Special districts, local preference policy

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Subject:
Special districts, local preference policy

Mr. George T. Reeves
Davis, Schnitker, Reeves & Browning, P.A.
Post Office Drawer 652
Madison, Florida 32341

RE: SPECIAL DISTRICTS--COMPETITIVE BIDDING--PROCUREMENT--WATER MANAGEMENT DISTRICTS--whether water management district is authorized to adopt policy of local preference in procurement of goods and services. ss. 255.20, 287.055, and Ch. 373, Fla. Stat.

Dear Mr. Reeves:

On behalf of the Governing Board of the Suwannee River Water Management District, you have asked for my opinion on substantially the following question:

Is the Governing Board of the Suwannee River Water Management District authorized to enact a policy granting a local preference in the procurement of goods and services to businesses which are located within the boundaries of the Suwannee River Water Management District?[1]

In sum:

The Suwannee River Water Management District is limited to utilizing the procedures set forth in the statutes for the procurement of goods and services including the Consultants' Competitive Negotiation Act and has no authority to enact a policy granting a local preference to businesses located within the boundaries of the district except to the extent the district can identify a statutory authorization for local preference consideration.

The Suwannee River Water Management District is a multi-county special taxing district created pursuant to section 373.069, Florida Statutes,[2] for the purpose of managing that geographical portion of Florida's water resources and managing those resources in a sustainable manner.[3] The district is recognized as an independent special district by the Division of Community Development, Florida Department of Economic Opportunity.[4]

While established as an independent special district, the powers of a water management district as an administrative agency are measured by the terms of the act under which it is organized and it can exercise no authority that has not clearly been granted to it by the Legislature or which is necessarily implied from the powers conferred.[5] Pursuant to sections 373.113 and 373.171(1)(c), Florida Statutes, the governing boards of water management districts are

authorized to issue orders and adopt rules to implement the provisions of the act. Further, the governing board is authorized to provide for district works:

"In order to carry out the works for the district, and for effectuating the purposes of this chapter, the governing board is authorized to clean out, straighten, enlarge, or change the course of any waterway, natural or artificial, within or without the district; to provide such canals, levees, dikes, dams, sluiceways, reservoirs, holding basins, floodways, pumping stations, bridges, highways, and other works and facilities which the board may deem necessary; to establish, maintain, and regulate water levels in all canals, lakes, rivers, channels, reservoirs, streams, or other bodies of water owned or maintained by the district; to cross any highway or railway with works of the district and to hold, control, and acquire by donation, lease, or purchase, or to condemn any land, public or private, needed for rights-of-way or other purposes, and may remove any building or other obstruction necessary for the construction, maintenance, and operation of the works; and to hold and have full control over the works and rights-of-way of the district."

Among the general powers and duties of the governing board of a water management district is the power to enter into contracts.[6]

It is the general rule with regard to competitive bidding by public agencies that, in the absence of any legislative requirements regarding the method of awarding public contracts, public officers may exercise reasonable discretion, and a contract may be made by any practicable method that will safeguard the public interest.[7] You have not specified the types of goods and services to which the water management district's proposed policy may apply; however, the Florida Statutes contain extensive direction to special districts regarding bidding procedures for contractual services, goods and commodities, and personal property which would control and which contain local preference provisions upon which the district must rely.

The statutory directives requiring special districts to competitively award contracts for public construction projects are contained in sections 255.20 and 287.055, Florida Statutes. Section 255.20, Florida Statutes, requires counties, municipalities, special districts as defined in chapter 189, or other political subdivisions[8] of the state that are seeking to construct or improve public construction works to competitively award these projects.[9] Such projects must be competitively awarded to a licensed contractor when the project is estimated to have construction costs of more than $300,000. The term "competitively award" is defined to mean "to award contracts based on the submission of sealed bids, proposals submitted in response to a request for proposal, proposals submitted in response to a request for qualifications, or proposals submitted for competitive negotiation."[10] The statute expressly allows contracts for construction management services, design/build contracts, continuation contracts based on unit prices, "and any other contract arrangement with a private sector contractor permitted by any applicable municipal or county ordinance, by district resolution, or by state law."[11] Exceptions to the statute are recognized for emergency situations.[12]

Section 255.20, Florida Statutes, making provision for letting contracts for certain public projects, contains a local preference requirement in subsection (3):

"All county officials, boards of county commissioners, school boards, city councils, city commissioners, and all other public officers of state boards or commissions that are charged

with the letting of contracts for public work, for the construction of public bridges, buildings, and other structures must specify lumber, timber, and other forest products produced and manufactured in this state if such products are available and their price, fitness, and quality are equal. This subsection does not apply to plywood specified for monolithic concrete forms, if the structural or service requirements for timber for a particular job cannot be supplied by native species, or if the construction is financed in whole or in part from federal funds with the requirement that there be no restrictions as to species or place of manufacture."

This statute also makes reference to local preference legislation, *i.e.*, "[t]his subsection does not preempt the requirements of any small-business or disadvantaged-business enterprise program or any local-preference ordinance." However, as discussed more fully herein, special districts, as limited purpose local governmental entities, have no home rule power to adopt ordinances.

