

NIGP – Tampa Bay Chapter






Agenda

- ❖ Brief Discussion – new public records
- ❖ Brief update – case law – Accela v. County of Sarasota



Sunshine Law

- What is the Sunshine Law
 - Provides a right of access to gov't proceedings at both State and Local level - *All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.*
- What are the requirements of the Law
 - Meetings of boards, commissions, or committees must be open to the public;
 - Reasonable notice of such meetings must be given;
 - Minutes of the meeting must be taken



The public records law and the FL Sunshine Laws are construed in favor of openness and exemptions are construed narrowly and strictly. .



Sunshine Law

- FS 286.011- enacted in 1967
 - Establishes basic right of access to most gov't meetings of boards, commission or other governing bodies
- 1976 amendment – concerned full and public disclosure of financial interests of all public officers, candidates, employees
- 1990 amendment to constitution – provided for open meetings of the state legislative branch of the gov't



Legislative

- ❖ Chapter 2011-140 / HB 7223
 - ❖ Revises both 119.071 and 286.0113



Legislative

- MAJOR CHANGES TO HOW WE HAVE DONE BUSINESS
- Legislative finding –
 - “temporarily protecting such information ensures that the process of responding to a competitive solicitation remains fair and economical for vendors, while still preserving oversight after a competitive decision is made or withdrawn.”



Legislative

- When are bids/responses subject to public disclosure?
 - Bids, or proposals received by an agency are exempt from 119 until such time as the agency provides notice of an intended decision or **until 30** ~~within 10 days~~ after opening the bids, proposals or final replies, whichever is earlier.
 - If an agency rejects all, and concurrently provides notice of intent to reissue a solicitation, the rejected bids/proposals are exempt from disclosure until the agency provides notice of intent concerning the reissued solicitation




Legislative

- Procurement Meetings and Oral Presentations
 - Oral presentations are now closed
 - Negotiation meetings are now closed
 - Staff meetings to discuss negotiation strategy are now closed
- Recordings
 - A complete recording shall be made of any portion of an exempt meeting.
 - The recording, and any records presented at an exempt meeting are exempt from disclosure until the agency provides notice of intent, or until 30 days after opening.




Legislative

- Reject and notice of intent
 - If an agency rejects all, and concurrently provides notice of intent to reissue a solicitation, the recordings and any records from exempt meetings remain exempt from disclosure until the agency provides notice of intent concerning the reissued solicitation
- 




Case Law

- Piggybacking
 - Accela, Inc., v. Sarasota County (Appellate case)
 - Exception to competition
 - Purchase from / via another agency
 - Saves time / resources
 - Save money / knowing specific price
- 



Accela, Inc., v. Sarasota County

- Challenged piggybacking by County
 - Purchase of software to track land management
 - County conducted two site visits where software had been implemented
 - County ‘piggybacked’ on vendor’s (CSDC) most current contract from Wisconsin
- 




Accela

- From 9 modules to 40 (only 8 common between both) County argued this made the contract “*substantially the same*”
- From \$176k to \$711k
- Implementation from \$269k to \$688K
- 5 YR maintenance from \$31K to 179K



Accela

- “In practice of course, the County (*or any agency*) and the vendor must draw up a fresh contract. The degree to which this contract can diverge from the other government entity's contract is a significant issue in the present lawsuit.”
- 



Accela

- Gov't agency must follow it's own rules ordinances (City of Hollywood v. Witt)
- Terms and scope of new 'piggybacked' contract must be substantially the same as original
- Cannot use another entity to 'begin' negotiation



Accela

- *“...given that the piggyback process contemplated by the Code is intended to be competitive, we cannot agree that the County and CSDC's contract-making process represented a valid manifestation of the piggyback provision. That is, the County was not permitted to use another entity's contracts merely as a “basis to begin negotiations, ...”*



Accela

- a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.” *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So.2d 505, 507 (Fla.1982).



Accela

- However, we conclude that that County went beyond the bounds of its discretion when it violated its Procurement Code. See [Dep't of Transp. v. Groves-Watkins Constructors, 530 So.2d 912, 913 \(Fla.1988\)](#) (noting that the rule that “an honest exercise of ... discretion cannot be overturned” does not apply when there is a finding of “ ‘*illegality*, fraud, oppression, or misconduct’ ” (emphasis added)) (quoting [Liberty County, 421 So.2d at 507](#)).



Times Publishing Co. v. City of Clearwater, (830 So. 2d, 844) Supreme Court of Florida

- Public Records jurisdiction case
- Personal/private e-mail sent from municipal computer
- Are all e-mails transmitted or received by public employees of a government agency subject to public records under Section 119?
- Times reporter requested copies of ALL e-mails sent/received by two Clearwater employees using City's computer network



Times Publishing (cont.)

- Employee's reviewed their e-mail for public/personal – (in accordance with City policy)
- No other review of e-mails
- City copies "*public*" e-mails and provided them to Times Publishing
- Times Publishing filed suit to obtain e-mails designated "*private*"
- Asserted, under 119, that Times was entitled to ALL e-mails generated and stored on City's computer network



Findings - Times Publishing Co.

- Circuit court granted injunction and ordered City to “make every reasonable effort to retrieve, preserve and secure from destruction” all e-mails sent or received by employees in question
- At trial court, injunction was denied, thereby not forcing City to provide all e-mails
- Second District affirmed trial court order, after a review of e-mails in question
- Sent to the Supreme Court by the District Court, as the issue was of great public importance*



Findings - Times Publishing Co. (cont.)

- “Private” or “personal” e-mails fall outside the current definition of public records, because
 - they are neither “made or received pursuant to law or ordinance” or “created or received in conjunction with official business of the City, or
 - ‘in connection with official business of the City’, or ‘in connection with the transaction of official business’
- AGO opinion that creation of e-mail header makes all e-mails, regardless of content, public record – Supreme Court disagreed
 - Unanimous Supreme Court decision **

Questions

THANK YOU

