

# Are You Willing To Put Your Money On It?

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## State Bid Protest Bonds

Florida's Administrative Procedure Act allows any person who is adversely affected by a state agency's contract award or solicitation to file a bid protest. However, that right to protest sometimes comes with a high price tag. As a general rule, state agency decisions regarding the solicitation or award of contracts are subject to administrative challenge under the procedures set out in [section 120.57\(3\), Florida Statutes](#).<sup>[1]</sup> While there are specific variations, most state contracting decisions are protested by filing a notice of intent to protest within 72 hours after the posting of the decision being protested, followed by a formal written protest 10 days thereafter. In almost every instance, a protest bond must be filed along with the formal written protest. The amount of the bond can sometimes be sizeable. For example, a state agency releases bid specifications for the design, construction, and operation of a large psychiatric hospital. A potential bidder, concerned that some of the specifications would prevent it from submitting a responsive bid, wishes to exercise its right to protest, alleging that the specifications in question are arbitrary and capricious. However, the purchasing agency determines that the value of the contested contract is \$200 million and, therefore, the potential bidder will be required to post a bond in the amount of \$2 million – a bond that may cost \$200,000 or more to obtain. This article discusses the various statutory provisions requiring a protest bond, the ramifications of failing to file a proper or timely bond, and the limited case law relating to the bond requirement. **Statutory Requirements** The protest bond requirement itself is not found in [section 120.57\(3\)](#). Instead, the various protest bond provisions are scattered among the statutes that give state agencies purchasing authority. Logically, since the Department of Management Services ("DMS") has general purchasing authority for the executive branch, the protest bond provision with the widest application is found in chapter 287, which describes DMS authority to contract for goods and services, as well as its authority to delegate the contracting function to other executive branch agencies. [Section 287.042\(2\)\(c\)](#) requires that when a contracting decision by DMS or any other agency acting under delegation from DMS is protested, a protest bond in the amount of one percent of the contract value must be filed at the same time a formal written protest is filed. The one percent is calculated based upon the amount bid by the protestor. If the

protestor had not yet submitted a bid – such as for protests of bid specifications or contract awards that did not result from a competitive solicitation (e.g. single source purchases) – the bond is based upon the agency’s estimate of the contract value. [Section 287.042\(2\)\(b\)](#) dictates that the agency’s estimate, which is to be provided within 72 hours after a notice of intent is filed, must be based upon such factors as the price of previous contracts, the amount appropriated for the contract, or fair market value. [§ 287.04\(2\)\(c\), Fla. Stat.](#) As mentioned above, however, [section 287.042\(2\)\(c\)](#) does not control in every instance. For example, [chapter 255](#) governs the procurement of construction services for public buildings. Section 255.0516, which relates specifically to contracts for the construction, repair, and maintenance of educational facilities, requires that when the contract value exceeds \$500,000, the required bond amount is the greater of \$25,000 or two percent of the lowest accepted bid. For all other projects, the required bond amount is five percent of the lowest accepted bid. Protests of contracting decisions involving the lease of space in privately-owned buildings by state agencies require the posting of a bond in an amount of \$5,000 or one percent of the estimated total rental under the base lease period, whichever is greater. [§ 255.25\(3\)\(c\), Fla. Stat.](#) Neither [section 255.25\(3\)\(c\)](#) nor [section 255.0516](#) specifies how the bond amount would be determined if a protest involved a decision where contract prices had been submitted, such as a challenge to the procurement specifications. However, it is likely that, if the provisions of [section 287.042\(2\)\(b\)](#) were followed, the bond would be deemed compliant. Chapter 255 imposes no bond requirement for protests of contracting decisions relating to the construction of state buildings other than educational facilities. For contracts procured by the Department of Transportation (“DOT”) involving construction or maintenance of either the State Highway System or the State Park Road System, the protest bond amount depends upon whether bidders must be pre-qualified to submit a bid.<sup>[2]</sup> For procurements that do not require bidders to be pre-qualified, the required protest bond amount is \$2,500. For those that do require pre-qualification, the bond amount required to challenge a contract award or rejection of bids is the greater of one percent of the lowest bid submitted or \$5,000, while the bond required to challenge specifications is a flat \$5,000. In addition to the differing bond amount, the protest bond requirements for DOT procurements involving highway construction or maintenance deviate from the [section 287.042](#) model with respect to the deadline for filing the protest bond. To challenge DOT decisions on highway contracts, the bond must be filed within 72 hours after the decision being protested is posted – rather than 10 days later with the formal written protest. [§ 337.11\(5\), Fla. Stat.](#) A 72-hour deadline for filing the bond also applies to protests of all purchasing decisions by the Department of Lottery and those purchasing decisions by DMS that relate to State Group Insurance. [§§ 24.109\(2\) & 110.123\(3\)\(d\), Fla. Stat.](#) None of these statutes establish a clear time period within which the purchasing agency must provide an estimated contract value if no bid prices have been submitted. Therefore, it is unclear how a bidder is to determine what the proper bond amount should be before the deadline for timely filing of the bond elapses. As suggested below, in these instances it is recommended that the bidder make a good faith effort to calculate the contract value and submit a bond based on that amount, rather than chance possible dismissal for failure to file a timely bond. **Consequences of Untimely or Defective Filing** In *ABI Walton Insurance v. State, Department of Management Services*, the court

