

REVISED: April 9, 1985
DATE: April 4, 1985

BILL NO. SB 419
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SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	<u>ANALYST</u>	<u>STAFF DIRECTOR</u>	<u>REFERENCE</u>	<u>ACTION</u>
1.	<u>Smawley</u>	<u>Swindell</u>	<u>1.GO</u>	<u>Fav/2 amd.</u>
2.	<u> </u>	<u> </u>	<u>2. </u>	<u> </u>
3.	<u> </u>	<u> </u>	<u>3. </u>	<u> </u>
SUBJECT:			BILL NO. AND SPONSOR:	
Administrative Procedure Act			SB 419 by Senator Deratany	

I. SUMMARY:

A. Present Situation:

The Administrative Procedure Act (APA), ch. 120, F.S., is the procedural mechanism by which persons and entities may seek redress for actions of state agencies. The APA currently has provisions dealing with disputes arising during the course of a contract bidding process. Agencies which enter into contracts pursuant to Title XXV, F.S., (Public Transportation, ss. 282.301-282.313, F.S.; Information Technology Resources, ch. 255, F.S.; Public Property and Publicly Owned Buildings, or ch. 287, F.S.; Procurement of Personal Property and Services) are required to adopt rules for resolving disputes which occur during the bidding process. The APA requires that these rules must have the following minimal provisions:

1. For a bid solicitation, notice of an agency decision or intended decision must be given by United States mail or by hand delivery.
2. For other decisions, or intended decisions, notice can be given by posting the bid tabulation where the bids were opened or by certified United States mail, return receipt requested.
3. These notices must contain a statement that the "Failure to file a protest within the time prescribed in s. 120.52(5), Florida Statutes, shall constitute a waiver of proceedings under chapter 120, Florida Statutes."
4. Any person who is adversely affected by the decision or intended decision must file a notice of protest within 72 hours after the bid tabulation is posted or receipt of the notice of decision or intended decision.
5. A formal written protest must then be filed within 10 days of the filing of the notice of protest. The failure to timely file both of these documents constitutes a waiver of rights under the APA.

6. When the agency receives a timely notice of protest, it must stop its bid proceedings until the protest is resolved, favorably or unfavorably to the protestor, by final agency action. If there is an immediate and serious danger to the public health, safety, and welfare in delaying the process, the agency head may set forth in writing the reasons and may continue the bid process.
7. The agency, on its own initiative at the request of a protestor, must provide an opportunity to resolve the protest by mutual agreement within 14 days of the receipt of the formal protest.
8. If no mutual agreement resolving the protest can be reached within 14 days of the receipt of the formal protest, then a formal hearing, pursuant to s. 120.57(2), F.S., can be requested if there are disputed issues of material fact; or if there are none, then an informal hearing can be held according to s. 120.57(1), F.S. An appeal to the appropriate district court can occur after these proceedings.

As a consequence, the award of the bid could be delayed until all of these protest procedures have occurred.

B. Effect of Proposed Changes:

The bill would shorten the time periods involved with the protest proceedings and dispense with formal and informal hearings under the APA and require the protestor to seek judicial review in the appropriate district court. The bill would make it clear that the failure to file the notice of protest and formal written protest within the prescribed time limits would constitute a waiver of proceedings under the APA.

The agency would only have to stop the bid process until an opportunity to resolve the protest by mutual agreement had been provided. This opportunity would be provided within 14 days of the notice of protest. No opportunity for resolving the dispute under s. 120.57(1), F.S. - Informal Proceedings, or s. 120.57(2), F.S., - Formal Proceedings, would be available.

The exclusive method for resolving the dispute would be to seek judicial review in the appropriate district court pursuant to s. 120.68, F.S. This review could occur, unless the bid proceedings were stopped by a court order, after the contract had already been awarded to another bidder.

I I. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

These alternative procedures may have a positive impact on successful bidders, by speeding the award process, and a negative effect on others. The costs associated with these effects are not readily determinable, however.

