HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 755 Department of the Lottery
SPONSOR(S): Clarke
TIED BILLS: **IDEN./SIM. BILLS:** SB 1942

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Governmental Operations Committee	5 Y, 1 N	Brown	Williamson
2) Business Regulation Committee			
3) State Administration Appropriations Committee			
4) State Administration Council			
5)			

SUMMARY ANALYSIS

The bill modifies the standard of review for competitive procurement protests arising from the Department of the Lottery. The bill bars administrative law judges from performing *de novo* review of agency actions leading up to the protest, and requires that the judge consider only whether the agency's final action was "illegal, arbitrary, dishonest, or fraudulent."

The Department of the Lottery suggests that the bill will have an indeterminate but positive fiscal impact, due to savings in legal fees incurred.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill reduces the scope of an administrative law judge's review of bid protests at Department of Lottery.

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 agency[1] 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 protests[8] 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 modifies the standard of review for protests of procurements undertaken by the Lottery from the standard applicable to all agencies ("clearly erroneous, contrary to competition, arbitrary, or capricious"), to the higher 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 changed 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:

The matter of the limitations and challenges of de novo review is unclear even under the current s. 120.57(3), F.S. There are opposing concepts as to what the very concept of a "de novo proceeding" actually means, in the context of a bid protest. One argument suggests that in the agency review process, a "de novo proceeding" is actually a hybrid trial-appellate process by which the court reviews agency actions but does not substitute its own judgment for the agency's. In contrast, other commentary suggests that bid protests are fundamentally "true" de novo proceedings.

De Novo means "review for correctness"

A Division of Administrative Hearings (DOAH) judge has analyzed the de novo problem in *R.N. Expertise v. Miami-Dade School Board, et al*.[20] In that case, the court begins by citing s. 120.57(3)(f), F.S., which spells out the rules for decisions applicable in bid protests. In part, the statute provides:

> *In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.*

In his analysis, the judge states, "These two sentences defy facile interpretation…. Confusion initially may be engendered by the statute's use of the term "de novo proceeding."[21] Typically, a de novo trial or hearing involves "[t]rying a matter anew; the same as if it had not been heard before and as if no decision had previously been rendered." *Black's Law Dictionary* (5th ed. 1979) (defining "de novo trial").

If the framers of s. 120.57(3), F.S., had intended the term "de novo proceeding" to have its customary legal meaning, it has been suggested that they presumably "would have written something like: the administrative law judge shall conduct a de novo proceeding to determine which of the competing offerors, if any, should be awarded the contract."[22] But instead, the drafters made it clear that the "de novo proceeding" must focus on the agency's "proposed action" and produce a recommended order to uphold or override such action. However, this creates confusion. "[S]uch a review of prior action is not a trial-level duty; it is an appellate function. And moreover, appellate-level proceedings are rarely… de novo proceedings…"[23]

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[20] *R.N. Expertise v. Miami-Dade School Board, et al.,* Case No. 01-2663BID, Feb. 4, 2002

[21] *Id.*

[22] *Id.*

[23] *Id.* Under chapter 120, F.S., the "trial-level duty" actually occurs within the agency, as part of a formal or informal review. Removal to DOAH is generally seen as the appellate procedure. [See generally ss. 120.569 and 120.57, F.S.]

In *State Contracting and Engineering Corp. v. Department of Transportation*,[24] the First District identified this confusion over the term "de novo proceeding" and determined that, as used in the statute, the term "describe[s] a form of intra-agency review… The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." The object is not to substitute the court's procurement decision-making with the agency's procurement decision-making.[25] "Although the hearing was called a de novo proceeding, it merely meant that the aggrieved party was given an evidentiary hearing during which all parties had a full and fair opportunity to develop an evidentiary record for administrative review purposes."[26] As a result, the court reasoned "the de novo proceeding contemplated in Section 120.57(3), F.S., might be envisaged, oxymoronically, as an 'appellate trial,' a hybrid proceeding in which evidence is received, factual disputes are settled, legal conclusions made - and prior agency action is reviewed for correctness."[27]

<u>De Novo means "de novo"</u>
The issue has been discussed, as recently as February 2006, in case law emanating from DOAH:

> 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.[28]

Clearly this administrative law judge takes a different view of the matter than the judge in the *R.N. Expertise* case cited frequently above.

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.

<u>Conclusion</u>
Ultimately, it is not entirely clear what the term "de novo proceeding" means, in the current s. 120.57(3), F.S., framework. Irrespective of this confusion at the DOAH level of review, the proposed legislation would remove any de novo review from the administrative law judge's purview.

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[24] *State Contracting and Engineering Corp. v. Department of Transportation*, 709 So. 2d 607, at 609 (Fla. 1st DCA 1998).
[25] As the court in *R.N. Expertise* noted, "[That] does not mean, as the hearing officer apparently thought, that the hearing officer sits as a substitute for the Department and makes a determination whether to award the bid *de novo.* Instead, the hearing officer sits in a review capacity, and must determine whether the bid review criteria … have been satisfied."
[26] *State Contracting and Engineering Corp. v. Department of Transportation*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).
[27] The court continues: "The first district's interpretation of 'de novo proceeding' is sensible and almost certainly implements the legislative intent. After all, if bid protests were de novo proceedings in the usual sense, then administrative law judges might become, de facto, the state's <u>über</u>-purchasing agents; it is doubtful the statute's drafters desired that result. The problem is, once bid protests are conceived to be 'appellate trials,' new questions arise, and chief among them is this: What are the standards of review?" [*R.N. Expertise v. Miami-Dade School Board, et al.,* Case No. 01-2663BID, Feb. 4, 2002.]
[28] *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. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.