691 So.2d 1099
District Court of Appeal of Florida,
Third District.

SILVER EXPRESS COMPANY, etc., Appellant,
v.
The DISTRICT BOARD OF LOWER TRIBUNAL TRUSTEES OF MIAMI–DADE COMMUNITY COLLEGE, and Husta International Aviation, Inc., a Florida corporation, Appellees.

No. 96–889. | March 19, 1997.

Contractor that had submitted unsuccessful proposal to college to provide flight training services brought action seeking to enjoin college board of trustees from awarding two-year contract to another contractor, alleging violation of sunshine law. The Circuit Court, Dade County, Amy Steele Donner, J., denied motion for temporary injunction, and contractor appealed. The District Court of Appeal, Fletcher, J., held that: (1) committee appointed by college's purchasing director to consider proposals to provide flight training services was subject to the sunshine law; (2)contractor was not precluded from bringing sunshine law action challenged closed selection meeting; and (3) college committee's violation of sunshine law caused irreparable public injury, warranting temporary injunction prohibiting college from entering into two-year contract based on ranking established by committee.

Reversed and remanded.

Nesbitt, J., filed dissenting opinion.

West Headnotes (5)

[1] **Education**
Meetings

Committee appointed by college's purchasing director to consider proposals to provide flight training services was subject to the sunshine law, where committee's function was to weed through various proposals, to determine which were acceptable and to rank them accordingly. West's F.S.A. § 286.011(1, 2).

1 Cases that cite this headnote

[2] **Education**
Unauthorized or illegal contracts

Closed selection meeting of committee appointed by college's purchasing director to evaluate proposals to provide flight training services violated sunshine law, making actions taken at that meeting void. West's F.S.A. § 286.011(1, 2).

Cases that cite this headnote

[3] **Education**
Rights and remedies of contractors

Contractor that submitted unsuccessful proposal to provide flight training services for college was not precluded from bringing sunshine law action challenged closed selection meeting held by committee appointed by college's purchasing director, although it could have challenged that process as violative of sunshine law in administrative hearing that was held to hear its other objections to committee's ranking of proposals. West's F.S.A. § 286.011(1, 2).

1 Cases that cite this headnote

[4] **Administrative Law and Procedure**
Meetings in general
Administrative Law and Procedure
Exhaustion of administrative remedies

That citizen may have available administrative remedy does not preclude him or her from pursuing public's statutory remedy under sunshine law on behalf of public's interest in open government. West's F.S.A. § 286.011(2).

Cases that cite this headnote

[5] **Injunction**
Administration; property, contracts, and liabilities

College committee's violation of sunshine law when it held closed meeting to evaluate proposals to provide flight training services was irreparable public injury, warranting temporary injunction prohibiting college and successful bidder from entering into two-year contract based on ranking established by committee. West's F.S.A. § 286.011(1, 2).

3 Cases that cite this headnote

Attorneys and Law Firms

***1099** Metsch & Metsch and Lawrence R. Metsch, Miami, for appellant.

Steel Hector & Davis LLP and John G. Van Laningham, West Palm Beach, for appellees.

Before NESBITT, FLETCHER and SHEVIN, JJ.

Opinion

FLETCHER, Judge.

Silver Express Company, plaintiff below, appeals the denial of its motion for temporary ***1100** injunction seeking to prohibit the District Board of Trustees of Miami–Dade Community College [College] from awarding a two-year contract to Husta International Aviation, Inc. [Husta] and barring the College and Husta from further performance under a temporary contract. Finding that the College violated section 286.011, Florida Statutes (1995), popularly known as the "Government in the Sunshine Law" [Sunshine Law], we reverse the denial of the temporary injunction as it pertains to the two-year contract and affirm the denial as to the temporary contract.

Silver Express Company's action arises out of the College's request for proposals for flight training services at Kendall–Tamiami Airport. Silver Express, the then-incumbent flight training provider, submitted a proposal in response to the College's advertised request, as did others including Husta. The College's purchasing director appointed a committee composed of College staff, as well as one outside individual, to advise and assist her in evaluating the various proposals. The committee met to conduct its evaluation of the responses, doing so without notice to the public, and voted to recommend to the purchasing director that a two-year contract commencing January 1, 1996, be awarded to Husta.

