Audit service contract renewal

Number: INFORMAL

Date: July 13, 2018

Mr. Thomas J. Ansbro
City Attorney for Dania Beach
100 West Dania Beach Boulevard
Dania Beach, Florida 33004

Dear Mr. Ansbro:

On behalf of the City of Dania Beach, you have requested an opinion related to the City Commission's recent action involving a contract for audit services.[1] Specifically, you ask:

(Bearing in mind that the City Commission has retroactively approved an audit services contract extension or renewal, subject to the opinion of this Office), does section 218.391(8), Florida Statutes (2018), permit the City to enter into a further contract extension or renewal of its original contract with an audit services provider [for fiscal years 2018 and 2019] without using the competitive selection process specified in section 218.391(1)-(7), where the request for proposals contemplated—and the resulting written audit services contract specified—only two renewal periods [for fiscal years 2016 and 2017] which have already been utilized by the parties?

Attorney General Bondi has asked that I respond to your letter.

Background Facts

In 2013, after following the procedures required by section 218.391, Florida Statutes ("Auditor Selection Procedures Statute"), the City entered into a contract for professional audit services ("Original Contract") with the successful proposer/provider ("Provider"). This contract was authorized by section 218.391, Florida Statutes ("Auditor selection procedures"). Subsection (7) of that statute provides:

"(7) Every procurement of audit services shall be evidenced by a written contract embodying all provisions and conditions of the procurement of such services. For purposes of this section, an engagement letter signed and executed by both parties shall constitute a written contract. The written contract shall, at a minimum, include the following:
(a) A provision specifying the services to be provided and fees or other compensation for such services.
(b) A provision requiring that invoices for fees or other compensation be submitted in sufficient detail to demonstrate compliance with the terms of the contract.
(c) A provision specifying the contract period, including renewals, and conditions under which the contract may be terminated or renewed."

As required by section 218.391(7), Florida Statutes, the Original Contract specified, *inter alia*, the "fees or other compensation" the Provider would receive for the services described and "the

contract period, including renewals, and conditions under which the contract may be terminated or renewed."[2]

The Original Contract, consistent with the May 2013 Request for Proposals for Professional Auditing Services,[3] expressly provided for two "separate, optional" renewals of one year each (for fiscal years ending September 30, 2016 and September 30, 2017), "subject to City Commission approval," and specified the compensation applicable to each such renewal period.[4] No additional contract renewals were either contemplated by the request for proposals or included in the Original Contract. The City and the Provider have already utilized both renewals provided for in the Original Contract.

At a City Commission meeting held on March 27, 2018, upon considering a noticed agenda item seeking the Commission's approval to solicit proposals for professional auditing services for the upcoming 2018, 2019, and 2020 fiscal years (with two, one-year optional renewals),[5] a member of the Commission, instead, spontaneously proposed to extend the Original Contract for an additional two years (*i.e.*, for fiscal years ending September 30, 2018 and September 30, 2019).[6] The City ultimately voted 3-2 to authorize a contract for audit services with the Provider without using competitive auditor selection procedures—subject to contract cancellation upon receipt of an opinion from this office interpreting section 218.391 as disallowing such action[7]—for the two additional years, and at an increased, previously unspecified rate of compensation.[8] In considering this action in light of section 218.391, not only subsection (7), but also subsection (8), is relevant. It provides:

"(8) Written contracts entered into pursuant to subsection (7) may be renewed. Such renewals may be done without the use of the auditor selection procedures provided in this section. Renewal of a contract shall be in writing."

Given these circumstances, the question posed is whether section 218.391(8) does, in fact, authorize the City to enter into the above-described "renewal" contract with the Provider "without the use of the auditor selection procedures[.]" As discussed below, it does not.

Analysis

Under Section 218.391(8), an Original Contract Entered Into Pursuant to Section 218.391(7) May Not Be Renewed Without Using the Auditor Selection Procedures Provided In Section 218.391 Unless—as Required by Section 218.391(7)—the Original Contract Specified the Subject Renewal Term(s) and the Conditions of Such Renewal(s)

In construing section 218.319, the intent of the statute "is the law, and this is ascertained by a consideration of the language of the enactment."[9] "The purpose to be accomplished…is to be considered as controlling, and effect given to the act as a consistent and harmonious whole."[10]

Here, the intent of the Auditor Selection Procedures Statute, as amended in 2005,[11] was to implement some of the recommendations made in a report authored by the Auditor Selection Task Force.[12] This Task Force was convened by the Florida Auditor General after issuing Report No. 2004-006, State of Florida Local Government Financial Reporting System.[13] The Florida Auditor General is required to prepare such reports regularly in connection with a

mandatory performance audit of the local government financial reporting system, undertaken to determine “the accuracy, efficiency, and effectiveness of the reporting system in achieving its goals and to make recommendations to the local governments, the Governor, and the Legislature as to how the reporting system can be improved and how program costs can be reduced.”[14]

