Sunshine Law, ratifying invalid action

Number: AGO 2012-31

Date: September 20, 2012

Subject:
Sunshine Law, ratifying invalid action

Mr. James M. Messer
City Attorney
City of Pensacola
Post Office Box 12910
Pensacola, Florida 32521

RE: MUNICIPALITIES—GOVERNMENT IN THE SUNSHINE—AUDITS—authority to ratify invalid action. ss. 218.39 and 218.391, Fla. Stat.

Dear Mr. Messer:

Upon the direction of the City Council, you ask the following question:

Does an audit committee's ratification of a request for proposals which was created and issued by the county's financial officer and found to be defective validate the previously issued request for proposals?

In sum:

An audit committee's statutorily prescribed function to exercise its discretion to create a request for proposals may not be delegated to a subordinate or other entity, absent statutory authorization. The committee may not, therefore, ratify a defective request for proposals which was created and issued by the county's financial officer contrary to the requirements of the law. A mere perfunctory or ceremonial acceptance of the previous action will not validate the defective request for proposals.

You state that the city's financial officer issued a request for proposals (RFP) for the city's annual financial audit required by section 218.39, Florida Statutes. You indicate that after the RFP had been issued an audit committee was created and the committee subsequently ratified it. The RFP issued by the financial officer apparently contained factors to use for the evaluation of the audit services which were not established by the audit committee, as required by the statute, but were ratified by the committee after the RFP was issued. According to your letter, the RFP also contained inaccurate information regarding the city's authority relating to the audit selection process.[1] Despite the irregularities, you indicate that you have advised the city council that the RFP was properly ratified by the audit committee and, therefore, it is valid and in compliance with the requirements of section 218.39, Florida Statutes, such that the selection process may proceed.

Section 218.39, Florida Statutes, requires a local governmental entity which has not been notified by the first day of the fiscal year that a financial audit will be performed by the Auditor General to have an annual financial audit of its accounts and records completed within nine months after the end of its fiscal year by an independent certified public accountant retained by it and paid from its public funds.[2] The statute specifically applies to any municipality with revenues or the total of expenditures and expenses in excess of $250,000 (as reported on the fund financial statements) or any municipality with revenues or the total of expenditures and expenses between $100,000 and $250,000, as reported on the fund financial statements, which has not been subject to a financial audit pursuant to this subsection for the two preceding fiscal years.[3]

The procedures to be used to select an auditor are contained in section 218.391, Florida Statutes. The statute requires each local governmental entity to use specified auditor selection procedures when selecting an auditor to conduct the annual financial audit required in section 218.39, Florida Statutes.[4] The governing body of the entity, however, must first establish an audit committee, the primary responsibility of which is to assist the governing body in selecting an auditor to conduct the annual financial audit.[5] Moreover, the activities of the audit committee must be open to the public.[6] As reflected in section 218.391(3), Florida Statutes, the audit committee *shall*:

"(a) Establish factors to use for the evaluation of audit services to be provided by a certified public accounting firm duly licensed under chapter 473 and qualified to conduct audits in accordance with government auditing standards as adopted by the Florida Board of Accountancy. Such factors shall include, but are not limited to, ability of personnel, experience, ability to furnish the required services, and such other factors as may be determined by the committee to be applicable to its particular requirements.
(b) Publicly announce requests for proposals. Public announcements must include, at a minimum, a brief description of the audit and indicate how interested firms can apply for consideration.
(c) Provide interested firms with a request for proposal. The request for proposal shall include information on how proposals are to be evaluated and such other information the committee determines is necessary for the firm to prepare a proposal.
(d) Evaluate proposals provided by qualified firms. If compensation is one of the factors established pursuant to paragraph (a), it shall not be the sole or predominant factor used to evaluate proposals.
(e) Rank and recommend in order of preference no fewer than three firms deemed to be the most highly qualified to perform the required services after considering the factors established pursuant to paragraph (a). If fewer than three firms respond to the request for proposal, the committee shall recommend such firms as it deems to be the most highly qualified."