Silver Express, as an unsuccessful proponent, initiated an administrative protest challenging the proposal that had been ranked number one. The College referred the challenge to an administrative hearing officer who ultimately issued a recommended order containing extensive findings of fact and conclusions of law. The College adopted the administrative hearing officer's recommended order, concluding that Silver Express, as third-ranked proponent, did not have standing to challenge the first-ranked proposal in the absence of a challenge to the second-ranked proposal.[1]

During the pendency of the administrative hearing, the College awarded a temporary flight-training service contract to Husta. Silver Express began this circuit court action, alleging that the committee's closed meeting to consider the proposals violated the Sunshine Law and seeking (1) to enjoin the College from awarding the two-year contract to Husta and (2) to enjoin further performance by the College and Husta of the temporary contract. The trial court denied Silver Express' motion for a temporary injunction, and it is that order which we are reviewing.

1.

[1] First, we must determine if the purchasing director's committee is subject to the Sunshine Law,[2] for if it is, its failure to give notice of its selection meeting and to open it to the public renders the actions taken at the meeting (ranking the proposals) void ab initio. *Town of Palm Beach v. Gradison*, 296 So.2d 473 (Fla.1974).

The answer lies in what effect the committee's actions had on the College's selection process. The record reflects that the committee's function was to weed through the various proposals, to determine which were acceptable and to rank them accordingly. In other words, the committee's action helped to crystalize the decision to be made by the College. This crystallization precluded Silver

Express (because of its third-place ranking) from its administrative challenge to Husta's first-ranked proposal, and resulted in the ***1101** College's selection of Husta's proposal on a "temporary" basis. It appears plainly from the record that Husta would not have received the temporary contract in the absence of the evaluation committee's high ranking of Husta's two-year proposal. Governmental advisory committees which have offered up structured recommendations such as here involved—at least those recommendations which eliminate opportunities for alternative choices by the final authority, or which rank applications for the final authority—have been determined to be agencies governed by the Sunshine Law. *Town of Palm Beach v. Gradison; Krause v. Reno*, 366 So.2d 1244 (Fla. 3d DCA 1979). In *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So.2d 694 (Fla. 3d DCA 1988), we stated:

> "The law is quite clear. An ad hoc advisory board, even if its power is limited to making recommendations to a public agency and even if it possesses no authority to bind the agency in any way, is subject to the Sunshine Law. The committee here, made a ruling affecting the decision-making process and it was of significance. As a result, it was improper for the committee to reach its recommendation in private since that constituted a violation of the Sunshine Law."

Id. at 695 (citations omitted).

[2] The purchasing director's committee is governed by the Sunshine Law. Its closed selection meeting violated that law, thus its actions taken at the meeting are void ab initio.

2.

[3] We are next called upon to decide whether Silver Express is precluded from bringing its Sunshine Law action in the circuit court because it possibly had an administrative remedy available to it which it did not take; i.e., it could have challenged the bid process (as violative of the Sunshine Law) in the administrative hearing that was held to hear Silver Express' other objections to the committee's ranking of the proposals. We conclude that whether Silver Express had an administrative remedy as to the Sunshine Law or not, such would have been personal to it as a bidder on the College's request for proposals. This remedy would be unavailable to non-bidders, thus unavailable to the public generally. The Sunshine Law, on the other hand, was enacted so as to permit any citizen to vindicate the public's interest in open government. It specifically includes the authorization that:

> "The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state."

§ 286.011(2), Fla.Stat. (1995).

[4] That a citizen may have an available administrative remedy, does not preclude him from pursuing the public's statutory remedy on behalf of the public's interest in open government. The two are unrelated remedies, one for the individual's own private interests, the other for the goal of public vindication. The legislative intent behind section 286.011 would be frustrated if the public's champions are to be relegated to administrative proceedings (of whatever nature) where the legislature has specifically provided in the controlling statute for jurisdiction in the circuit courts.

3.

[5] The College committee's violation of the Sunshine Law constitutes an irreparable public injury, *Town of Palm Beach v. Gradison*, the only remedy for which is to enjoin the violator from acting on the decisions made out of the sunshine. As the advocate for the public's interest in securing open government, Silver Express was thus entitled to obtain injunctive relief pending the trial court's final determination of the case so as to maintain the status quo. As a consequence, the trial court erred in not temporarily enjoining the College and Husta from entering into the two-year contract based on the ranking established by the committee out of the sunshine.

We do find, however, that the College's temporary contract with Husta for flight training services should not be enjoined at this time. Numerous students are presently in the training process and their interests should be weighed in the balance. Upsetting ***1102** their educational schedules would not be in the public interest and we decline to do so.

4.