B. Government:

Agencies would incur the costs of adopting new rules to comply with the provisions of the bill. The shortening of the bid protest procedure may result in savings to agencies, however, the amount is not readily determinable.

I I I. COMMENTS:

If a protestor sought judicial review in the district court, there would not be a record of a hearing for the court to review in reaching its decision. This might result in the court remanding the case to the agency with an order to conduct an administrative-type hearing. The court could also reverse the action awarding the bid after it had been subsequently awarded to another bidder.

I V. AMENDMENTS:

Amendment #1 by Governmental Operations:

Provides that the formal written protest must state the facts which demonstrate that the agency decision or intended decision is improper.

Shortens the time period for resolving the protest by mutual agreement from 14 to 7 days.

Provides that the protestor may petition for an administrative hearing and that the hearing, to be conducted within 15 days of receiving the request by the Division of Administrative Hearings, is to be held on an expedited basis unless waived by all parties.

Requires the Administration Commission to adopt model rules of procedure.

Provides an appropriation to the Division of Administrative Hearings.

Amendment #2 by Governmental Operations:

Title amendment.

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waiver of proceedings under chapter 120. The formal written protest shall state with particularity those facts that demonstrate that the agency decision or intended decision is arbitrary, capricious, based on a misconception of law, based upon ignorance through lack of inquiry, in violation of law, the result of improper influence, or is otherwise an abuse of the agency's discretion.

(d) The agency, on its own initiative or upon the request of a protestor, shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7 ~~14~~ days, excluding Saturday, Sunday, and legal holidays, of receipt of a formal written protest.

1. If the subject of a protest is not resolved by mutual agreement within 7 ~~14~~ days, excluding Saturday, Sunday, and legal holidays, of receipt of the formal written protest and if there is no disputed issue of material fact, an informal proceeding shall be conducted pursuant to s. 120.57(2) and applicable agency rules before a person whose qualifications have been prescribed by rules of the agency.

2. If the subject of a protest is not resolved by mutual agreement within 7 ~~14~~ days, excluding Saturday, Sunday, and legal holidays, of receipt of the formal written protest and if there is a disputed issue of material fact, the agency shall refer the protest to the division for proceedings under s. 120.57(1).

(e) Upon receipt of a formal written protest referred pursuant to this subsection the division director shall expedite the hearing and assign a hearing officer who shall conduct a hearing within 15 days of the receipt of the formal written protest by the division. The provisions of this paragraph may be waived upon stipulation by all parties.

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(f) The Administration Commission shall promulgate model rules of procedure pursuant to the provisions of s. 120.54(10) for the filing of notice of protests and formal written protests.

Section 2. There is hereby appropriated from the General Revenue Fund to the Division of Administrative Hearings of the Department of Administration an amount sufficient to carry out the purposes of this act.

Section 3. This act shall take effect July 1, 1985.

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(reported favorably)

The Committee on . . . Gov. Operations. . . . recommended the following amendment which was moved by Senatorand adopted:
and failed:

Title Amendment

In title, on page 1, lines . . 2-6, strike all of said lines

If amendment is text from another bill insert:	No X
Bill No. HB 1150 Draft No. 192-343A-4-5 With Changes?	Yes

and insert:

An act relating to administrative procedures; amending s. 120.53, F.S., providing that the formal written protest shall include particular parts; providing for model rules; providing for expedited hearing; providing an appropriation; providing an effective date.

Date: March 21, 1985
Revised: April 4, 1985
Final: _____

HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENTAL OPERATIONS
STAFF ANALYSIS

BILL# HB1150 SPONSOR Governmental Operations

EFFECTIVE DATE July 1, 1985 IDENTICAL/SIMILAR BILLS _____

RELATING TO Contract Bid Disputes

OTHER COMMITTEES OF REFERENCE _____

I. SUMMARY:

This bill would modify the procedure for resolving bid disputes which arise from contacting pursuant to sections 282.301-282.313, (information technology) chapter 255, (building construction and leasing) chapter 287 (purchasing) and chapters 334-349 (transportation).

