Clerk of Courts -- Advance Payments

Number: INFORMAL

Date: August 10, 2012

The Honorable Dwight E. Brock
Clerk of the Circuit Court
P.O. Box 413044
Naples, Florida 34101-3044

Dear Mr. Brock:

As Clerk of Courts for Collier County, Florida, you have requested an opinion on a number of questions which have generally been characterized as:

"1. The legality of making advance payments to:
A. FPL utilizing public funds generated by a Collier County created municipal services taxing unit, the Vanderbilt Beach Municipal Services Taxing Unit (hereinafter "MSTU") for the underground conversion of overhead electrical utility lines within Collier County road rights of way (the "MSTU Project"; and,
B. the FDOT (using public funds generated by the Collier County Water-Sewer District, hereinafter "CCWSD") to pay the expense of relocating existing underground utility lines owned by the CCWSD, during FDOT roadway expansion work on a state roadway; and,

2. Whether the MSTU Project must be competitively awarded pursuant to section 255.20, Florida Statutes."

This office has no authority to review contracts and construe contractual terms nor will this office comment on the duties and responsibilities of another governmental agency or private actor at the request of the clerk of court unless those entities join in your request. Our authority is statutory and grants us the power to issue legal opinions on questions of state law to governmental actors on their own duties and responsibilities. Thus, in an effort to assist you I have take the liberty of rephrasing your questions in a fashion that would allow this office to comment.

In light of this office's statutory limitations and in an effort to provide you with some direction in this matter, I have recharacterized your questions as:

1) Whether the Clerk of Courts is authorized by the Florida Statutes to
make advance payments and for what purposes; and
2) Whether an electrical project undertaken by an MSTU must be competitively bid.

The following informal comments are provided in an effort to assist you in performing your duties as auditor of county funds.

As this office has previously stated, the clerk of the circuit court, although a constitutional officer, possesses only such powers as have been expressly or by necessary implication granted by statute.[1] Thus, the clerk's powers, like those of other constitutional county officers, are limited to those powers which have been expressly granted or are clearly necessary to give meaning and effect to those powers which have been expressly granted.[2]

In the case of *Alachua County v. Powers,*[3] the Clerk of the Circuit Court of Alachua County sought a declaratory judgment to clarify his fiscal duties as clerk of the county commission in four capacities: as auditor, accountant, custodian, and investor of county funds. The Florida Supreme Court stated that the trial court had correctly determined that "the Clerk was to act as county auditor in all auditing functions except when the board employs an independent auditing firm pursuant to Section 125.01(1)(x), Florida Statutes (1975)." As the Court in *Alachua County v. Powers*, stated:

"The clerk has the authority and responsibility to perform the auditing functions both as an arm of the board in auditing the records of constitutional officers and as a watchdog of the board in the case of pre-auditing accounts of the board in determining legality of expenditure. The phrase 'legality of expenditure' includes that the funds are spent for a public purpose, that the funds are spent in conformity with county purchasing procedures or statutory bidding procedures, that the expenditure does not overspend any account or fund of the budget as finally adopted and recorded in the office of the clerk. If the board becomes concerned, it has the authority to require a performance audit or post-audit by an independent accounting firm."[4]

Thus, while the clerk of court is charged with performing certain auditing functions, it appears that his inquiry into the "legality of expenditure" should be directed to determining whether the funds being audited are spent for a public purpose, whether they are spent in conformity with county purchasing procedures or statutory bidding procedures, and whether the expenditure is within the limits of any account or fund of the budget as finally adopted and recorded in the office of the clerk.

In regard to your first question you have referred to the authority granted the Clerk of Court by sections 28.235 and 215.422(14), Florida Statutes. Section 28.235, Florida Statutes, authorizes the clerk of the circuit court to make advance payments for goods and services:

"The clerk of the circuit court is authorized to make advance payments on behalf of the county for goods and services, including, but not limited to, maintenance agreements and subscriptions, pursuant to rules or procedures adopted by the Chief Financial Officer for advance payments of invoices submitted to agencies of the state."

Thus, the statutory authority is broad, includes maintenance agreements and subscriptions but is not limited to those types of services and must be accomplished with reference to rules or procedures adopted by the Chief Financial Officer that apply to advance payments by state agencies.