For the foregoing reasons, we reverse in part the order denying Silver Express's motion for temporary injunction and remand for the entry of an order enjoining the College from entering into a two-year contract based on the ranking established at the meeting held in violation of the Sunshine Law. As the purpose of actions pursuant to section 286.011(1),(2), Florida Statutes (1995) is not to secure private rights, but to vindicate the public's right to open meetings, the College is not precluded from, in the future, ranking the various proposals submitted in response to its request at a meeting or meetings held in compliance with the Sunshine Law and acting thereon.

Reversed and remanded.

SHEVIN, J., concurs.

NESBITT, Judge, dissenting:

I respectfully dissent. Silver Express Company, having elected to pursue its administrative remedy which could have been full, complete, and adequate, had it been followed to its ultimate conclusion, should not have been permitted to change course and seek the trial court's direct judicial intervention.

Reviewing the facts, Silver Express was the incumbent in a request for proposal (RFP) process undertaken by Miami–Dade Community College (MDCC) to award a contract for aviation services of MDCC's private pilots' curriculum. Three companies submitted proposals and MDCC's director of purchasing appointed several staff members and one non-MDCC employee to review all the proposals for a technical recommendation to the MDCC Board of Trustees [board] of which proposal to accept.

On October 30, 1995, the evaluation committee met to review the proposals without notifying the proponents of the time and place of the meeting. The committee ranked appellee Husta International Aviation, Inc. first and Silver Express was ranked third. On November 3, 1995, the purchasing director issued a recommendation to the board to award the contract to Husta. On November 6, 1995, Silver Express timely gave written notice to MDCC that it intended to protest the recommendation. On November 16, 1995, Silver Express filed its formal protest of the decision, in response to which, on November 22, 1995, MDCC issued to Silver Express an order to show cause. On December 6, 1995, MDCC requested a hearing officer be appointed to consider the protest.

On December 13, 1995, Silver Express took the deposition of MDCC's purchasing manager. It was then, according to Silver Express, that it was alerted to the possibility of a Sunshine Law violation. § 286.011, Fla.Stat. (1995). On January 8, 1996, MDCC moved in limine to exclude the claim of a Sunshine Law violation, citing to section 120.53(5)(b) Florida Statutes(1995) and arguing: "The hearing officer should not allow Silver Express to offer evidence on issues other than the ones framed in its pleadings."

On January 10, 1996, Silver Express submitted its pre-hearing catalogue, in it contending the contract award to Husta violated the Sunshine Law. On January 10–11, 1996, the hearing officer conducted the required evidentiary hearing. Silver Express sought to amend its formal protest to include the Sunshine Law violation claim. MDCC again argued that this was a ground not stated with particularity within the time limits prescribed in section 120.53(5)(b), Florida Statutes (1995). The hearing officer indicated he was inclined to accept MDCC's argument that issues should be limited to those raised in pleadings.

Thereafter, notwithstanding the ongoing administrative action, on January 23, 1996, post hearing, but before the hearing officer had made his final recommendation, Silver Express brought suit in circuit court alleging the same Sunshine Law violation.

On February 12, 1996, Silver Express submitted to the hearing officer proposed facts and law and a recommended order. At that time Silver Express also notified the administrative proceeding that it was withdrawing its Sunshine Law claim, however this action was taken weeks after the administrative hearing, and with full knowledge of the hearing ***1103** officer's stated inclination to limit the hearing to those matters raised in the formal protest. Of course, by this time the agency had been put to the task of defending the issue in the administrative hearing. *See Williams v. Robineau,* 124 Fla. 422, 168 So. 644, 646 (Fla.1936) (explaining an election of remedies has matured when the rights of the parties have been materially affected to the advantage of one or the disadvantage of the other).

On February 29, 1996, the hearing officer issued his recommended order, giving an account of the evidentiary hearing including his action at the time of advising that he "tended to agree that the issue should be limited to those

that are specified ... in notice of formal protest." In the circuit court action, following evidentiary hearings, the trial judge determined that the evaluation process did not violate the Sunshine Law and denied the motion for temporary injunction. Consequently, both parties litigated in an unneeded trial court proceeding as well as the instant appeal which followed.

