

PRACTITIONERS' CORNER

**THE FLORIDA SUNSHINE LAW AND EVALUATION
COMMITTEES**

Kirk W. Buffington*

ABSTRACT. Within each political subdivision of the state of Florida, there is an ordinance which applies to the procurement of goods and services for agencies under its jurisdiction. One common requirement in all these ordinances is the use of the Request for Proposal when purchasing goods or services above a given threshold. In contrast to an Invitation to Bid, the RFP is structured in such a way as to allow other criteria to be evaluated, along with the bottom line price submitted by vendors. The issue in this analysis is whether each meeting of the evaluation committee set up to review these criteria is subject to Florida's Sunshine Law. Several court decisions and opinions of Attorneys General have held that meetings of ad-hoc committees, advisory committees, and other panels of staff or non-staff members are subject to the Sunshine Law. It appears clear, after a discussion of a few cases relating to the Sunshine Law, that any agency procurement officer must be very careful to avoid even the suggestion of making any recommendation outside of the public view. Public notice should be posted at least seventy-two hours prior to any meeting of the committee. Only by closely adhering to both the letter and the intent of the law will procurement officers avoid having their agency brought into court for a violation of the Sunshine Law.

INTRODUCTION

Within each political subdivision of the state of Florida, there is an ordinance which applies to the procurement of goods and services for

** Kirk W. Buffington, MBA, Director, Purchasing Division, City of Fort Lauderdale. His research interest is in the area of public procurement.*

agencies under its jurisdiction. Although each agency's enabling ordinance may differ from others in specifics, there are some points that are almost universal among ordinances. One of these is the use of the Request for Proposal (RFP), which, in contrast to an Invitation to Bid, is structured in such a way as to allow other criteria to be evaluated, along with the line price submitted by vendors. These criteria are determined at the time the RFP is created and may include items such as vendors' previous performance, references, and vendors' ability to perform in a timely manner, vendors' financial capability, and the vendors' understanding of the RFP as shown in the vendors' proposal. Each criterion used is given some type of point assignment, and may also have some type of assigned weighting factor.

Normally a committee of technically knowledgeable staff will be assembled to evaluate each proposal. Sometimes, an individual from outside the agency may be asked to also serve on the committee. This individual may be from another government agency or may be an interested citizen. When the agency's procurement office opens the submitted proposals, the evaluation process begins (Appendix A). It is the committee members' responsibility to independently evaluate each proposal and to assign points to each category as established in the RFP. Once members have completed their evaluation, the committee comes together to discuss the proposals, and arrive at a ranking. The ranking is based on the points each proposal receives. After the initial ranking, a "short list" is often established, which is normally the top three to five proposals as determined by total points. Normally, the committee will then invite each proposer from the short list to make a presentation to the committee in order to further clarify or expand upon their proposals before the final selection.

After each proposer is heard from, the committee again ranks the firms and makes a final recommendation of award to the governing body. The governing body makes the final determination regarding which proposer should receive the award, but that body usually reserves the right to override the committee's award recommendation. However, in the vast majority of these RFP award recommendations, the governing body will follow the recommendation of the evaluation committee. While this seems to be a straightforward process, opportunities for inappropriate and unethical actions, by both the agency staff and the elected officials abound. In an effort to promote fairness, avoid favoritism, and prevent corruption like kickbacks, different levels and branches of government across the

nation have taken steps to ensure that proper procedures are followed in awarding

contracts. The executive, legislative, and judicial branches, along with federal, state, and local governments have all weighed in on the action.