“Based on the results of this audit, and because of the variations in methods used to procure audit services,” the Auditor General believed “that it would be worthwhile to perform additional work to determine how the procurement of audit services by local governments may be improved.”[15] Accordingly, “a task force consisting of various stakeholders and other persons, including procurement professionals,” was assembled, “to provide input as part of our evaluation of the various procurement methods and to make recommendations to the Legislature for statutory changes, as appropriate.”[16]

This Task Force included representatives from the Florida Association of Counties, Florida Association of Court Clerks and Controller, Florida Association of Special Districts, Florida Association of Public Purchasing Officers, Florida Government Finance Officers Association, Florida League of Cities, Florida School Finance Officers Association, Florida Institute of Certified Public Accountants, charter schools, and the Joint Legislative Auditing Committee.[17] After meeting in Fall 2003 and Summer 2004, the Task Force drafted consensus language to implement some of its recommendations for legislative action addressing areas of concern. Its recommendations included:

§ Requiring local governments to establish written auditor selection procedures and establish limits on how long an auditor could be retained without re-procuring that service using a competitive selection process;
§ Requiring local governments to establish and use audit committees and to specify their membership;
§ Requiring the use of requests for proposals containing certain provisions;
§ Clarifying the extent to which local governments should consider audit fees during the auditor selection process; and
§ Requiring written agreements containing certain provisions between local governments and auditors.[18]

Consistent with this last objective, the Auditor Selection Procedures Statute, as amended in 2005, requires written agreements awarded pursuant to the mandated competitive selection process to include a “provision specifying the contract period, *including renewals, and conditions under which the contract may* be terminated or renewed.”[19] The Auditor Selection Procedures Statute also makes it clear, in section 218.391(8), that *only* contracts entered into “pursuant to subsection (7) may be renewed”—that is, contracts awarded pursuant to the competitive selection process outlined in the statute, which have, consistent with 218.391(7), provided for such renewals in writing and specified the “conditions under which the contract may be…renewed.” *Only those renewals* “may be done without the use of the auditor selection procedures provided” in the statute.

To conclude that the City may, under subsection (8), renew a contract “entered into *pursuant to subsection (7)*” which does not provide for the subject renewals, including the conditions for such

renewals, would effectively eviscerate the renewal requirements imposed on such contract by subsection (7). To the extent that such an interpretation might be posited, under established rules of statutory construction, because this would create an irreconcilable conflict between subsections (7) and (8) (an incongruous result), such interpretation must be rejected.[20]

Instead, the alternative construction, which makes the two subsections harmonious, must prevail.[21] Here, the harmonious interpretation is that subsection (8), consistent with subsection (7), only allows contract renewals without using auditor selection procedures if the contract to be renewed specified in writing the subject renewal periods and the conditions for such renewals. This interpretation has been adopted by the Florida Auditor General and the Auditor Selection Task Force, as reflected in the Auditor Selection Guidelines ("Guidelines") which the Task Force has prepared.

The Auditor Selection Guidelines Confirm That an Original Audit Services Contract Cannot Be Renewed Where All Renewals Provided for In the Contract Have Already Been Exhausted

Specifically (given that the "number of years" and "contract period" specified in an annual audit services contract necessarily refer to the fiscal years comprised by the contract), the Guidelines provide that, where a contract has been renewed for the last fiscal year included in its written renewal provisions, such contract may not be further renewed:

"Contract period, renewals, and termination (Section 218.391(7)(c), Florida Statutes). The contract *must specify the number of years for which it will be in effect, including any options for renewal on the part of the government*. The law does not prescribe a maximum term for an audit services contract or a maximum number of renewal periods. *Once the contract period, including renewals, has expired, any further required annual audit services must be subjected to the auditor selection law as required by Section 218.391, Florida Statutes*."[22]

This conclusion is reinforced in the Question and Answer section[23] of the Guidelines:

"3. Question: If the entity is satisfied with the existing auditor and can negotiate acceptable fees, *can the contract for annual financial audit services be renewed without ever going through the auditor selection procedures required by Section 218.391, Florida Statutes*?