The Consultants' Competitive Negotiation Act (CCNA), section 287.055, Florida Statutes, applies to political subdivisions[13] such as the Suwannee River Water Management District and requires that certain professional services be acquired utilizing the competitive selection procedures set forth in the statute. The statute includes procedures for competitive selection and, in subsection (4)(b) sets forth the factors an agency may consider in determining whether a firm is qualified to perform the required services:

"In determining whether a firm is qualified, the agency shall consider such factors as the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; *location*; recent, current, and projected workloads of the firms; and the volume of work previously awarded to each firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms." (e.s.)

Thus, the location of a firm may be considered by the agency in evaluating qualifications to perform the services under the CCNA.

The Suwannee River Water Management District is also subject to the provisions of section 287.084, Florida Statutes, which provides preference to Florida businesses in the purchasing of personal property:

"(1)(a) When an agency, university, college, school district, or other political subdivision of the state is required to make purchases of personal property through competitive solicitation and the lowest responsible and responsive bid, proposal, or reply is by a vendor whose principal place of business is in a state or political subdivision thereof which grants a preference for the purchase of such personal property to a person whose principal place of business is in such state, then the agency, university, college, school district, or other political subdivision of this state shall award a preference to the lowest responsible and responsive vendor having a principal place of business within this state, which preference is equal to the preference granted by the state or political subdivision thereof in which the lowest responsible and responsive vendor has its principal place of business. In a competitive solicitation in which the lowest bid is submitted by a vendor whose principal place of business is located outside the state and that state does not grant a preference in competitive solicitation to vendors having a principal place of business in that state, the

preference to the lowest responsible and responsive vendor having a principal place of business in this state shall be 5 percent."

Section 287.082, Florida Statutes, provides that commodities manufactured, grown, or produced in Florida are to be given preference in the sealed bidding process.

While this office has, on several occasions, recognized the authority of local governments to adopt ordinances or regulations establishing a local preference for procurement of goods and services, these opinions have related to the authority of local governments with home rule powers such as municipalities, counties, and, to a limited extent, school districts.[14] Unlike counties or municipalities which have been granted home rule powers, special districts possess no inherent or home rule powers. Created by statute for a specific, limited purpose, the Suwannee River Water Management District may exercise only such power and authority as it has been granted by law. Thus, when presented with the issue of the authority of a water management district to adopt alternative or "hybrid" procedures for such things as public construction projects, this office has concluded that no such authority exists in the absence of statutory authority.[15]

In sum, it is my opinion that the Suwannee River Water Management District is limited to utilizing the procedures set forth in the statutes for the procurement of goods and services and has no authority to enact a policy granting a local preference to businesses located within the boundaries of the district except to the extent the district can identify a statutory authorization for local preference consideration.

Sincerely,

Pam Bondi
Attorney General

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[1] I note that you have asked a second question premised on an affirmative response to your first question (set out above). In light of my response to your initial question, no consideration of your second question is necessary.

[2] *See* s. 373.069(1)(b), Fla. Stat.

[3] Section 373.016, Fla. Stat., provides the declaration of policy for the "Florida Water Resources Act of 1972," *i.e.*, Ch. 373, Fla. Stat.

[4] *See* Suwannee River Water Management District, Official List of Special Districts Online, Division of Community Development, Florida Department of Economic Opportunity.

[5] *See Florida Elections Commission v. Davis*, 44 So. 3d 1211 (Fla. 1st DCA 2010), *State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So. 2d 628 (Fla. 1st DCA 1974), and *e.g.*, Op. Att'y Gen. Fla. 08-02 (2008). *Cf. Forbes Pioneer Boat Line v. Board of Commissioners of*

Everglades Drainage District, 82 So. 2d 346 (Fla. 1919); Ops. Att'y Gen. Fla. 80-55 (1980), 83-44 (1983), and 74-169 (1974), recognizing that special districts possess only such powers as have been expressly granted by law or necessarily implied therefrom.

[6] *See* s. 373.083(1), Fla. Stat.

[7] *See, e.g.*, Ops. Att'y Gen. Fla. 93-28 (1993) and 93-83 (1993) and the cases cited therein.

[8] *See* s. 1.01(8), Fla. Stat., defining "political subdivision" to include "all other districts in this state."

[9] Section 255.20(1), Fla. Stat.

[10] Section 255.20(1), Fla. Stat.

[11] *Id.*

[12] Section 255.20(1)(c)1., Fla. Stat.

[13] The definition of "[a]gency" for purposes of the CCNA includes "a political subdivision" and, as discussed herein, the definition of "political subdivision" includes special districts. See n.8 *supra*.

[14] *See* Ops. Att'y Gen. Fla. 02-03 (2002) and 01-65 (2001), discussing school boards and competitive bidding; Inf. Op. to the Hon. Dana Young, dated August 24, 2011, and Inf. Op. to the Hon. John Tobia, dated December 1, 2010, discussing local governments and local preference legislation generally; *and see City of Port Orange v. Leechase Corp.*, 430 So. 2d 534 (Fla. 5th DCA 1983) (legality of municipal bidding ordinance giving a local preference to bidders with principal place of business within municipality).

[15] *See* Op. Att'y Gen. Fla. 11-21 (2011), concluding that the Southwest Florida Water Management District is limited to utilizing the procedures set forth in the statutes for public construction works and for construction management services and that the district has no authority to develop a "hybrid" model for awarding construction projects in the absence of statutory authority to do so.