The issue, which becomes critical to this analysis, is whether each meeting of the evaluation committee is subject to Florida's Sunshine Law. Fulfilling the sunshine requirements is an added cost to the procurement function, in time, money, and facilities; and this raises issues relating to efficiency and responsiveness. In fact, some may even argue that private sector purchasing remains more efficient and responsive than public purchasing because of private firms' ability to conduct negotiations and leverage deals in private. This usually allows a reduction in purchasing response time, minimizes paperwork and labor, and is more responsive to the companies' need. However, private firms do not spend from the public purse; they only need be responsive to their company's needs, and their accountability is in the bottom line of their ledgers. Public agencies expend tax dollars and thus face a different situation. They have to be accountable to the auditors, appointed executives, and elected officials; and they must be responsive to both their citizens and user departments. Underscoring this point is the Florida Court of Appeals opinion that "the purpose of public contracting is to protect the public against collusive contracts and to secure fair competition upon equal terms to all bidders" (*Harry Pepper & Associates v. City of Cape Coral*, 352 so 2d 1190, 1977 Fl. App.).

In general, this paper seeks to determine whether the entire government procurement process has to be opened up to public scrutiny, or if public access to procurement information should be confined to major decisive issues. The specific question is: *Are advisory boards or RFP Evaluation Committees that make award recommendations subject to the Sunshine Law?* Was the intent of the Sunshine Law to also include these types of meetings, or was it solely intended to govern the meetings of elected bodies? This paper will examine the Florida Sunshine Law, FS, 286.011, and how the intent of the law relates to evaluation committees of procurement purchases for local jurisdictions. There are several cases that will be examined not only for their statements of law, but also for their examination of legislative intent. In addition there is a Florida Attorney General's opinion that will be discussed. Finally, a conclusion will be drawn as to how this case law should be applied by the local jurisdiction's procurement officers.

THE SUNSHINE LAW

The State of Florida's Government in the Sunshine Law is defined in FS: 286.011. Briefly, this law provides a right of access to governmental proceedings at both the state and local levels. The law is equally applicable to both elected officials and appointed boards and has been applied to any gathering of two or more members of the same board to discuss a matter which may come before that board. There are three basic requirements of the statute: (1) Meetings of public boards or commissions must be open to the public, (2) reasonable notice of such meetings must be given, and (3) minutes of the meetings must be taken. Also, in 1992, the Florida voters approved an amendment to the Florida Constitution, which virtually mandated public access to meetings of all public bodies, with the exception of the judiciary and the legislature. The only exceptions are those established by law or the Constitution.

Several court decisions and opinions of Attorneys General have held that meetings of ad-hoc committees, advisory committees, and other panels of staff or non-staff members are subject to the Sunshine Law. The courts have found that a committee making any type of recommendation that will be acted upon by the governing body, is in essence acting on behalf of that body and is therefore subject to the Sunshine Law.

Major Court Rulings

In *Town of Palm Beach v. Gradison*, 296 So.2d 443, the Florida Supreme Court held that the Sunshine Law should be construed so as to frustrate all evasive devices and that under the legislative intent of the Sunshine Law, when in doubt, members of any board, agency, authority or commission should follow the open-meeting policy of the State. In this case, a citizens committee appointed by the Town Council to make recommendations about the town's zoning ordinance had been meeting without public notice. After, several non-public meetings, this committee made significant recommendations to the Town Council relating to the revisions of the town's zoning ordinance. The Town Council ultimately acted upon some of these recommendations, and an injunction was sought arguing that the adoption of the ordinance should be rendered invalid because of the non-public activities of the citizen's planning committee. The Court stated that one purpose of the Sunshine Law was to prevent, at non-public meetings, the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a

non-public pre-meeting conference except to conduct some part of the decisional process behind closed doors.

In *Wood v. Martson*, 442 So.2d 934, the Court stated that it is the nature of the act performed by the board or committee, not its makeup or its proximity to the final decision, which determines whether an advisory committee is subject to the Sunshine Law. In *Wood*, the local news media of Gainesville, FL, filed a complaint against the University of Florida's President and against the chairman of a search-and-screen committee appointed by the President to solicit and screen applications for a university position. The media sought an injunction prohibiting the President from excluding the press or public from meetings of the committee. The Circuit Court entered a final judgment permanently enjoining the university from closing any meetings to the public. On appeal, the District Court of Appeals reversed and remanded. On application for review, the Florida Supreme Court quashed the District Courts of Appeals' decision, and affirmed the judgment of the Circuit Court. In the majority opinion discussion of the case, the Florida Supreme Court reaffirmed its decision in *Town of Palm Beach v. Gradison*, 296 So.2d 443, which stated,

The statute should be construed so as to frustrate all evasive devices. This can be accomplished only by embracing the collective inquiry and discussion stages within the terms of the statute, as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates to any matter on which foreseeable action will be taken (296 So.2d 443).