Thus, the Legislature has provided a template which must be followed by a municipality for the creation of and performance of functions by an audit committee under section 218.391, Florida Statutes, before the municipality may choose an auditor. Where the Legislature has prescribed the manner in which something is to be done, it is, in effect, a prohibition against its being done in any other manner.[7]

You cite to *Frankenmuth Mutual Insurance Company v. Magaha*,[8] however, for the proposition

that the audit committee may ratify the RFP which was created and released by the county's financial officer. In *Frankenmuth*, the Supreme Court of Florida considered whether a county commission could approve or ratify a contract that had been executed without authority by the county's comptroller. Citing to several early cases and a general treatise on the power of municipal corporations, the Court determined that the board of county commissioners had the power to approve the agreement after it was executed.[9]

The *Frankenmuth* Court stated, however, "for a local government to properly ratify a previously executed, unauthorized agreement, the agreement must be ratified 'in the same manner . . . in which it might have been originally adopted.'"[10]

In this instance, section 218.391, Florida Statutes, contemplates the creation of an audit committee which is responsible for the formulation of factors to be used in evaluating a firm's ability to perform auditing functions and such a committee must carry out its functions at public meetings. The committee must publicly announce requests for proposals and provide interested firms with information on how proposals are to be evaluated and such other information as the committee determines is necessary for the firm to prepare a proposal. The committee must then rank and recommend in order of preference at least three firms it deems the most highly qualified to perform the required auditing services. After the audit committee has fulfilled these functions, the governing body may select one of the recommended firms and negotiate a contract.

A mere perfunctory ratification or approval of the financial officer's action which should have been performed by the audit committee at a public meeting would not appear to fulfill the audit committee's responsibilities and duties under the statute. It is questionable, moreover, whether the audit committee's statutorily prescribed functions may be delegated to the financial officer. Absent statutory authority, the discretionary authority of a public official or entity may not be delegated to a subordinate.[11]

As the courts have found, independent final action taken at a public meeting is the only means to cure the defect created by action taken outside of the sunshine.[12] Moreover, there is a distinction between the ratification of a contract which should have been signed by a county commission and the approval of the unauthorized performance of statutorily prescribed duties which should have been undertaken at a public meeting.

Accordingly, it is my opinion that the audit committee may not ratify or approve the action taken by the financial officer, absent statutory authority authorizing the delegation of the committee's duties. A mere perfunctory or ceremonial acceptance of the previous action will not validate the defective request for proposals.

Sincerely,

Pam Bondi
Attorney General

PB/tals

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[1] You have provided a list of irregularities and misstatement of facts present in the RFP. This office will not address the impact of the alleged irregularities, as this office does not comment upon the provisions of local codes or contracts.

[2] Section 218.39(1), Fla. Stat.

[3] Section 218.39(1)(b), Fla. Stat.

[4] Section 218.391(1), Fla. Stat.

[5] Section 218.391(2), Fla. Stat.

[6] *Id.*

[7] *See Alsop v. Pierce*, 19 So. 2d 799, 805-806 (Fla. 1944) ("When the Legislature has prescribed the mode, that mode must be observed. When the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way"); *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976).

[8] 769 So. 2d 1012 (Fla. 2000).

[9] *Id.* at 1019-1029, citing *Ramsey v. City of Kissimmee*, 139 Fla. 107, 111-13, 190 So. 474, 476-477 (1939); *Brown v. City of St. Petersburg*, 111 Fla. 718, 720, 153 So. 140 (1933); *cf. City of Panama City v. T&A Utility Contractors*, 606 So. 2d 744, 747 (Fla. 1st DCA 1992) (city ratified city manager's unauthorized contract between city and third party); *Tolar v. School Board of Liberty County*, 398 So. 2d 427, 428-429 (Fla. 1981) (school board's action taken in violation of Sunshine Law could be later ratified if taken in accordance with such law); 10A McQuillin, *The Law of Municipal Corporations*, s. 29.104 at 63 (3d ed. 1999) (general rule that whatever acts public officials may do or authorized to do in first instance may subsequently be adopted or ratified with the same effect as though properly done under previous authority).

[10] 769 So. 2d at 1021, citing *Ramsey v. City of Kissimmee, supra* at 477, and *Broward County v. Conner*, 660 So. 2d 288, 290 (Fla. 4th DCA 1995) (if county could not enter into contract without taking action at a public meeting, it necessarily follows that actions of the county's attorneys could not bind the county in the absence of proper commission approval).

[11] *See* Op. Att'y Gen. Fla. 88-61 (1988), citing Op. Att'y Gen. Fla. 74-116 (1974) and 67 C.J.S. *Officers* s. 194). *See also State v. Inter-American Center Authority*, 84 So. 2d 9 (Fla. 1955), recognizing that absent statutory authority, public officer cannot delegate powers, even with court approval.

[12] *See Finch v. Seminole County School Board*, 995 So. 2d 1068, 1073 (Fla. 5th DCA 2008); *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So. 2d 694 (Fla. 3d DCA 1988) (only a full open hearing will cure a defect; a violation of the Sunshine Law will not be cured by a perfunctory ratification of the action taken outside the sunshine).