

Special Disabilities Trust Fund Privatization Comm'n

Number: INFORMAL

Date: March 17, 1999

Subject:

Special Disabilities Trust Fund Privatization Comm'n

Ms. Rene Lewis, Chairman
Special Disability Trust Fund Privatization Commission
535 John Knox Road
Tallahassee, Florida 32399-4101

RE: Special Disabilities Trust Fund--Government in the Sunshine Law--Bids--responsibilities of Special Disabilities Trust Fund Privatization Commission. s. 440.49, Fla. Stat. (1998 Supp.)

Dear Ms. Lewis:

On behalf of the Special Disabilities Trust Fund Privatization Commission (commission), you ask several questions relating to the trust fund. Attorney General Butterworth has asked me to respond to your letter.

The Legislature created the Special Disability Trust Fund (trust fund) as an incentive for employers to hire workers with pre-existing physical impairments. In 1998, the Legislature amended section 440.49, Florida Statutes, to create the Special Disability Trust Fund Privatization Commission to study the feasibility of privatizing all, or portions of, the trust fund.

Your first inquiry concerns whether meetings of the panels established by the Special Disabilities Trust Fund Privatization Commission to create requests for proposal and evaluate vendor responses are subject to section 286.011, Florida Statutes, the Government in the Sunshine Law.

According to your letter, the commission has directed its coordinator, with the assistance of the Division of Workers' Compensation, to draft preliminary Requests for Proposal (RFP). The commission has appointed two separate RFP panels, composed of various agency representatives, to review and revise the preliminary drafts.[1] The panels' final drafts will be submitted to the commission for final approval and issuance by the commission. The RFP panels are also responsible for evaluating vendor responses to any RFP issued.

Section 286.011, Florida Statutes, Florida's Government in the Sunshine Law, requires that meetings of public boards or commissions must be open to the public. While meetings of staff of covered boards or commissions are not ordinarily subject to section 286.011, Florida Statutes,[2] when staff members cease to function as staff and are appointed to a committee with delegated authority to make recommendations to a board or official, they lose their staff identity while working on the committee, and the Sunshine Law applies to the committee.

In *Silver Express Company v. Miami-Dade Community College*,^[3] the district court held that a committee composed of staff and one outside person that was created by a college purchasing director to assist and advise her in evaluating contract proposals was subject to the Sunshine Law. The committee's job to "weed through the various proposals, to determine which were acceptable and to rank them accordingly," was sufficient to bring the committee within the scope of the law. The court found that "[g]overnmental advisory committees which have offered up structured recommendations such as here involved--at least those recommendations which eliminate opportunities for alternative choices by the final authority, or which rank applications for the final authority--have been determined to be agencies governed by the Sunshine Law."^[4]

Section 440.49(13)(a), Florida Statutes (1998 Supplement), requires the commission to develop and issue a request for proposal to transfer the liabilities of the Special Disability Trust Fund to a qualified entity. The commission is also authorized to contract with an administrator to "review, allow, deny, compromise, controvert, and litigate claims of the Special Disability Trust Fund[.]"^[5] Thus, the commission has delegated its responsibility under the statutes to develop RFPs to the two panels. These panels not only develop the RFPs for final approval by the commission but they are also responsible for evaluating vendor responses to the RFPs that are issued.

In light of the above, it appears that the panels created by the Special Disability Trust Fund Privatization Commission to create requests for proposal and evaluate vendor responses are subject to the Government in the Sunshine Law.

You next ask whether the commission, in selecting a "qualified entity," may utilize a request for information or an invitation to negotiate rather than a request for proposal.

Section 440.49(13)(a), Florida Statutes, specifically states that the commission may develop and issue an RFP to transfer the liabilities of the Special Disability Trust Fund to a qualified entity. The commission is authorized to contract with such qualified entity only if the commission determines that such an arrangement would substantially reduce costs and be more effective than the current administration of the trust fund.

The statute refers to requests for proposals. Where the Legislature has directed how a thing is to be done, the statutorily prescribed manner must be followed.^[6] While the commission may also utilize other competitive methods such as a request for information to assist it in the process, it must utilize a request for proposal to select a qualified entity.

Your third question is similar to the previous question. You ask whether the commission, in selecting an "administrator," may utilize a request for information or an invitation to negotiate rather than a request for proposal.