The Supreme Court found further that the fact that members of the committee were staff did not shelter its acts from the Sunshine Law.

In *Spillis Candela & Partners, Inc., v. Centrust Savings Bank*, 535 So. 2d 694, the Dade County Board of Rules and Appeals appointed a committee comprised, with one exception, entirely of Board members. The purpose of the committee was to report on the correctness of plans relating to the fire resistivity provisions of the Building Code for the Centrust Bank parking garage. After a public hearing on the matter, the committee recessed and deliberated on the matter for several minutes and then took a vote. These deliberations and the resulting vote were conducted in private without the inclusion of the public. Thus, the public was not given the opportunity to express views or to participate in the decision making process. Following this meeting, the Board was presented the committee's

report. The Board ratified the committee's report without a full and open public hearing on the matter.

The District Trial Court found that the committee was advisory and subject to the Sunshine Law. Spillis Candella appealed, maintaining that the trial court erred in finding that the committee was subject to the Sunshine Law. The District Court of Appeals affirmed the decision of the lower court. The appeals court stated that the law is quite clear. An ad-hoc advisory board, even if its power is limited to making recommendations to a public agency and even if it possesses no authority to bind the agency in any way, is subject to the Sunshine Law. As a result, it was improper for the committee to reach its recommendation in private since that constituted a violation of the Sunshine Law. Similarly, the violation was not cured by the Board's ratification of the report. Only a full, open public hearing by the Board could have cured any problem. The appeals court decision refers to *Town of Palm Beach v. Gradison*, and *IDS Properties, Inc., v Town of Palm Beach*, 279 So. 2d 353.

In *IDS Properties, Inc., v. Town of Palm Beach*, 283 so 2d 364 the Town of Palm Beach, after contracting with a professional planner to produce a comprehensive zoning plan ordinance, appointed a committee of five citizens to act as an advisory committee to the planner. The purpose of this committee was to assure that the produced plan would be consistent with the character, image and land use controls intended by the Town's citizens. After many meetings, all held in private, and without any notes or minutes being taken, a plan was presented to the Town's Zoning Commission. Upon presentation, the Zoning Commission noticed public hearings and took comments. Subsequently, upon the Zoning Commission's recommendation, the Town Council held additional full public hearings prior to the ordinance being approved and enacted by the Town Council.

IDS Properties, Inc., which had applied for a building permit, and was denied, filed suit alleging that the ordinance was invalid because of a sunshine violation in the method of enactment. IDS Properties, Inc. maintained that, notwithstanding the adoption of the zoning ordinance by the Zoning Commission and the Town Council after public hearings, such ordinance is invalid because the activities of the citizen's committee were in violation of the Sunshine Law. The District Trial Court ruled in favor of the Town, finding that the enactment of the ordinance was not in violation of the Sunshine Law. On appeal, the District Court of Appeals reversed the

lower court, concluding that the legislative intent lead the court to believe that the Sunshine Law did in fact apply to the citizen's committee. The Court stated that although the zoning plan was born when the Town Council, acting in the sunshine, approved the ordinance, the conception of the plan took place in the dark, during the meetings of the citizen's committee. The Court found that the planning and conception, which took place during the committee's meetings, were inseparable parts of the life giving process, which created the plan. Therefore, the zoning ordinance was not conceived at public hearings, but instead was the product of deliberations and actions of the citizen's committee, acting as the alter ego of the Town Council.

