



# THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

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September \_\_\_\_, 2016

Pam Bondi, Attorney General  
Department of Legal Affairs  
The Capitol PL01  
Tallahassee, Florida 32399-1050

**RE: *Request for Attorney General Opinion  
Electronic Opening of Bids/Proposals Submitted to District School Board***

Dear Attorney General Bondi:

This request for an Attorney General Opinion is submitted at the request of a majority of the members of The School Board of Broward County, Florida ("The School Board"). The School Board approved this request for opinion during its regular meeting held on \_\_\_\_\_, 2016.

The School Board requests an opinion upon whether a Florida district school board may electronically open bids, responses and replies submitted through an online procurement system for competitive proposals without the necessity of conducting a public opening of bids, proposals or replies.

## Memorandum

Section 1010.04, Florida Statutes, is entitled "Purchasing" and is part of Title XLVIII - K-20 Education Code." During the 2016 Legislative Session, Senate Bill 350 was enacted which amended Section 1010.04(2), Florida Statutes, to provide that "[p]urchases may be made through an online procurement system, an electronic auction service, or other efficient procurement tool."

The passage of Senate Bill 350 recognizes that modern procurement practices have achieved increased efficiency through online and electronic procurement systems. Many such systems are available for consideration that can release competitive solicitations; receive bids, responses and replies and withhold same from school district view until the announced bid opening date; and withhold such bids, responses and replies from public view until their release is permitted under applicable law. SBBC would like to invoke its authority under Section 1010.04(2), Florida Statutes, to conduct its competitive solicitations through such systems, but wishes to confirm that it may do so without being required to conduct a physical public opening of any bids, proposals and replies.

No requirement of a “public opening” of bids, responses and replies appears in the K-20 purchasing statute [Section 1010.04, Florida Statutes] or within Section 6A-1.012, F.A.C., which was promulgated by the State Board of Education pursuant to its authority under Section 1010.04(1)(a) and (4)(a), Florida Statutes. However, Section 4.2(2)(e), State Rules for Educational Facilities (SREF - 2014) provides that “[b]ids shall be publicly opened, read and tabulated at the designated time and place by an employee of the Board or other appointed individual.”

The concept of a “public opening” of bids, proposals and replies appears to be a vestige of a time prior to the introduction of those online and electronic procurement systems that the 2016 Legislature wished to make available to district school boards. In addition to the SREF provision cited above, a “public opening” of bids, proposals and replies is also referenced in Section 287.057(1), Florida Statutes, which is entitled “Procurement of commodities or contractual services” and is part of “Title XIX – Public Business.” In pertinent part, Section 287.057(1), Florida Statutes, states that “[a]ny competitive solicitation shall be made available simultaneously to all vendors, must include the time and date for the receipt of bids, proposals, or replies and of the public opening, and must include all contractual terms and conditions applicable to the procurement, including the criteria to be used in determining acceptability and relative merit of the bid, proposal, or reply.” [Emphasis added].

It is respectfully submitted that the “public opening” requirement of Section 287.012(1), Florida Statutes, is intended for state executive branch agencies and does not generally extend to district school boards. Section 287.057, Florida Statutes, addresses how an “agency” shall conduct its procurement of commodities or contractual services and “agency” is defined by Section 287.012(1), Florida Statutes, to mean “any of the various state officers, departments, boards, commissions, divisions, bureaus and councils and any other unit of organization, however designated, of the executive branch of state government.” [Emphasis added]. Section 287.057 goes on in considerable detail about how these state “agencies” are to conduct their procurements and how they will work with the “department” which is defined by Section 287.012(9), Florida Statutes, to be the Department of Management Services. The limited applicability of Section 287.057 to state executive branch agencies is further demonstrated by references within the section to consideration of what is “most advantageous to the state,” what might cause “substantial loss to the state,” present the “best value to the state,” or be “in the best interest of the state.”

In contrast, Section 287.012(14), Florida Statutes, provides the defined term “governmental entity” which, in pertinent part, means “a political subdivision or agency of this state... including, but not limited to,... school district...” Please note that district school boards are political subdivisions pursuant to Section 1.01(8), Florida Statutes. The only reference to “governmental entities” within Section 287.057, Florida Statutes, may be found at subsection (3)(e)12 which exempts “agencies” from complying with the competitive solicitation requirements of that section when “services and commodities [are] provided by governmental entities.”

The concept of a “public opening” of bids, proposals and replies by a district school board [or even by an executive branch agency] is wholly incompatible with Section 119.071(1)(b)1-3, Florida Statutes, which provides as follows:

1. For the 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(a) 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 re-issued competitive solicitation or until the agency withdraws the re-issued 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.

Unlike Section 287.012(1), Florida Statutes, the term “agency” is defined by Section 119.011(2), Florida Statutes, for the purposes of Chapter 119 to mean “any state, county, district, authority or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law...” [Emphasis added].

The public records exemption for bids, responses and replies predates the State Board of Education’s 2014 adoption of SREF Section 4.2(2)(e). This exemption has existed in its current form since the enactment of Chapter 2011 - 140, Laws of Florida on June 2, 2011 [C.S. for HB 7223] and various iterations of this public records exemption as a legislative statement of public policy may be found, without limitation, in Chapter 2004-335, Laws of Florida [C.S. for SB 1678]; Chapter 2005-251, Laws of Florida [C.S. for SB 1144]; and Laws of Florida 2006-284 [HB 1369].

No practical purpose remains to be accomplished by a “public opening” of bids, proposals or replies as such practice is wholly inconsistent and incompatible with public policy as expressed through the exemption of such documents from public inspection found under Section 119.071(1)(b), Florida Statutes, “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” and this statutory public records exemption takes precedence over Section 4.2(2)(e), State Rules for Educational Facilities (SREF - 2014).

In light of the express authority granted to district school boards under Section 1010.04(2), Florida Statutes, and of the public records exemption found at Section 119.071(1)(b), Florida

Statutes, it is this Office's opinion that a district school board may make purchases through an online procurement system, an electronic auction service, or other efficient procurement tool without the necessity of conducting a public opening of bids, responses or replies.

If additional information would be helpful concerning this request, please contact the undersigned at your convenience.

Sincerely,

Barbara J. Myrick  
General Counsel

BJM:rpv

c: Dr. Rosalind Osgood, Chair  
Robert W. Runcie, Superintendent of Schools  
Maurice L. Woods, Chief Strategy & Operations Officer  
Leo Bobadilla, Chief Facilities Officer  
Mary Coker, Director – Procurement & Warehousing Services  
Robert Paul Vignola, Deputy General Counsel  
Matthew H. Mears, General Counsel – Florida Department of Education

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