concluded that a protestor's failure to file a timely protest bond could not serve as grounds to dismiss the protest unless and until the protestor was given notice and an opportunity to cure. The same conclusion was later applied to the bond requirement for challenging Department of Transportation highway contracts. *General Elec. v. Department of Trans.* Subsequent to these two decisions, the Legislature amended the notice required to be posted by state agencies in connection with all contracting decisions to include the underlined language below. Failure to file a protest within the time prescribed in section [120.57\(3\)](#), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes. [§ 120.57\(3\)\(a\)](#), Fla. Stat (emphasis supplied). The Administration Commission then amended the Uniform Rules of Procedure to require that, if such notice is given by the agency but a bond is not timely posted, "the agency shall summarily dismiss the petition." Fla. Admin. Code R. [28-110.005](#) (emphasis supplied). Florida's appellate courts have not issued any opinions that directly address the issue since these statutory and regulatory changes were adopted. However, a DMS final order dismissing a protestor for failure to file a timely protest bond has been upheld by the First District Court of Appeal in a per curiam affirmance. *United HealthCare v. State, Dep't of Management Servs.* In the order of the Division of Administrative Hearings relinquishing jurisdiction back to DMS for dismissal, the administrative law judge determined that the untimely filing of the protest bond left the agency with no discretion but to dismiss. It remains unclear whether the same result would occur if a bond were filed in a timely manner but was defective in some other manner – either because it was for an insufficient amount or did not comply with the bond requirements established in the Uniform Rules. Because both the statutory notice and the Uniform Rule only refer to a waiver of rights and summary dismissal when a bond is not timely filed, it may well be that the decision in *ABI Walton* remains applicable for other bond defects. If a bond is for too little or has some other flaw, the agency cannot dismiss until it first notifies the protestor and provides a reasonable opportunity for the defect to be cured. Cf. [§ 120.569\(2\)\(c\)](#), Fla. Stat. (providing that a petitioner must be given an opportunity to cure a defective petition for hearing unless the defect appears noncurable). It is also likely that failure to file a protest bond in a timely manner may not justify dismissal of the protest with prejudice if grounds are established for equitable tolling. In a recent First District opinion, *Pro-Tech Monitoring v. State, Dep't of Corrections*, the court relied upon equitable tolling, in part, as the basis for reversing the dismissal of a bid protest. In that case, the protester attempted to deliver its formal bid protest but was not permitted to enter the part of the agency building where the agency clerk was located. The protestor therefore left its formal petition with an agency security guard who time-stamped the petition as being received 15 minutes before the deadline for filing elapsed. The guard failed to relay the petition to the agency clerk until the next day. The court ruled that, while the Uniform Rules provide that a document is not deemed filed until it is received by the agency's clerk, the security guard in this instance was functioning in that capacity. The court also made the alternative ruling that, even if the filing did not technically adhere to the Uniform Rules, dismissal of the protest petition would be unduly harsh under these circumstances. Applying a standard established in *Machules v. Department of Administration*, the court found that, while "the filing deadlines contained [in section