Public officials cannot do indirectly what they are prevented from doing directly. Those to whom public officials delegate de facto authority to act on their behalf in the formulation, preparation, and promulgation of plans on which foreseeable action will be taken by such public officials stand in the shoes of such public officials insofar as the application of the Government in the Sunshine Law is concerned (*283 so 2d 364*).

A more recent and interesting case because of its proximity, its discussion of the Sunshine Law, standing, and exhaustion of remedy, is *Silver Express Co., v. The District Board of Trustees of Miami-Dade Community College, 3rd District Case No. 96-889*. Here the Community College had issued an RFP for the furnishing of flight training services. Silver Express Co., the incumbent provider, submitted a proposal, along with Husta and one other proposer. The purchasing office appointed an evaluation committee to assist in the evaluation process. This committee met on several occasions but did so without any public notice. Ultimately, the committee recommended to the purchasing director that a two-year contract be awarded to Husta, commencing January 1, 1996.

Silver Express first initiated an administrative protest challenging the ranking of the number one proposal. Ultimately, an administrative hearing officer concluded that as the third ranked proposer, Silver Express did not have standing to challenge the first ranked proposal, in the absence of a challenge to the second ranked proposal. During the administrative hearing process, the Community College issued a temporary contract to Husta, to begin providing flight-training services. Silver Express initiated circuit court action seeking to enjoin the college from awarding a contract to Husta. The Circuit Trial Court denied Silver Express's motion, and the case

went to the Circuit Court of Appeals. In its motion, Silver Express alleged that the actions of the evaluation committee were subject to the Sunshine Law, and that by not posting public notice of the committee meetings, any actions or recommendations of the committee are void. The Court of Appeals agreed, finding that the Purchasing Director's committee is governed by the Sunshine Law. The Court further stated that its closed meetings violated the law and thus its actions taken at the meeting are void.

The Court believed that the committee was subject to the Sunshine Law because of the effect that the committee's actions had on the college's selection process. The record reflected that the committee's function was to sift through the various proposals to determine which were acceptable and to rank them accordingly. In other words, the committee's action helped to crystallize the decision to be made by the college. This crystallization precluded Silver Express (because of its third place ranking) from its administrative challenge to Husta's first-ranked proposal and resulted in the college's selection of Husta's proposal on a temporary basis. The court went on to state the following to clarify the applicability of the Sunshine Law:

Governmental advisory committees which have offered up structured 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. The law is quite clear. An ad hoc advisory board, even if its power is limited to making recommendations to a public agency and even if it possesses no authority to bind the agency in any way, is subject to the Sunshine Law. In this case the committee made a significant ruling affecting the decision making process. As a result, it was improper for the committee to reach its recommendation in private since that constituted a violation of the Sunshine Law (*3rd District Case No. 96-889*).

The Court then had to determine if Silver Express had exhausted its other available administrative remedies prior to bringing action in the circuit court. The remedy of the administrative hearing would be unavailable to non-bidders, and thus unavailable to the general public, while the Sunshine Law was enacted to permit any citizen to vindicate the public's interest in open government. In fact, the statute specifically states, "The circuit courts

of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.” *FS: 286.011(2)*.

The court went on to state that the committee’s violation of the Sunshine Law constituted an irreparable public injury, referring to *Town of Palm Beach v. Gradison*. The only remedy for this violation was to enjoin the college from acting on any decisions made out of the sunshine. Silver Express was acting as an advocate for the public’s interest, and was thus entitled to obtain injunctive relief pending the trial court’s final determination of the case. As a consequence, the trial court erred in not temporarily enjoining the college and Husta from entering into a contract based on the ranking established by the committee, out of the sunshine. The case was reversed and remanded, with an order to the trial court to enter an order to enjoin the college from entering into a two-year contract with Husta. The court did go on to say that the college was not precluded from, in the future, ranking the various proposals received at a meeting held in compliance with the Sunshine Law, and then taking further action.

