

MEMORANDUM

**TO: BRADLEY ARNOLD  
SUMTER COUNTY ADMINISTRATOR**

**FROM: GEORGE G. ANGELIADIS, ESQ.  
THE HOGAN LAW FIRM, COUNTY ATTORNEY**

**RE: ANALYSIS OF F.S. §119.071 AND F.S. §286.0113 AS RELATED TO  
COMPETITIVE SOLICITATION EXEMPTIONS**

**DATE: OCTOBER 25, 2011**

**Question Presented:** How are the exemptions to public records with regard to competitive bids affected as a result of the amendment of Florida Statute §119.071 and Florida Statute §286.0113?

**General Summary:**

With regard to the general exemptions from inspection or copying of public records, F.S. §119.071 previously stated (in pertinent part):

(1) AGENCY ADMINISTRATION.—

(a) Examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure, certification, or employment are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. A person who has taken such an examination has the right to review his or her own completed examination.

(b) 1. a. Sealed bids or proposals received by an agency pursuant to invitations to bid or requests for proposals **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 a decision or intended decision pursuant to s. 120.57(3)(a) or within 10 days after bid or proposal opening, whichever is earlier.**

b. If an agency rejects all bids or proposals submitted in response to an invitation to bid or request for proposals and the agency concurrently provides notice of its intent to reissue the invitation to bid or request for proposals, the rejected bids or proposals **remain 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 a decision or intended decision pursuant to s. 120.57(3)(a) concerning the reissued invitation to bid or request for proposals or until the agency withdraws the reissued invitation to bid or request for proposals.** This sub-subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

2. a. **A competitive sealed reply in response to an invitation to negotiate, as defined in s. 287.012, is 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 a decision or intended decision pursuant to s. 120.57(3)(a) or until 20 days after the final competitive sealed replies are all opened, whichever occurs earlier.

b. **If an agency rejects all competitive sealed replies in response to an invitation to negotiate** and concurrently provides notice of its intent to reissue the invitation to negotiate and reissues the invitation to negotiate within 90 days after the notice of intent to reissue the invitation to negotiate, the rejected replies remain 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 a decision or intended decision pursuant to s. 120.57(3)(a) concerning the reissued invitation to negotiate or until the agency withdraws the reissued invitation to negotiate. A competitive sealed reply is not exempt for longer than 12 months after the initial agency notice rejecting all replies.

c. This subparagraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on **October 2, 2011**, unless reviewed and saved from repeal through reenactment by the Legislature.

With regard to the general exemptions from inspection or copying of public records, F.S. §119.071 was AMENDED to state (in pertinent part):

(1) AGENCY ADMINISTRATION.—

(a) Examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure, certification, or employment are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. A person who has taken such an examination has the right to review his or her own completed examination.

(b) 1. For purposes of this paragraph, *“competitive solicitation” means the process of requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement.*

*2. 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.*

*3. If an agency rejects all bids, proposals, or replies submitted in response to a competitive solicitation and the agency concurrently provides notice of its intent to reissue the competitive solicitation, the rejected bids, proposals, or replies remain 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 concerning the reissued competitive solicitation or until the agency withdraws the reissued competitive solicitation. A bid, proposal, or reply is not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.*

4. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on **October 2, 2016**, unless reviewed and saved from repeal through reenactment by the Legislature.

With regard to the general exemptions from public meetings, F.S. §286.0113 stated (in pertinent part):

(1) That portion of a meeting that would reveal a security system plan or portion thereof made confidential and exempt by s. 119.071(3)(a) is exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution.

(2) (a) **A meeting at which a negotiation with a vendor is conducted pursuant to s. 287.057(1) is exempt** from s. 286.011 and s. 24(b), Art. I of the State Constitution.

(b) 1. **A complete recording shall be made of any meeting made exempt in paragraph (a).** No portion of the meeting may be held off the record.

2. The recording required under subparagraph 1. is **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 a decision or intended decision pursuant to s. 120.57(3)(a) or until 20 days after the final competitive sealed replies are all opened, whichever occurs earlier.**

3. If the agency rejects all sealed replies, the recording remains 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 a decision or intended decision pursuant to s. 120.57(3)(a) concerning the reissued invitation to negotiate or until the agency withdraws the reissued invitation to negotiate. A recording is not exempt for longer than 12 months after the initial agency notice rejecting all replies.

