

INCREASING USE OF REGIONAL PREFERENCES FOR BIDDING PUBLIC PROJECTS IN FLORIDA

Introduction

The use of local preferences for bidding public projects in Florida has long been controversial.¹ Supporters argue that a county or municipal government benefits from local preferences because they help develop the local economy, increase their tax base and promote reinvestment in the community. Critics argue that any “benefit” is offset by the loss of an even playing field among bidders and ultimately reduced competition will result in increased costs. Florida’s competitive bidding statutes allow for the use of local preferences² and courts have generally approved them, so long as the preferences are “reasonable,” not “arbitrary and capricious” and do not conflict with existing law.³

Traditional local preferences have extended only to bidders with a presence in the county or municipality making the award. But recently a new take on local preferences has become increasingly common. This preference, commonly referred to as a regional preference, expands on the idea of local preferences and provides bidders in a defined geographical area with a preference, *even if they do not have a presence in the city or county that is offering the public letting*. This occurs when a local government enters into a reciprocity agreement with another jurisdiction, thus allowing contractors from both locations to enjoy a preference. For example, Sarasota County has entered into reciprocity agreements with Charlotte County, Manatee County, and DeSoto County. Contractors located in any of these counties receive a preference when bidding on projects in any other county with a reciprocal agreement. Lee County and Collier County also have reciprocity agreements.

Potential Legal Challenges to Regional Preferences

¹See, Adolphus v. Baskin, 116 So. 225 (Fla. 1928) (rejecting local preferences as unreasonable and contrary to the principles of public bidding).

²These exceptions to the competitive bidding process have been permitted in Florida law since at least 1994. Fla. Stat. 255.20(i); But see, Florida Attorney General Opinion 2002-03 (warning that “it would appear contrary to the process of competitive selection to give undue weight to a particular factor [location] such that it could be found that the school board has acted arbitrarily and capriciously.”).

³See, for example, Port Orange v. Leechase Corp., 430 So. 2d 534 (Fla. 5th DCA 1983); Engineering Contractors Ass’n of South Florida, Inc. v. Broward County, 789 So. 2d 445, 450 (Fla. 4th 2001) (“Under [Florida’s competitive bidding system], the public authority may not arbitrarily or capriciously discriminate between bidders, or make the award on the basis of personal preference.”). Additionally, U.S. Department of Transportation regulations provide that “[n]ondiscriminatory bidding procedures shall be afforded to all qualified bidders regardless of National, State or local boundaries. . . .” 23 C.F.R. § 635.112(d).

Over the years there have been a number of legal challenges to the use of local preferences. Although Florida courts give significant deference to local governments in the creation of local preferences, that deference is not absolute. Courts have held that local preferences are legitimate because they:

- 1) Offset a competitive disadvantage of higher costs paid to reside in the particular locale;
- 2) Entice businesses to relocate into the locale;
- 3) Prefer those who contribute to the local economy; and
- 4) Generally encourage the local economy.

Unlike traditional local preferences where arguably there are direct economic benefits to public owners, courts may be more apt to find that regional preferences are “arbitrary and capricious” or “unreasonable” because the benefit to the local entity is harder to quantify. In other words, although one may argue that the rationale for regional preferences would be the same as that for a local preference, the result may be different.

For instance, a contractor challenging the use of a regional preference may argue that the economic success of a contractor in another county has little or no impact on the local economy or tax revenues of the county awarding the bid. That argument may be even stronger if the counties are not contiguous or can otherwise be shown to have limited or no interdependent economic relationships. The same might be said if one local government extends a regional preference to one neighboring jurisdiction and not another. A contractor based in the non-preferred jurisdiction could argue that the discrimination between similarly situated neighbors is arbitrary and capricious and unjustifiable. Although the public owner may argue that it benefits from giving its own contractors a favored status when bidding on projects outside its jurisdiction, those indirect benefits may be less persuasive to the courts.

Potential Legislative Changes to Regionalized Preferences

In the 2011 legislative session, bills were introduced in both the Florida House of Representatives and the Florida Senate to amend section 287.084 of the Florida Statutes which allows preferences by political subdivisions purchasing “personal property” where one of the bidders is an out-of-state vendor. The amendment, if it passed, arguably could have eliminated a local government’s ability to adopt its own preference program.⁴ Had the amendment been allowed to leave committee, it may have standardized – at the state level – how local governments can apply preferences. This 2011 legislative effort followed similar bills filed in 2010⁵ and 2009.⁶ However, these bills died in committee.⁷ While section 287.084 does not

⁴The initial draft of the proposed amended statute is cursory and there is no legislative history or committee analysis to give guidance on the direction the proposed amendment would have ultimately taken.

⁵Fla. HB 899 (2010).

⁶Fla. SB 616 (2009) would have eliminated local preferences except in circumstance where the low bids were otherwise “equal with respect to price, quality and services.”

directly address public works procurements, a legislative change could be very persuasive to a court in weighing whether a particular regional bidding preference for contractors is reasonable.

Conclusion

In the current economic climate it is likely that the trend toward more regional and local preference programs will continue as local politicians look for creative ways to benefit contractors in their area. With that said, the use of regional preferences may lead to challenges by disappointed bidders arguing that they have been adversely effected by an arbitrary standard lacking any tangible benefit to the local economy. Until the legislature acts or the courts rule on the legality of regional preferences, it is probably a safe bet the debate will continue.

⁷In September 2011, Hillsborough County declined to adopt an ordinance that would have created a local preference program. At least one construction association opposed the ordinance on the grounds the preference was unwanted governmental interference which disrupts a level playing field.