In the dissenting opinion, it was stated that Silver Express should not be allowed “two bites of the apple.” The dissent could not accept the premise that after going to final administrative hearing and hearing the review officer’s inclination to agree with the College, that a bidder may then bring an action in Circuit Court under Section 286.011. The dissent went on to state that Silver Express was given the opportunity to bring a challenge directly in Circuit Court without having to resort to an administrative remedy. But, having elected the administrative remedy which was fully available, and then having abandoned that remedy in the eleventh hour, Silver Express is precluded from having both avenues of redress.

Another case of interest, both because of its proximity, and its interpretation of who may participate in the review process is *Port Everglades Authority v. International Longshoremen’s Association, Local No. 1922-1*, 652 So. 2d 1169. In this case, Port of Everglades had reviewed proposals received for the on-going maintenance of their cranes and had awarded a contract to G.F.C. Crane Consultants, Inc. During the review process, the Port’s Selection and Negotiation Committee (SNC), by request of the Procurement Officer, asked competing bidders to excuse themselves from hearing the presentations by competitors. The Port maintained that the procurement officer did not exclude the competing presenters, but only requested that they voluntarily excuse themselves. The trial court expressly

rejected this contention, and ordered that the subsequent contract was void.

The Court of Appeals affirmed the trial court's decision, stating that the actions of the Port amounted to a de facto exclusion of the competitors, especially since the "request" was made by an official who was directly involved in the procurement process. The higher court went on to also reject the Port's argument that, even if a technical violation of the Sunshine Law did occur, the trial court erred in finding that it required invalidation of the contract awarded as a result of the process. This court also referred to *Town of Palm Beach v. Gradison*, quoting, in part, "mere showing that the government in the Sunshine Law has been violated constitutes an irreparable public injury so that the ordinance is void *ab initio*." The Court went on to state that once a violation to the Sunshine Law is established, prejudice is presumed. Although a violation may be remedied by the governmental entity, a "cure" did not occur in this case because the SNC, before whom the competitors were excluded, did not reconvene in a public forum before the contract was awarded. Neither did the Port conduct a full and open hearing on the competing bidders for the contract, before ratifying the committee's recommendations.

Attorney General's Opinion

The Florida Attorney General has issued opinions referring to the Sunshine Law, one of which is noted here. In 87-42, the Attorney General answers the following question: Is a meeting of an ad hoc committee, appointed by the mayor and composed of city officials, with officials of the Chamber of Commerce to discuss a proposal to donate or sell city land to the chamber subject to the Sunshine Law? The Attorney General's summary answer is as follows:

Unless and until legislatively or judicially determined otherwise, meetings of an ad hoc committee appointed by the mayor and playing an integral part in the decisional process with respect to matters upon which foreseeable action will be taken by the agency or authority are subject to the provisions of Florida's Government-in-the-Sunshine Law" (Attorney General's Ruling 87-42).

CONCLUSION

It appears clear, after a discussion of just these few cases relating to the Sunshine Law, that any agency's procurement officer must be very careful to avoid even the suggestion of making any recommendation outside of the

public view. The procurement officer should make every effort to comply with the intent of the law, by publicly posting notice of all evaluation committee meetings, recording each meeting, and making sure to allow the presence of all, including competing bidders. Public notice should be posted at least seventy-two hours prior to the meeting of the committee. In addition, a copy of the public notice should be sent to each bidder so that they are given every chance to attend the meeting if they so choose. After the recording of the meeting, summary minutes should be prepared which should be made available to the public and the press. Upon a committee recommendation being made, notice of award should be posted as part of the governing board's agenda, and again each bidder should be advised, in writing, of the committee's recommendation and when that recommendation is being made to the governing board. Only by closely adhering to both the letter and the intent of the law, will procurement officers avoid having their agency brought into court for a violation of the Sunshine Law.

REFERENCES

Harry Pepper & Associates v. City of Cape Coral, 352 So.2d 1190, 1977 Fl. App.