(c) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

With regard to the general exemptions from public meetings, F.S. §286.0113 was AMENDED to state (in pertinent part):

2) (a) For purposes of this subsection:

1. **“Competitive solicitation” means the process of requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement.**

2. **“Team” means a group of members established by an agency for the purpose of conducting negotiations as part of a competitive solicitation.**

(b) 1. **Any portion of a meeting at which a negotiation with a vendor is conducted pursuant to a competitive solicitation, at which a vendor makes an oral presentation as part of a competitive solicitation, or at which a vendor answers questions as part of a competitive solicitation is exempt** from s. 286.011 and s. 24(b), Art. I of the State Constitution.

2. **Any portion of a team meeting at which negotiation strategies are discussed is exempt** from s. 286.011 and s. 24(b), Art. I of the State Constitution.

(c) 1. **A complete recording shall be made of any portion of an exempt meeting. No portion of the exempt meeting may be held off the record.**

2. The recording of, and any records presented at, the exempt meeting 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 occurs earlier.

3. If the agency rejects all bids, proposals, or replies and concurrently provides notice of its intent to reissue a competitive solicitation, the recording and any records presented at the exempt meeting remain 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 concerning the reissued competitive solicitation or until the agency withdraws the reissued competitive solicitation. A recording and any records presented at an exempt meeting are not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.

(d) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2016, unless reviewed and saved from repeal through reenactment by the Legislature.

**Discussion:** Upon reviewing the amendments to the above-referenced statutes, one of the obvious changes is the elimination of the distinction between how sealed bids, proposals and replies addressed. The revisions to F.S. §119.071 and F.S. §286.0113 define “competitive solicitation” as the process of requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement.

The next significant change is found in the modification of the time frame in which sealed bids, proposals or replies are exempt. The original language of F.S. §119.071 required that sealed bids or proposals were exempt from public records until such time as the agency provides notice of a decision or intended decision or within 10 days after bid or proposal opening, whichever was earlier. The previous requirement contained in the statute for sealed replies was identical, but exempted the records for up to 20 days.

The amendment to F.S. §119.071 requires that 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. In addition, the amendment to the statute provides that if an agency rejects all bids, proposals, or replies submitted in response to a competitive solicitation and the agency concurrently provides notice of its intent to reissue the competitive solicitation, the rejected bids, proposals, or replies remain exempt until such time as the agency provides notice of an intended decision concerning the reissued competitive solicitation or until the agency withdraws the reissued competitive solicitation. However, a bid, proposal, or reply is not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies. Under the previous version of the statute, the 12 month time limit did not exist as to bids and proposals; however, it did exist as to replies. The amendment treats sealed bids, proposals and

replies to competitive solicitations the same in the event the agency rejects them all. Thus, the timing distinction between bids, proposals and replies under the total rejection scenario has been eliminated.

One change to F.S. §286.0113 includes the definition of the term "Team" as a group of members established by an agency for the purpose of conducting negotiations as part of a competitive solicitation. The amendment also provides that any portion of a meeting at which a negotiation with a vendor is conducted pursuant to a competitive solicitation, at which a vendor makes an oral presentation as part of a competitive solicitation, or at which a vendor answers questions as part of a competitive solicitation is exempt from public records. Additionally, any portion of a team meeting at which negotiation strategies are discussed is exempt from public records. However, a complete recording shall be made of any portion of any such exempt meeting, and no portion of the exempt meeting may be held off the record

The changes to F.S. §286.0113 are consistent with the changes to F.S. §119.071, in that the timing distinctions between sealed bids, proposals and replies are eliminated. In addition, the same definition of the term "competitive solicitation" is incorporated into F.S. §286.0113. The amendment requires that the recording of, and any records presented at any meetings designated as exempt are exempt from public records 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 occurs earlier. In addition, the amendment to F.S. §286.0113 indicates that if the agency rejects all bids, proposals, or replies and concurrently provides notice of its intent to reissue a competitive solicitation, the recording and any records presented at the exempt meeting remain exempt until such time as the agency provides notice of an intended decision concerning the reissued competitive solicitation or until the agency withdraws the reissued competitive solicitation. However, a recording and any records presented at an exempt meeting are not exempt for longer than 12 months after the initial agency notice rejecting all bids, proposals, or replies.

It is clear that the Legislative intent related to the amendments discussed above is to ensure that the process of responding to a competitive solicitation remains fair and economical to vendors. This includes the necessity to temporarily exempt from public records communications and records presented during meetings with potential vendors. Recordings of exempt meetings are also temporarily exempt from public records.

The Legislature has reasoned that it would inequitable to compel vendors to disclose to competitors the nature and details of their proposals during such meetings or through the minutes of such meetings. In addition, the public and private harm associated with these exemptions outweighs the temporary delay in access to such records.

The Legislature also determined that it is a public necessity that any portion of a team meeting, including recordings, at which negotiation strategies are discussed should be temporarily exempt.