Currently, a person can protest a bid solicitation or contract award by filing a notice of protest within 72 hours of the posting of the bid tabulation or notice of the agency decision or intended decision. Upon the filing of the notice, the process is stopped until resolved by final agency action, usually the completion of an administrative hearing.

This bill provides that the formal written protest must state with particularity the reasons for the protest. It must show facts that demonstrate that agency's decisions or intended decision is an abuse of the agency's discretion. The standard established is a codification of existing caselaw as stated in William A. Berbusse Jr. Inc. v. North Broward Hosp. Dist., 117 So. 2d 550 (Fla. 2nd DCA 1960).

It also provides that the agency shall provide an opportunity to resolve the protest by mutual agreement within 7 days (excluding Saturdays, Sundays and holidays) rather than the 14 days currently provided by this section.

In addition, the Division of Administrative Hearings would be directed to expedite the hearings on bid protests and hearings would be required to be conducted within 15 days of the receipt of the notice of protest by the division.

Finally, the Administration Commission would be directed to promulgate model rules of procedure for the filing of the notice of protests and the formal written protests.

I I. ECONOMIC IMPACT:

A. Public:

The general public would not be directly impacted by this bill. Persons doing business with the state would be affected; the process would be streamlined and successful bidders could begin working on the contracts without unnecessary delays. Yet the hearing rights for a valid protest would be maintained.

B. Government:

Cost avoidance would be realized by state agencies. No longer would protests which have no merit be able to delay bid solicitations and contract awards. Meritorious protests would be adjudicated promptly and fairly.

The Department of Transportation estimates that the inflation rate for their contracts has been increased nine percent during the past year.

The Board of Regents indicated that the actual cost of the delays which it has experienced is difficult to ascertain, but the protests caused delays in the utilization of space, delays in planned programs, and caused relocation, or cancellation of programs for all or part of the school year. It was also noted by the Board's Director of Capital Programs, that delays increase the cost of the project to the state because the contractor cannot guarantee the prices of his subcontractors for more than sixty days after receipt of the bids.

The Division of Administrative Hearings estimates that it would need additional positions to implement the expedited hearing provisions of this bill. The division estimates that 2 hearing officers, 2 secretaries, and a part-time file clerk would be needed. The costs are estimated at \$172,763 for the first year and \$159,144 for the second and subsequent years --these figures include salaries, benefits and operating capital outlay.

I I I. COMMENTS:

The Administrative Procedure Act, chapter 120, Florida Statutes, provides procedures where "the substantial interests of a party are determined by an agency." The First District Court of Appeal in State ex. rel. Department of General Services v. Willis, 344 So.2d 580 (Fla. 1st DCA 1977), held that the issuance of specifications for a bid was "agency action" as used by the Administrative Procedure Act and such action affected "the substantial interests. . . .of prospective bidders for public work. . ."

Each year, the Joint Administrative Procedures Committee surveys agencies of state government for their suggestions for changes to the APA. Several agencies responded last year that they were having serious problems with the current bid resolution process because of the time required to process these cases and the chairman of the JAPC requested this committee to investigate this matter. This bill is the result of that investigation and study.

The Board of Regents maintained that they have had serious problems with the bid protest procedure under section 120.53(5), Florida Statutes. That office indicated that it has had three protests since January 1982 and all were resolved in accordance with the Board's original decision. Each of these protests also took over six months to resolve.

The Department of Transportation responded that it has been seriously affected by the current situation. For example, in 1982 only 10 protests were filed with the department; in 1984, 61 protests had been filed. Under existing law, resolution of a protest often takes 6 to 9 months.

IV. AMENDMENTS:

None.

V. PREPARED BY Booter Imhof

V I. STAFF DIRECTOR Jack C. Overstreet