IDS Properties, Inc., v Town of Palm Beach, 279 So. 2d 353.

Port Everglades Authority v. International Longshoremen's Association, Local No. 1922-1, 652 So. 2d 1169.

Silver Express Co., v. The District Board of Trustees of Miami-Dade Community College, 3rd District Case No. 96-889.

Spillis Candela & Partners, Inc., v. Centrust Savings Bank, 535 So. 2d 694.

Town of Palm Beach v. Gradison, 296 So.2d 443.

Wood v. Martson, 442 So.2d 934.

APPENDIX A

Request for Proposals (RFP) Evaluation Committee Policies and Procedures

Thank you for agreeing to serve on the evaluation committee.

1. All proposals received in response to an RFP that are determined to be responsive by the Procurement and Materials Management Division,

will be evaluated by the evaluation committee

2. The evaluation committee is most often comprised of City staff, but other knowledgeable people may be used. There are certain occasions and circumstances that will require that 50% of the committee be comprised of members that are not a part of City staff. There are also occasions where a draft copy of the RFP may need to be distributed to the City Commission, so that they may recommend committee members. The procurement specialist and/or committee chair will determine those special situations.

A member of the Procurement and Materials Management Division staff will act as a non-voting advisor to the evaluation committee.

3. Each member of the evaluation committee must be given a complete copy of each proposal, a copy of the RFP including all addenda, and a scoring sheet. These must be distributed promptly to allow each committee member adequate time to read and evaluate each proposal.

Committee members should refrain from discussion of the RFP with any potential proposer during the bidding/evaluation process. Any questions or clarifications should be addressed to the Procurement Division.

4. Proposals can only be evaluated by using the criteria listed in the "Consideration for Award Section" of the RFP. No other criteria may be used. Initial evaluation must be based solely upon the proposal submitted, no other or additional information may be used. Scoring and rating details must be identified and included in the RFP for each evaluation criteria, so that proposers know how heavily each criterion is weighed.
5. The Procurement Division will provide the scores for cost to the City. This will be based upon a mathematical formula with the lowest cost proposal receiving the maximum points available for this criterion.
6. Evaluation committee meetings must be either taped or summary minutes must be kept and distributed to the members.
7. The committee should begin by establishing procedures, with a general discussion of their task and a review of the proposals received. A committee member should be assigned to review references and make a report. The report on the references will be discussed at the evaluation committee meeting. After discussion, members will review their

scoring sheets and the Procurement staff person shall complete tabulation. The scores shall be added together and an average score for each proposal determined. Based on these scores the proposals shall then be ranked. From this ranking, the finalists, normally the top 3 or possibly 4 will be chosen.

8. The City's Purchasing Ordinance requires that fair and equal discussion be held with at least 3 proposals. Prior to the oral presentations, new evaluation and scoring sheets will be distributed to the committee members. Committee members will re-evaluate each of the finalists on both the oral presentation and the proposal submitted using the same process of tabulation as above.
9. After all oral presentations, scoring and ranking shall again be completed to determine the first ranked proposer. The Procurement Division and the chairperson shall then proceed to a best and final offer from the first ranked proposer. Upon acceptance of the final offer, a recommendation for award shall be prepared and forwarded to the City Commission.
10. All records of the evaluation committee meetings, including tapes, notes, scoring sheets become public records. It is the responsibility of the chair to make sure that all records are forwarded to the Procurement Division for inclusion into the file. All records are available for review by any or all proposers. It is very important to enter comments on the scoring sheets, particularly when giving a low score, so that your rationale can be recalled if it is required at a later date.

Any questions should be directed to the Procurement Division representing this solicitation.

[Name], Chairperson
Telephone: (954) 828-XXXX,
E-mail: XXXXXXXX@ci.fort-lauderdale.fl.us or

[Name], Procurement Specialist
Telephone: (954) 828-XXXX,
E-mail: XXXXXXXXXX@ci.fort-lauderdale.fl.us