Without these exemptions, the Legislature has reasoned that the effective and efficient administration of the competitive solicitation process would be hindered.

**Conclusion:** In order to comply with the Legislative intent of the statute amendments discussed above, Sumter County should be sure to incorporate the exemptions identified within F.S. §119.071 and F.S. §286.0113. Specifically, the County should ensure that competitive solicitation documents are exempt from public records 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 occurs earlier. In the event all bids, proposals or replies are rejected, and the County concurrently provides notice of its intent to reissue the competitive solicitation, the rejected bids, proposals, or replies should remain exempt until such time as the County provides notice of an intended decision concerning the reissued competitive solicitation or until the County withdraws the reissued competitive solicitation. However, it should be noted that a bid, proposal, or reply is not exempt for longer than 12 months after the initial County notice rejecting all bids, proposals, or replies

In addition, the County should adhere to the requirements of the statute amendment by ensuring that any portion of a meeting at which a negotiation with a vendor is conducted pursuant to a competitive solicitation, including oral presentations, or at which a vendor answers questions as part of a competitive solicitation be treated as exempt from public records. Additionally, any portion of a team meeting at which negotiation strategies are discussed should be treated as exempt from public records. Complete recordings shall be made of any portion of any such exempt meeting, and no portion of the exempt meeting may be held off the record

These recordings, and any records presented at any meetings designated as exempt should be treated as exempt from public records 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 occurs earlier. If the County rejects all bids, proposals, or replies and concurrently provides notice of its intent to reissue a competitive solicitation, the recording and any records presented at the exempt meeting should be treated as exempt until such time as the County provides notice of an intended decision concerning the reissued competitive solicitation or until the County withdraws the reissued competitive solicitation. It should be noted that any records presented at an exempt meeting are not exempt for longer than 12 months after the initial County notice rejecting all bids, proposals, or replies.

Following these procedures will allow the County to operate consistently with the intent of the Florida Legislature in ensuring that the process of responding to a competitive solicitation remains fair and economical to vendors, and will also promote the effective and efficient administration of the competitive solicitation process.

## Douglas, Jessica

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**From:** Arnold, Bradley  
**Sent:** Thursday, October 27, 2011 3:57 PM  
**To:** Douglas, Jessica  
**Subject:** FW: Revisions to Competitive Solicitation Statute

Add this with the memo for the 11/8/11 meeting

-----Original Message-----

**From:** George Angeliadis [mailto:george@hoganlawfirm.com]  
**Sent:** Thursday, October 27, 2011 11:36 AM  
**To:** Arnold, Bradley; Bisner, Art  
**Cc:** Shawna Morales; Amy Palmer; Douglas, Jessica  
**Subject:** RE: Revisions to Competitive Solicitation Statute

Brad / Art,

The Legislature has determined that it is a "public necessity" to exempt competitive solicitations from becoming public records "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." As discussed in my memo, there are separate procedures when all bids are rejected. The Legislature has reasoned that temporarily protecting such information ensures that the process of responding to a competitive solicitation remains fair and economical for the vendors, while still providing oversight after a competitive solicitation is made or withdrawn.

Therefore, I would recommend that bid amounts not be disclosed, verbally or in writing, until such time as the County provides notice of its intended decision, or until 30 days after opening, whichever is earlier.

George

**From:** Bisner, Art  
**Sent:** Wednesday, October 26, 2011 9:02 AM  
**To:** Arnold, Bradley  
**Subject:** RE: Revisions to Competitive Solicitation Statute

In the past, we have read each proposal dollar amount aloud during the opening of the proposals. Do the revised exemption laws preclude us from doing so. I would think the exemptions would apply to both verbal and written information.

Art Bisner  
Financial Services Manager

Sumter County Board of County Commissioners

7375 Powell Rd., Suite 206

Wildwood, FL 34785

Phone: 352-689-4438

\*\*\*\*\* Notice \*\*\*\*\*

The Board of Sumter County Commissioners is a public agency subject to Chapter 119 of Florida Statutes concerning public records.

From: countyattorney.sumtercounty.fl [mailto:countyattorney.sumtercounty.fl@hoganlawfirm.com]  
Sent: Tuesday, October 25, 2011 3:22 PM  
To: Arnold, Bradley; Bisner, Art  
Cc: Douglas, Jessica; Shawna Morales; Amy Palmer; Tom Hogan; Jennifer Rey  
Subject: Revisions to Competitive Solicitation Statute

Brad,

Attached please find a Memorandum analyzing the amendments to the Competitive Solicitation Statutes, and respective exemptions, you asked me to review.

GGA

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