Answer: A contract for annual financial audit services can be renewed *only as provided in the contract, which is required to include a provision specifying the contract period, including renewals*."[24]

Thus, the Auditor Selection Guidelines advise that, once all fiscal year renewals provided for in an original annual audit services contract have been exhausted, the competitive auditor selection process must be used to obtain any further annual audit services.[25]

The Florida Auditor General Also Interprets the Auditor Selection Procedures Statute as Only Allowing an Original Audit Services Contract to Be Renewed Where the Subject Renewal Is Provided for In the Contract

This is also the interpretation which has been adopted by the Florida Auditor General, as

reflected in Report No. 2015-037, which he authored. In “Finding No. 11: Auditor

Selection Procedures,” the Florida Auditor General wrote:

“Finding No. 11: Auditor Selection Procedures
Local governments, prior to entering into a written contract for audit services, must use the auditor selection procedures prescribed in Section 218.391, Florida Statutes, when selecting an auditor to conduct the annual financial audit. The law requires local governments to select an audit committee, assigns certain responsibilities to the audit committee in evaluating and recommending an auditor for the annual financial audit, and specifies certain provisions that must be included in the written contract for audit services. ”

Of the 30 local governments reviewed, 9 (30 percent) of the entities (4 municipalities and 5 special districts) *did not use the auditor selection procedures prescribed in Section 218.391, Florida Statutes*, to select an auditor for the 2012-13 fiscal year annual financial audit, *as follows*:

* * *

§ Five (17 percent) of the entities (3 municipalities and 2 special districts) *improperly extended the original contract as the original contract did not contain renewal provisions*.

Properly performed audits play a vital role in the public sector by helping to preserve the integrity of the public finance functions and, thereby, maintaining citizens’ confidence in their elected leaders. The use of an objective auditor selection process ensures selection of a qualified auditor and satisfactory audit effort. ”[26]

Therefore, in evaluating the audit procedures implemented by local government entities, the Florida Auditor General deems “renewals” of audit services contracts which are not authorized by the original contract to be noncompliant with statutory requirements.

Interpreting Subsection (8) of the Auditor Selection Procedures Statute as Referring Solely to Renewals Provided for In the Original Contract Also Maintains the Integrity of the Competitive Selection and Public Contract Process

Lastly, this interpretation is consistent with general legal principles regarding public contracts. Contracts entered into pursuant to statutory authority are binding as written, and must be consistent with the grant of statutory authority.[27] “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.”[28] Here, the Auditor Selection Procedures Statute requires a competitively procured written audit services contract to include a “provision specifying the contract period, including renewals, and conditions under which the contract may be…renewed.” With respect to such contracts, the statute only allows renewals which comport with those subsection (7) requirements; no other renewals are authorized.

This construction is in keeping with the principle of fundamental fairness which underlies any public competitive procurement process. As applied here, the City’s request for proposals and resulting contract contemplated only two annual renewal periods.

Consistent with the requirements of section 218.391(7), these were included in the Original Contract, and they have already been exhausted. Neither the May 2013 Request for Proposals for Professional Auditing Services nor the Original Contract provided any basis for further renewals. Thus, an additional extension of the contract would be contrary both to the contract's express written provisions and to the request for proposal process which resulted in the Original Contract award. "[A] public body is not entitled to omit or alter material provisions required by the RFP because in doing so the public body fails to 'inspire public confidence in the fairness of the [RFP] process.'"[29] Adhering to that principle, the Original Contract between the City and the Provider could not be further renewed.

Conclusion

Based on the foregoing, because the Original Agreement did not contain any renewal provisions applicable to fiscal year 2018 and beyond, the City must comply with the auditor selection procedures contained in section 218.391 to obtain such professional audit services. I trust that these informal comments will be helpful.

Sincerely,

Teresa L. Mussetto
Senior Assistant Attorney General

TLM/tsh

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[1] Your letter with attachments conformed to the requirements for submitting an opinion request by "clearly and concisely" stating "the question of law to be answered," fully setting out "the particular set of facts or circumstances" on which the question is predicated, and providing a "memorandum of law" reflecting "the opinion of the requesting party's own legal counsel," including "a discussion of the legal issues involved, together with references to relevant constitutional provisions, statutes, charter, administrative rules, judicial decisions, etc." (*See Frequently Asked Questions About Attorney General Opinions*, available at: http://myfloridalegal.com/pages.nsf/Main/dd177569f8fb0f1a85256cc6007b70ad) (last visited July 12, 2018).

[2] A copy of the Original Agreement was included with your letter.

[3] A copy of the subject Request for Proposals (RFP No. 13-011) was included with your letter.

[4] *Id.; see also* § 218.391(7), Fla. Stat. (2017).

[5] Copies of the agenda item materials were provided at this Office's request.

[6] *See* video of March 27, 2018 Dania Beach City Commission meeting at 50:29 (available at https://www.youtube.com/watch?v=DEHFF8Dewzs) (last visited May 9, 2018).

[7] *See id.; see also* video of April 24, 2018 Dania Beach City Commission meeting at 1:12

(available at https://www.youtube.com/watch?v=lqpFDLMKnNg) (last visited May 9, 2018).