120.57(3) relating to bid protest] should be strictly enforced under ordinary circumstances,” the facts before them were not ordinary. Because the agency’s actions misled the protestor into believing it had satisfied the filing requirement, equitable tolling precluded dismissal. While the bid protest bond was not mentioned, it must be assumed that the court would apply the same equitable tolling analysis to determine whether late filing of a protest bond should be grounds for dismissal. Therefore, even a late filed bid protest bond may not always require summary dismissal if facts are established showing that dismissal would be unduly harsh and require the application of equitable estoppel. **Challenges to the Bond Requirement** Bid protest bonds are conditioned on the payment of costs that are required to be assessed if the protestor loses the protest. While this includes any assessment of appellate costs, it excludes attorneys’ fees. Obviously, in those instances when the protest bond is established as a percentage of contract value, the amount of the required bond can be far larger than any amount that would likely be assessed in costs. This has led to allegations that the bond provisions are unconstitutional – either on their face or as applied. While these issues have been raised on appeal, to date, they have not been ruled on or even directly addressed in a majority opinion. However, in a minority opinion involving a \$5 million protest bond, Judge Benton opined that the issue of facial constitutionality “does not present a close question . . . .” Judge Benton also raised some doubt as to whether a particular bond “ever could be set so high as to deprive a vendor of a constitutional right . . . .” *Hadi v. Liberty Behavioral Health* (constitutional issues raised but not addressed in majority opinion). The constitutionality of an \$873,581 protest bond, as applied, was also raised on appeal from the order of dismissal in the *United Healthcare* case. However, as indicated above, the appellate court “per curiam affirmed” and, therefore, provided no written explanation of its reasoning. Notably, if a purchasing agency is responsible for determining the contract value (and, thus, the bond amount), as when there is a protest of bid specifications, the statute does not allow the protestor to challenge the agency’s estimate through a [section 120.57\(3\)](#) bid protest. [§ 287.042\(2\)\(c\), Fla. Stat.](#) That leaves open the ability to challenge the bond amount on appeal – either as an as-applied attack on the statute or as a challenge to the factual basis for agency’s calculation of the contract value. In either case, some factual record would be necessary.

**Conclusion** Clearly, a disappointed bidder or potential contractor cannot afford to overlook or neglect the protest bond requirement. While there continue to be issues regarding the repercussions of defective posting of the bond, the possible consequence – loss of all opportunity to challenge an agency’s contracting decision – is sufficiently grave that every effort should be made to file a fully compliant and timely bond .

**Resources** *ABI Walton Insurance v. State, Department of Management Services*, 641 So. 2d 967 (Fla. 1<sup>st</sup> DCA 1994). *General Elec. v. Department of Trans.*, 869 So. 1273 (Fla. 1<sup>st</sup> DCA 2004). *Hadi v. Liberty Behavioral Health*, 927 So. 2d 34 (Fla. 1<sup>st</sup> DCA 2006). *Machules v. Department of Administration*, 523 So. 2d 1132 (Fla. 1988). *Pro-Tech Monitoring v. State, Dep’t of Corrections*, 72 So. 3d 277 (Fla. 1<sup>st</sup> DCA 2011). *United HealthCare, Healthcare v. State, Dep’t of Management Servs.*, 2011 WL 6091772 (Fla. 1<sup>st</sup> DCA 2011) (unpublished). *United Healthcare v. Department of Management Servs.*, DOAH Case No. 11-3998BID (entered Sept. 9, 2011). [1] All references to Florida Statutes are to the 2011 edition. [2] Not all DOT procurements involve highway

construction or maintenance. Other types of purchases by DOT are subject to chapter 287 and, therefore, are also subject to the general bid protest bond provisions of [section 287.042\(2\)\(c\)](#).

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