Counties, procurement policies

Number: INFORMAL

Date: February 15, 2012

Mr. Frank A. Baker
Jackson County Attorney
4431 Lafayette Street
Marianna, Florida 32446

Dear Mr. Baker:

On behalf of the Board of County Commissioners of Jackson County, Florida, you have asked for this office's assistance in determining whether a procurement policy of the county may be violative of sections 336.41 or 336.44, Florida Statutes. Attorney General Bondi has asked me to respond to your letter.

You have requested that this office review a procurement policy adopted by the Board of County Commissioners of Jackson County as Jackson County Resolution 2011-16 and advise whether sections 336.41 or 336.44, Florida Statutes, would prohibit the implementation of the county policy. While this office has no authority to review or comment on local legislation or administrative regulations, I offer the following informal comments to assist you.[1]

Section 336.44, Florida Statutes, makes provision for county road construction contracts and requires that:

"(1) The commissioners shall let the work on roads out on contract, in accordance with s. 336.41(4).
(2) Such contracts shall be let to the lowest responsible bidder, after publication of notice for bids containing specifications furnished by the commissioners in a newspaper published in the county where such contract is made, at least once each week for 2 consecutive weeks prior to the making of such contract.
(3) Upon accepting a satisfactory bid, the commissioners shall enter into a contract with the party whose bid has been accepted. Such contract shall contain the specifications of the work to be done or material furnished, the time limit in which the construction is to be completed or material delivered, the time and amounts in which payments are to be made upon the contract, and a penalty to be paid by the contractor for the failure to comply with the terms of such contract.
(4) The successful bidder shall enter into a good and sufficient bond with the commissioners for the faithful execution of the contract; the amount of the bond to be fixed by the commissioners, and the sufficiency of said bond to be likewise approved by the commissioners.
(5) The commissioners may reject any or all bids and require new bids to be made."

Section 336.41, Florida Statutes, sets forth requirements for employing labor and providing road equipment for counties and provides when competitive bidding is required. Subsection (4) of the statute states that

"All construction and reconstruction of roads and bridges, including resurfacing, full scale mineral seal coating, and major bridge and bridge system repairs, to be performed utilizing the proceeds of the 80-percent portion of the surplus of the constitutional gas tax shall be let to contract to the lowest responsible bidder by competitive bid, except for:
(a) Construction and maintenance in emergency situations, and
(b) In addition to emergency work, construction and reconstruction, including resurfacing, mineral seal coating, and bridge repairs, having a total cumulative annual value not to exceed 5 percent of its 80-percent portion of the constitutional gas tax or $400,000, whichever is greater, and
(c) Construction of sidewalks, curbing, accessibility ramps, or appurtenances incidental to roads and bridges if each project is estimated in accordance with generally accepted cost-accounting principles to have total construction project costs of less than $400,000 or as adjusted by the percentage change in the Construction Cost Index from January 1, 2008,

for which the county may utilize its own forces. However, if, after proper advertising, no bids are received by a county for a specific project, the county may use its own forces to construct the project, notwithstanding the limitation of this subsection. Nothing in this section shall prevent the county from performing routine maintenance as authorized by law."

The statutes establish a procedure for county road projects and require the award of such contracts to the "lowest responsible bidder" determined by competitive bid. Florida courts have held that statutes requiring a governmental agency to let a contract to the lowest "responsible" bidder have not been construed to mean, literally, the lowest dollars and cents bidder.[2] Rather, such statutory requirements have been held to "invest public authorities with discretionary power to pass upon the honesty and integrity of the bidder necessary to a faithful performance of the contract - upon his skill and business judgment, his experience and his facilities for carrying out the contract, his previous conduct under other contracts, and the quality of his previous work . . . . "[3]

While counties are granted the "power to carry on county government" by section 125.01(1), Florida Statutes, such power is qualified. Non-charter counties, such as Jackson County, may act "[t]o the extent not inconsistent with general or special law[.]"[4] Pursuant to section 125.01(3)(a), Florida Statutes, the county commission is empowered to enter into contractual obligations to carry out any of its enumerated or "implied powers" and such authority includes the power to "[p]rovide and regulate . . . roads[.]" However, sections 336.41 and 336.44, Florida Statutes, clearly establish parameters in which a county must operate in contracting for road construction projects and require that all contractors who are responsible and satisfy all of the criteria are permitted to submit a bid. Jackson County may not adopt a policy by ordinance or administrative rule which would be inconsistent with the statutory competitive bidding procedure.