[8] A copy of this fiscal year 2018 and 2019 agreement was included with your letter. It reflects that the cost for the annual audit decreased from $49,000 to $48,250 (a decrease of 1.53%) and the cost for each single audit and each state revolving funds audit increased from $2,000 to $3,500 (an increase of 75% per audit).

[9] *State v. Knight*, 124 So. 461, 462 (Fla. 1929).

[10] *Id.* Further, the "endeavor may be made…by tracing the history of the legislation on this subject, to ascertain the uniform and consistent purpose of the Legislature or to discover how the policy of the Legislature with reference to the subject-matter has been changed or modified from time to time." *Amos v. Conkling*, 126 So. 283, 288 (Fla. 1930).

[11] The title to the 2005 amendment, HB 349 CS, reads: "Auditor Selection Procedures: Revises the auditor selection procedures that local governmental entities, district school boards, charter schools, and charter technical career centers must use in selecting auditors to conduct certain required financial audits; revises provisions relating to membership, purposes, and duties of audit committees required to be established to aid in such selection; provides for requests for proposals; provides review and ranking requirements; *requires written contracts and provides requirements therefor, including renewal requirements*." (Emphasis added.) Thus, even the title of HB 349 appears to contemplate that contract renewals will be authorized only where the requirements for such renewals have been included in the contract to be renewed.

[12] House of Representatives Staff Analysis for Bill #: HB 349 CS (available at: http://www.myfloridahouse.
gov/Sections/Documents/loaddoc.aspx?FileName=h0349e.SAC.doc&DocumentType=Analysis&BillNumbe
(last visited May 9, 2018).

[13] A copy of report 2004-006 may be obtained from https://flauditor.gov/pages/forms.htm.

[14] § 11.45, Fla. Stat. (2017).

[15] Report No. 2004-006, State of Florida Local Government Financial Reporting System, at 3.

[16] *Id.*

[17] *See* House of Representatives Staff Analysis for Bill #: HB 349 CS (*see* note 12, *supra*).

[18] *Id.*

[19] § 218.391(7), Fla. Stat. (2017) (Emphasis added).

[20] *See Hardee Cty. v. FINR II, Inc.*, 221 So. 3d 1162, 1165 (Fla. 2017), *reh'g denied*, No. SC15-1260, 2017 WL 3015682 (Fla. July 17, 2017).

[21] *See Goode v. State*, 39 So. 461 (Fla. 1905) ("It is the general rule, in construing statutes,

'that construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used should be rejected, if an interpretation can be found which will give it effect.'") (additional citations omitted).

[22] *See* Auditor Selections Guidelines at 21 (Emphasis added).

[23] *Id.* at Appendix B, 25-28.

[24] *Id.* (Emphasis added). This interpretation is reinforced in questions 5 and 6:

"5. Question: Is it necessary to include renewal option provisions in audit services contracts entered into after July 1, 2005?

Answer: No. The contract is not required to include a renewal provision; *however, a contract cannot be renewed in the absence of such a provision*.

6. Question: Are the revised auditor selection procedures required to be used only when an entity decides to change auditors or initiate a request for proposals process?

Answer: No. The revised auditor selection procedures are required to be followed when an audit contract period expires. *The audit contract is required to include a provision specifying the contract period, including renewals*."

Id. at 26 (Emphasis added).

[25] *See id.* at 21.

[26] *See* Florida Auditor General, Report No. 2015-037, Local Government Financial Reporting System, Performance Audit, at 14 (October 2014) (available at https://flauditor.gov/pages/pdf_files/2015-037.pdf) (last visited May 9, 2018). As a result of these findings, the Auditor General recommended that the "Legislature should consider amending Section 218.391…to require local governments to perform auditor selection procedures at specified intervals," and "should also consider establishing provisions in law to encourage local governments to comply with the auditor selection procedures in Section 218.391." *Id.*

[27] *See generally Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5–6 (Fla. 1984) (holding that the state may not assert the defense of sovereign immunity in an action arising from the state's alleged breach of an "express, written [contract] into which the state agency has statutory authority to enter").

[28] *Alsop v. Pierce*, 19 So. 2d 799, 805 (Fla. 1944).

[29] *Emerald Corr. Mgmt. v. Bay Cty. Bd. of Cty. Comm'rs*, 955 So. 2d 647, 653 (Fla. 1st DCA 2007) (quoting *State, Dep't of Lottery v. Gtech Corp.*, 816 So. 2d 648, 653 (Fla. 1st DCA 2001) (reflecting the companion principle that a governmental entity subject to a competitive selection requirement cannot "treat the RFP process as little more than a ranking tool to determine a

preferred provider and then negotiate a contract with that provider with little or no concern for the original proposal of that preferred provider")).