Rule 69I-40.120, Florida Administrative Code, is the administrative rule of the Department of Financial Services and Chief Financial Officer relating to advance payments and makes such payments valid when made in accordance with several statutes.[5] Section 215.422(14), Florida

Statutes,[6] is cited in the rule as authority for certain advance payments:

"(3) Advance payment may be made under the provisions of Section 215.422(14), Florida Statutes, in accordance with the following:
(a) Advance payment may be made for maintenance agreements, software license agreements, and subscriptions which meet one of the following criteria:
1. Advance payment will result in a savings to the State which is equal to or greater than the amount the State would earn by investing the funds and paying in arrears.
2. The goods or services are essential to the operation of a State agency and are available only if advance payment is made.
3. Payments which are equal to or less than the threshold of category two as defined in Section 287.017, F.S., and which meet one of the above criteria do not require prior approval of the Chief Financial Officer. The voucher requesting payment must document that the payment meets one of the above criteria.
4. Prior approval of the Chief Financial Officer is required for advance payment in excess of the threshold of category two as defined in Section 287.017, F.S.
(b) Advance payment may be made for other goods or services if approved in advance by the Chief Financial Officer. Criteria for approval shall include:
1. Advance payment will result in a savings to the State which is equal to or greater than the amount the State would earn by investing the funds and paying in arrears.
2. The goods or services are essential to the operation of a State agency and are available only if advance payment is made."

A determination of whether a particular project or agreement meets these criteria is outside the scope of this office's authority but both section 28.235, Florida Statutes, and Rule 69I-40.120, Florida Administrative Code, contemplate and authorize advance payments upon satisfaction of the prescribed criteria.

Your second question appears to involve the issue of whether an electrical project undertaken by an MSTU (municipal services taxing unit) must be competitively bid pursuant to section 255.20, Florida Statutes.

Section 255.20(1), Florida Statutes, in part, provides:

"A county, municipality, special district as defined in chapter 189, or other political subdivision of the state seeking to construct or improve a public building, structure, or other public construction works must competitively award to an appropriately licensed contractor each project that is estimated in accordance with generally accepted cost-accounting principles to have total construction project costs of more than $300,000. For electrical work, the local government must competitively award to an appropriately licensed contractor each project that is estimated in accordance with generally accepted cost-accounting principles to cost more than $75,000."

As used in the statute, the term "competitively award" means:

"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."

However, the provisions of subsection (1) above requiring competitive awards do not apply:

"To construction, remodeling, repair, or improvement to a public electric or gas utility system if such work on the public utility system is performed by personnel of the system."[7]

According to your letter and information submitted with that letter, the MSTU project under consideration is to be performed by Florida Power and Light, a public utility, using personnel of the system. In light of these assertions, it would appear that the exemption in section 255.20 (1) (c) 3., Florida Statutes, would apply.

I trust that these informal comments will provide you with some assistance. I regret that this office could not be of more direct assistance to you but trust you understand that our statutory authority is limited.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *See, e.g.*, Op. Att'y Gen. Fla. 78-95 (1978), concluding that, in the absence of any authorizing statute, the clerk of the circuit court was not authorized to enter into a contract for insurance as specified therein, *and* Ops. Att'y Gen. Fla. 77-76 (1977) and 79-70 (1979); *cf*. Op. Att'y Gen. Fla. 80-59 (1980). *And see Security Finance Co. v. Gentry*, 109 So. 220, 222 (Fla. 1926), in which the Florida Supreme Court stated that "[t]he clerk's authority is entirely statutory, and his official action, to be binding upon others, must be in conformity with the statutes." *Cf. Pan American World Airways v. Gregory*, 96 So. 2d 669, 671 (Fla. 3d DCA 1957), stating that "[t]he clerk is an officer of the court whose duties are ministerial and as such he does not exercise any discretion."

[2] *See Overholser v. Overstreet*, 383 So. 2d 953 (Fla. 3d DCA 1980) (clerk's authority is entirely statutory, and his official action to be binding upon others, must be in conformity with such statutes); *Ferlita v. State*, 380 So. 2d 1118 (Fla. 2d DCA 1980) (clerk of court's power to act must clearly appear from particular statute). *Gessner v. Del-Air Corporation*, 17 So. 2d 522 (Fla.1944); and 67 C.J.S. *Officers* s. 190(a). *See also* Ops. Att'y Gen. Fla. 86-94 (1986), 78-95 (1978) and 75-161 (1975).

[3] *Alachua County v. Powers*, 351 So. 2d 32 (Fla. 1977).

[4] *Id.,* at 37.

[5] The rule also recognizes advance payments made pursuant to section 216.181(6), Fla. Stat., which deals with moneys appropriated by the Legislature and does not appear to apply to your situation.

[6] The statute requires that the Chief Financial Officer must adopt rules to authorize advance payments for goods and services and that "[s]uch rules shall provide objective criteria for determining when it is in the best interest of the state to make payments in advance and shall also provide for adequate protection to ensure that such goods or services will be provided."

[7] Section 255.20 (1) (c) 3., Fla. Stat.