School Districts -- Electronic Purchasing Options

Number: INFORMAL

Date: October 18, 2016

Ms. Barbara J. Myrick
General Counsel
The School Board of Broward County
600 Southeast Third Avenue, 11th Floor
Fort Lauderdale, Florida 33301

Dear Ms. Myrick:

On behalf of The School Board of Broward County, you ask for assistance in determining whether the board may electronically open bids, responses, and replies submitted through an online procurement system for competitive proposals, without conducting a physical public opening of bids, proposals, or replies. Your question arises in light of section 4.2(2)(e), State Requirements for Educational Facilities, stating that "[b]ids shall be publicly opened, read and tabulated at the designated time and place by an employee of the Board or other appointed individual." You also question the incompatibility of the requirement that sealed bids be publicly opened with the exemption from disclosure in section 119.071, Florida Statutes, for sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation.[1]

Initially, I would note that the exemption in section 119.071, Florida Statutes, for sealed bids does not preclude publicly opening bids at an appointed time and place, but rather would appear to protect against public access to sealed bids prior to their being opened.[2]

Section 1010.04(1) and (2), Florida Statutes, as amended during the 2016 Session,[3] provides:

"(1)(a) Purchases and leases by school districts and Florida College System institutions shall comply with the requirements of law and rules of the State Board of Education.

(b) Before purchasing nonacademic commodities and contractual services, each district school board and Florida College System institution board of trustees shall review the purchasing agreements and state term contracts available under s. 287.056 to determine whether it is in the school board's or the board of trustees' economic advantage to use the agreements and contracts. Each bid specification for nonacademic commodities and contractual services must include a statement indicating that the purchasing agreements and state term contracts available under s. 287.056 have been reviewed. Each district school board may also use the cooperative state purchasing programs managed through the regional consortium service organizations pursuant to their authority under s. 1001.451(3). This paragraph does not apply to services that are eligible for reimbursement under the federal E-rate program administered by the Universal Service Administrative Company.

(c) Purchases and leases by state universities shall comply with the requirements of law and regulations of the Board of Governors.

(2) Each district school board and Florida College System institution board of trustees shall adopt rules, and each university board of trustees shall adopt regulations, to be followed in making purchases. Purchases may be made through an online procurement system, an electronic auction service, or other efficient procurement tool."

The plain language of the statute directs that purchases by school districts must comply with the rules of the State Board of Education and allows each district school board to use online procurement systems, electronic auction services, or other efficient procurement tools to make purchases. While there may have been an expansion of the means for making purchases using the Internet, there is no indication that the Legislature intended to alter the procedural requirements for competitively bidding certain purchases.

The Florida State Board of Education has adopted the "State Requirements for Educational Facilities 2014" pursuant to Chapter 120, Florida Statutes, applicable to all educational and ancillary facilities constructed by a school board. For construction projects estimated to cost $300,000.00 or more, legal notice published in accordance with Chapter 50, Florida Statutes, is required.[4] Such legal notice must provide at least the following information:

"1. Project name and name of Board.
2. Location of the project.
3. Brief statement describing the work.
4. *Date, time and place of bid opening*.
5. From whom and when contract documents are available, including deposit or charge.
6. Other information for bidders: prequalification of bidders, notice of pre-bid conference, bid security, insurance, plan deposit and whether the Board intends to waive technicalities." (e.s.)[5]

Section 4.2(2)(e), State Rules for Educational Facilities, requires that "[b]ids shall be publicly opened, read and tabulated at the designated time and place by an employee of the Board or other appointed individual."

Whether the requirement that competitive bids be publicly opened, read, and tabulated at a designated time and place by an employee of the school board or an appointed individual precludes the electronic opening of such bids at a specified time and place is a question which must be determined by the State Board of Education. This office cannot interpret the board's rules, nor may it read into the Legislature's expanded means of procuring commodities the authority to disregard the State Board's rules. It would be advisable for you to contact the Florida Department of Education, Office of Educational Facilities, at the following:

Mr. Thomas H. Inserra, Director
Office of Educational Facilities
Florida Department of Education
1054 Turlington Building
325 West Gaines Street
Tallahassee, Florida 32399-0400
850.245.0494 Telephone
850.245.9236 Fax

I am hopeful that Mr. Inserra will be able to clarify the requirements a school district must meet in order to utilize electronic purchasing options while complying with the rules of the State Board of Education.

Sincerely,

Lagran Saunders
Senior Assistant Attorney General

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[1] Section 119.071(1)(b)2., Fla. Stat., provides:

"Sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time as the agency provides notice of an intended decision or until 30 days after opening the bids, proposals, or final replies, whichever is earlier."

[2] *Cf.* s. 255.0518, Fla. Stat., providing that notwithstanding s. 119.071(1)(b), Fla. Stat., agencies receiving sealed bids pursuant to a competitive solicitation for construction or repairs of a public building or public work must open the bids at a public meeting conducted in compliance with the Sunshine Law and must also announce the bidder and price information at that meeting. *See also* Op. Att'y Gen. Fla. 2013-30.

[3] *See* CS for SB 350, 2016 Legislative Session.

[4] Section 4.2(2), State Requirements for Educational Facilities 2014, effective November 2014, p. 45.

[5] *Id.*