Competitive bidding; state leasing real property

Number: INFORMAL

Date: August 26, 1996

The Honorable Sally A. Heyman
Representative, District 105
17101 Northeast 19th Avenue, Suite 205
North Miami Beach, Florida 33162-3159

RE: REAL PROPERTY--STATE AGENCIES--PAROLE AND PROBATION--LEASES--COMPETITIVE BIDDING--lease of private real property for use by Parole and Probation. ss. 120.53 (5)(b), 255.249 and 255.25, Florida Statutes.

Dear Representative Heyman:

Thank you for contacting this office regarding a problem in your district relating to the lease of certain real property by the Department of Corrections for a parole and probation office.

According to your letter, the neighbors in the vicinity are alarmed that a parole and probation office is proposed to be located in a commercial strip mall in their neighborhood. You have posed a number of questions relating to how the proposed 5-year lease of this property may be broken. The following general comments are meant to assist you in discussing these issues with your constituents.

Section 255.249, Florida Statutes, makes the Department of Management Services responsible for adopting rules establishing procedures for soliciting and accepting bids for leased space of more than 3,000 square feet in privately owned buildings.[1] The Division of Facilities Management has adopted Chapter 60H-1, Florida Administrative Code, in response to this legislative directive. These administrative rules make provision for leases of real property by state agencies and a copy is enclosed for your review.

Section 255.25, Florida Statutes, provides that "no state agency shall enter into a lease as lessee for the use of 3,000 square feet or more of space in a privately owned building except upon advertisement for and receipt of competitive bids and award to the lowest and best bidder."[2] This statutory section also makes provision for protesting a decision or intended decision relating to competitive bids as follows:

"Any person who files an action protesting a decision or intended decision pertaining to a competitive bid for space to be leased by the agency pursuant to s. 120.53(5)(b) shall post with the state agency at the time of filing the formal written protest a bond payable to the agency in an amount equal to 1 percent of the estimated total rental of the basic lease period or $5,000, whichever is less, which bond shall be conditioned upon the payment of all costs which may be adjudged against him or her in the administrative hearing in which the action is brought and in any subsequent appellate court proceeding. If the agency prevails after completion of the administrative hearing process and any appellate court proceedings, it shall recover all costs and

charges which shall be included in the final order or judgment, excluding attorney's fees. Upon payment of such costs and charges by the person protesting the award, the bond shall be returned to him or her. If the person protesting the award prevails, the bond shall be returned to that person and he or she shall recover from the agency all costs and charges which shall be included in the final order of judgment, excluding attorney's fees."[3]

Section 255.25, Florida Statutes, clearly demonstrates a preference for the use of publicly owned facilities when a state agency is leasing space but, under certain circumstances, the statutes authorize the lease of privately owned space after satisfying the competitive bid requirements of the statute.[4]

You ask whether, in light of the competitive bidding requirements expressed in this statute, the state may make an award if only one responsive bid is received or whether a second round of bidding must be undertaken. In a case considering competitive bidding for the purchase of commodities, *Satellite Television Engineering, Inc., v. Department of General Services*,[5] the court held that the Department of Education (DOE) was not required to institute a second round of bidding where there were more than two bids but only one conformed in all material respects to the invitation to bid.

In that case, DOE issued invitations to bid to provide services for a statewide satellite telecommunications network. After issuing the invitation and addendums, DOE received six responses. Of these responses one was disqualified on technical grounds, four were rejected as non-responsive, and DOE awarded the bid to the sole responsive bidder. One of the non-responsive bidders filed a formal protest under section 120.53(5), Florida Statutes.

The court considered the goal or purpose of the competitive bid statutes and determined that such statutes exist "to further fair and open competition,' so as to establish public confidence in the process by which contractual services are procured.'"[6] The court stated:

"[W]e conclude that the term "competitive bids," as it is used in [now section 287.057], was intended to encompass those situations where an agency has received one responsive bid together with one or more non-responsive bids. In other words, if there have been two or more bids, only one of which "conforms in all material respects to the invitation to bid," the competitive bidding requirement has been met and the Division may authorize the agency involved to award the contract without instituting a second round of bidding."[7]

In the *Satellite Television* case the court upheld the award of the DOE contract to the one responsive bidder.[8]

Finally, you also ask whether a state agency, when leasing private property for state use, must comply with local zoning regulations. The leading case in this area is *Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace*,[9] a copy of which I am enclosing for your consideration. The question in that case was the extent to which agencies of the state are subject to municipal zoning ordinances.

The Court in the *Temple Terrace* case held that a "balancing of interests" test applies when one governmental unit seeks to use land located in another governmental unit's jurisdiction contrary

to applicable zoning regulations of the host government. The Court stated, "[w]e conceive that the effect of our decision will be that the state will always cooperate with local government when it has decided to achieve an objective by means of a non-conforming use."[10]

Thus, if your inquiries result in a determination that the use of this property constitutes a non-conforming use of the property under the local zoning code, an administrative proceeding may provide the forum in which the competing interests of these two governmental bodies may be weighed.

I trust that these informal comments may provide some direction to you and your constituents in evaluating their options to proceed in this matter.

Sincerely,

Gerry Hammond
Assistant Attorney General

GH/tgk

Enclosures: Chapter 60H-1, Fla. Admin. Code.; 332 So. 2d 610 (Fla. 1976); 522 So. 2d 440 (Fla. 1st DCA 1988)

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[1] Section 255.249(2)(b), Fla. Stat. (1995). *And see* s. 255.25(2)(c), Florida Statutes (1996), amended by s. 44, Ch. 96-399, Laws of Florida, which provides that:

"The Department of Management Services shall adopt as a rule uniform leasing procedures for use by each state agency other than the Department of Transportation. Each state agency shall ensure that the leasing practices of that agency are in substantial compliance with the uniform leasing rules adopted under this section and ss. 255.249, 255.2502, and 255.2503."

[2] Section 255.25(3)(a), Fla. Stat. (1995).

[3] Section 255.25(3)(c), Fla. Stat. (1995).

[4] *See* s. 255.25(4)(a) and (b), Fla. Stat. (1995).

[5] 522 So. 2d 440 (Fla. 1st DCA 1988).

[6] *Id.* at 442.

[7] *Supra,* n. 5 at 443-444.

[8] *And see* s. 287.057(4), Fla. Stat. (1995), which provides that:

"If less than two responsive bids or proposals for commodity or contractual services purchases

are received, the division may negotiate or authorize the agency to negotiate on the best terms and conditions."

[9] 332 So. 2d 610 (Fla. 1976).

[10] *Id*. at 613.