This office has considered the authority of a governmental entity to adopt "hybrid" bidding procedures for public construction projects and construction management services. In Attorney General Opinion 2011-21, the Southwest Florida Water Management District asked whether it could lawfully use a "hybrid" process to award public construction projects when that process combined a request for bids or proposals with competitive negotiation such that the lowest or best responsive bidder is selected and then competitive negotiations are begun in an effort to arrive at a final project or service cost. The opinion stated that the district was limited to utilizing

the procedures set forth in the statutes for public construction works and for construction management services and concluded that the district had no authority to develop a "hybrid" model for awarding construction projects in the absence of statutory authority.

Similarly, it appears that Jackson County is constrained by sections 336.41(4) and 336.44, Florida Statutes, to competitively bid its road construction projects as statutorily prescribed. The procedures set forth in sections 336.41(4) and 336.44, Florida Statutes, do not appear to include a procedure such as the "piggyback" contracting described in Jackson County Resolution 2011-16. I would also note that recent litigation in Jackson County on this issue apparently raised questions regarding the validity of this procedure in light of the statutory competitive bidding procedures for road construction projects.[5]

Indeed, while a public body may have wide discretion in soliciting and accepting bids for public improvements,[6] that discretion is limited when the Legislature has prescribed a procedure for particular public improvements such as county road construction.[7] Florida courts have balanced that governmental discretion with the protection of the public which is the paramount purpose of competitive bidding statutes.[8] Thus, to the extent any procedure deviates from the requirements of section 336.41(4) and 336.44, Florida Statutes, or seeks to facilitate a purpose other than that for which the statutory competitive bidding scheme was designed, this office would suggest that it is of questionable validity when used by a county for road construction projects.

I trust that these informal comments will assist you in advising your client. Thank you for considering this office as a source for assistance.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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Enclosures: AGO 2011-21

Statement Concerning Attorney General Opinions

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[1] *See* Department of Legal Affairs Statement Concerning Attorney General Opinions (copy enclosed) and s. 16.01(3), Fla. Stat., stating that the Attorney General may issue opinions to local governments on questions of state law.

[2] *Couch Construction Company v. Department of Transportation*, 361 So. 2d 184, 187 (Fla. 1st DCA 1978).

[3] *Engineering Contractors Association of South Florida, Inc. v. Broward County*, 789 So. 2d 445 (Fla. 4th DCA 2001); *Couch Construction Company, id.*; *City of Pensacola v. Kirby*, 47 So. 2d 533, 535 (Fla. (1950).

[4] Section 125.01(1), Fla. Stat.

[5] *See* "Judge rules against pavers seeking payment," by Deborah Buckhalter, July 31, 2011, Jackson County Floridan (jcfloridan.com), in which Judge Fishel is quoted as stating in his order that the contracts for work performed were "substantially likely to be found void because they were awarded without complying with the competitive bid statutes."

[6] *See Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982) (bid of lowest bidder for road resurfacing project substantially complied with bidding statute).

[7] *See Engineering Contractors Ass'n of South Florida, Inc. v. Broward County*, 789 So. 2d 445 (Fla. 4th DCA 2001) (Broward County's attempt to preempt section 336.44, Fla. Stat., requirements by a preliminary selection and elimination process not contemplated by the statute was invalid).

[8] *Engineering Contractors Ass'n of South Florida, Inc. v. Broward County, id.*