issues of Material Fact." Sections 120.57(1)(j) - (k), F.S., excerpted below, contain detailed requirements regarding the DOAH judge's obligations to determine facts:

(j) Findings of fact shall be based upon a preponderance of the evidence... and shall be based exclusively on *the evidence of record* and on matters officially recognized.

(k) The presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order. *All proceedings conducted pursuant to this subsection shall be de novo.* The agency shall allow each party 15 days in which to submit written exceptions to the recommended order....

(Emphasis added.) These sections indicate that, in determining disputed issues of fact, it is necessary to receive evidence and review the evidence in a *de novo* proceeding. *De novo* means "Anew; afresh; a second time."¹⁴ A "*de novo* trial" means "trying a matter anew; as if it had not been heard before and as if no decision had been previously rendered."¹⁵ In an administrative law context, a *de novo* review of disputed facts requires the judge to receive and review evidence from both parties and evaluate that evidence, ignoring the agency's previous internal rulings on the disputed fact(s).

As a result of this *de novo* review, the judge must determine whether the agency's action was "clearly erroneous, contrary to competition, arbitrary, or capricious."¹⁶ If the agency's action was to dismiss all bids received (in effect, canceling the bid and awarding no contract), the standard of review is raised to "illegal, arbitrary, dishonest, or fraudulent."

Department of Lottery Procurement

The Lottery is unique among agencies in that it is granted authority to create its own procurement code if it so desires. Section 24.105(13), F.S., grants the Lottery authority to:

perform any of the functions of the Department of Management Services under chapter...287, or any rules adopted [thereunder]. If the Department finds, by rule, that compliance... would impair or impede the effective or efficient operation of the lottery, the Department may adopt rules providing alternative procurement procedures.

Section 24.109, F.S., requires Lottery to follow the Administrative Procedure Act, as other agencies are required, but again Lottery is granted certain exceptions. The Lottery may proceed with a bid, solicitation, or contract award process notwithstanding the filing of a notice of intent to protest.¹⁷ This

¹¹ Section 120.57(3)(d)3., F.S.

¹² Section 120.57(3)(d)2., F.S.

¹³ Section 120.57(1)(b), F.S.

¹⁴ *Black's Law Dictionary*, 6th ed. (West Publishing, 1990).

¹⁵ *Id.*

¹⁶ Section 120.57(3)(f), F.S.

¹⁷ See s. 120.57(3)(c), F.S.

'over-ride' is permitted when the Secretary of the Lottery 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."¹⁸

Proposed Changes

The bill makes the following addition to the Lottery's procurement statute:¹⁹ "In a competitive procurement protest... the administrative law judge shall *not* conduct a de novo proceeding but instead shall review the intended agency action to determine if the agency action is illegal, arbitrary, dishonest, or fraudulent." (Emphasis added.)

The bill denies an administrative law judge the opportunity to review evidence *de novo* and raises the standard of review for protests of procurements undertaken by the Lottery from the higher standard applicable to all agencies ("clearly erroneous, contrary to competition, arbitrary, or capricious"), to the lower standard currently applicable in reviews of agency rejection of all bids ("illegal, arbitrary, dishonest, or fraudulent").

C. SECTION DIRECTORY:

Section 1 amends 24.109, F.S., changing the standard of review for Department of Lottery bid protests.

Section 2 provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not create, modify, amend, or eliminate a state revenue source.

2. Expenditures:

The higher standard of review applicable to procurement protests may reduce legal costs for the Department of the Lottery. According to *OPPAGA Report No. 02-11, Justification Review: Sale of Lottery Products Program, Department of the Lottery*, the Lottery estimates that small procurement protests typically cost \$6,000, medium \$23,000, and large procurement protests may cost over \$100,000.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

The bill does not create, modify, amend, or eliminate a local expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

¹⁸ Section 24.109(2)(b), F.S.

¹⁹ Section 24.109, F.S.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

In the event that a future Lottery bid protest involves a disputed issue of material fact, this bill appears to prevent the administrative law judge from making any findings contradicting the agency. Without the ability to conduct a *de novo* review of the evidence, the judge is constrained to accept the findings of the previous trier of fact – in this case, the previous trier of fact is the agency against whom a protest has been lodged. In effect, the change asserts that the Lottery’s determination of disputed facts is always correct. A protesting party may not be able to have contrary evidence reviewed, as a result, a protesting party may claim that the proposed statute is unconstitutional and denies the party due process.

The matter of *de novo* reviews and bid protests has recently been discussed in case law:

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.²⁰

The issue is further confused by the fact that the proposed legislation relies on the introductory phrase contained in the current s. 24.109(2), F.S.: “The provisions of s. 120.57(3) apply to the [Lottery’s] contracting process, except...” In the bill, the new exception is the denial of a *de novo* review. However, the denial of a *de novo* review may reach beyond just s. 120.57(3), F.S., and also affect s. 120.57(1), F.S., which states that “[a]ll proceedings conducted pursuant to this subsection shall be *de novo*.” If an administrative law judge cannot determine how to review evidence of disputed issues of fact, he or she may determine that the *de novo* review permitted (indeed, *required*) by s. 120.57(1), F.S., cannot be overridden by a Lottery statute limited in application to overriding s. 120.57(3), F.S.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

²⁰ *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).

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Not applicable.