As observed in The Florida Bar, *Florida Administrative Practice*, § 4.10 at 4–12 (4th ed. 1995):

> A petitioner may amend the petition, as of right, at any time "prior to the Agency's designating the presiding officer." Fla.Admin.Code Model Rule 28–5.202. Amendment after such designation or after the agency has referred the matter to the division is allowed only on order of the hearing officer, Rule 60Q–2.004(4), or other presiding officer, Rule 28–5.202. Amendments should be liberally allowed. *Anthony Abraham Chevrolet Co. v. Collection Chevrolet, Inc.*, 533 So.2d 821 (Fla. 1st DCA 1988); *All Risk Corp. Of Florida v. State, Dept. Of Labor & Employment Security, Division of Workers' Compensation,* 413 So.2d 1200 (Fla. 1st DCA 1982). It can be argued that amendments that substantially alter the nature of the issues and proceedings, if offered after the case is referred to the division, should be scrutinized carefully because an agency might have chosen a different forum under those circumstances. Nonetheless, it has been held an abuse of discretion to deny a motion to amend that raises new issues, even if it is filed on the day the hearing is scheduled to commence, absent a showing of prejudice to other parties. *Key Biscayne Council v. State, Dept. of Natural Resources,* 579 So.2d 293 (Fla. 3d DCA 1991).

As stated above, while it is true that the formal bid protest, which was required to have been filed within ten days of notice of intent to protest, did not contain a challenge of the Sunshine Law, subsequent pleadings sought to so amend. The hearing officer had discretion to permit such an amendment and this was the argument that should have been made and pursued in the administrative hearing. The Sunshine Law violation was the sine qua non of the instant bid protest, given the fact that the committee had ranked Silver Express third, and as such, the company lacked the standing to succeed on its other claims of error in the committee's decision.[3] *See Preston Carroll Co., Inc. v. Florida Keys Aqueduct,* 400 So.2d 524 (Fla. 3d DCA 1981).

Since the bid protest, as amended, raised no facial constitutional challenge, there was no need for direct judicial intervention. The hearing officer's or agency's inability to issue an injunction did not render the administrative remedy any less viable. In sum, Silver Express having elected its administrative remedy should have pursued it to its outcome. *See Lowry v. Logan,* 650 So.2d 653 (Fla. 1st DCA) (observing doctrine of election of remedies provides one electing should not later be permitted to avail himself of an inconsistent course), *review denied,* 659 So.2d 1087 (Fla.1995). Even if the hearing officer had ultimately ruled incorrectly, prohibiting amendment, that error could have been swiftly rectified on appeal, given the blatant Sunshine Law violation, and the particular disability Silver Express suffered by that deficiency. Silver Express had an absolute need for the hearing contemplated by the Sunshine Law in order to explain why its bid ***1104** was superior notwithstanding its third rank status.

I cannot accept the premise espoused by the court today that after going to final hearing on its administrative protest and hearing the administrative officer's stated inclination to agree with the college, a bidder like Silver Express may then bring an action in circuit court pursuant to section 286.011, Florida Statutes (1995). I see no legislative intent to give a litigant like Silver Express "two bites at the apple." Section 286.011 was adopted by the legislature out of respect for the common law rule recognized in *Rickman v. Whitehurst,* 73 Fla. 152, 74 So. 205 (1917) which prevented a member of the public without "special injury" from seeking redress in different kind and degree than other members of the public. The purpose of the statute is to give even a citizen without "special injury" "standing" to challenge a Sunshine Law violation. A party like Silver Express who has the ability to allege a "special injury," does not need that provision of the statute to authorize an initial entry into the judicial system if it so desires. I cannot agree the statute was designed to afford a litigant like Silver Express an additional and cumulative remedy.

I nonetheless agree that a private litigant like Silver Express was given the opportunity, because of the breadth of the statute, to bring an initial challenge directly in the circuit court without having to resort to its administrative remedy. But having elected an administrative remedy which was fully viable, and having abandoned it in the eleventh hour, the doctrine of election of remedies precludes it from having both avenues of redress. *See Armour & Co. v. Lambdin,* 154 Fla. 86, 16 So.2d 805 (1944) (observing election of remedies is the adoption of one or more coexisting remedies with the effect precluding resort to the other.)

Consequently, I would affirm the denial of Silver Express's motion for temporary injunction.

All Citations

691 So.2d 1099, 117 Ed. Law Rep. 1144, 22 Fla. L. Weekly D710

Footnotes

1 That decision was the subject of an appeal to this Court which we have affirmed by separate order. *Silver Express Co. v. Miami Dade Community College,* 691 So.2d 14 (Fla. 3d DCA 1997).

2 Section 286.011(1),(2), Florida Statutes (1995):

> "(1) 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.
>
> (2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state."

3 This is evidenced by our affirmance of Silver Express' companion appeal of the order rejecting its administrative claim, *Silver Express v. District Bd. of Trustees of Miami Dade Comm. Col.,* No 96–848, 691 So.2d 14 (Fla. 3d DCA 1997).

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