Section 440.49(13)(b), Florida Statutes (1998 Supplement), requires that on or by July 1, 1999, the commission develop and issue a request for proposal for the transfer and assumption of liabilities and for the administration of certain functions related to claims of the disability trust fund. An examination of the legislative history surrounding the enactment of Chapter 98-199, Laws of Florida, indicates that the statute contemplates separate requests for proposal for the administrator and the qualified entity.^[7]

As discussed in the previous question, where the Legislature has directed how a thing is to be accomplished, that method must be employed. Thus, while the commission may also utilize other competitive methods such as a request for information it must utilize a request for proposal to select an administrator of the Special Disability Trust Fund.

Your last question asks for direction in determining what constitutes reimbursement obligations of the Special Disability Trust Fund for purposes of section 440.49(13)(b), Florida Statutes (1998 Supplement).

Section 440.49(11), Florida Statutes (1998 Supplement), provides that the Special Disability Trust Fund shall not be liable for, or reimburse employers or carriers for, any case in which the accident causing the subsequent injury or death or the disablement or death from a subsequent occupational disease occurred on or after January 1, 1998. Thus the liability of the trust fund appears to be fixed and ascertainable.

Section 440.49(13)(b), Florida Statutes (1998 Supplement), states:

"The commission, in consultation with the [Division of Workers' Compensation of the Department of Labor and Employment Security], is authorized to contract with a qualified entity to assume the reimbursement obligations of the Special Disability Trust Fund for claims which have previously been accepted for reimbursement by the Special Disability Trust Fund and claims which are determined to be reimbursable by the Special Disability Trust Fund."

Under the language of the above statute, reimbursement obligations include not only those claims that have been previously accepted for reimbursement but also those claims that are determined to be reimbursable. The determination as to which claims are reimbursable or have been accepted for reimbursement involves mixed questions of law and fact that this office cannot resolve.[8] The Legislature, however, has directed the commission to contract with consultants to determine the liabilities of the Special Disability Trust Fund as of December 31, 1998.[9]

I trust that the above informal advisory comments may be of assistance.

Sincerely,

Joslyn Wilson
Director, Opinions Division

JW/tgk

[1] The panel for the "administrator" RFP includes a representative from the Department of Management Services, the Department of Labor and Employment Security, and the Department of Insurance. The panel for the "qualified entity" RFP includes various agency representatives and a financial advisor under contract with the Division of Bond Finance.

[2] See *Occidental Chemical Company v. Mayo*, 351 So. 2d 336 (Fla. 1977), *disapproved in part*

on other grounds, *Citizens v. Beard*, 613 So. 2d 403 (Fla. 1992); *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99, 101 (Fla. 1st DCA 1996) (staff personnel not subject to Sunshine Law).

[3] 691 So. 2d 1099 (Fla. 3d DCA 1997).

[4] *Id.* at 1101.

[5] Section 440.49(13)(b), Fla. Stat. (1998 Supp.).

[6] See *Alsop v. Pierce*, 19 So. 2d 799 (Fla. 1944) (express statutory direction as to how a thing is to be done is implied prohibition of its being done in any contrary manner); *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976).

[7] See Final Bill Research & Economic Impact Statement, House of Representatives Committee on Financial Services on CS/SB 1372, dated May 28, 1998.

[8] See, e.g., s. 440.49(7)(c), Fla. Stat. (1998 Supp.) (proof of claim must be filed for each notice of claim on file as of June 30, 1997, within 1 year after July 1, 1997, or the right to reimbursement of the claim will be barred); s. 440.49(7)(d), Fla. Stat. (1998 Supp.) (each notice of claim filed or refiled on or after July 1, 1997, must be accompanied by a notification fee, and a proof of claim must be filed within 1 year after the date the notice of claim is filed or refiled, together with a proof-of-claim fee, or the claim will be barred except as provided therein).

[9] Section 440.49(13)(d), Fla. Stat. (1998 Supp.). An examination of the legislative history surrounding the amendment of s. 440.49, Fla. Stat., in 1998 indicates the Division of Workers' Compensation had contracted with a private consultant to determine the trust fund liability; as of January 13, 1998, the consultant estimated the total dollar amount at \$4.05 billion undiscounted and \$1.65 billion discounted. See Final Bill Research & Economic Impact Statement, *supra*.