

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: CS/CS/SB 1784

SPONSOR: Governmental Oversight and Productivity Committee, Regulated Industries Committee, and Senators Clary and Crist

SUBJECT: Professional Services Acquisition

DATE: April 6, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>Imhof</u>	<u>RI</u>	<u>Fav/CS</u>
2.	<u>McKay</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>GA</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill amends the Consultants' Competitive Negotiations Act (CCNA) in s. 287.055, F.S., to revise certain definitions and provide additional criteria for acquisition of the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper.

The bill amends the definition of "compensation" to provide that the term means the amount, instead of the total amount, paid by the agency for the professional services regardless of whether stated as compensation or stated as hourly rates, overhead rates, or other figures or formulas from which compensation can be calculated. It amends the definition of "continuing contract" to provide that firms providing professional services under continuing contracts shall not be required to bid against one another.

The bill defines the term "negotiate" to mean to conduct legitimate, arms length discussions and conferences to reach an agreement on a term or price. It excludes from this definition the presentation of flat-fee schedules with no alternative or discussion.

The bill amends the bid selection process to require that each agency provide a good faith estimate in determining whether the proposed activity meets the threshold amounts in the CCNA.

The bill permits agencies to consider proven capability and location, if the agency has adopted a local preference program when determining the qualifications of a firm. It deletes willingness and recent, current, and projected firm workloads from consideration.

The bill requires that, if an agency is using a non-negotiation procurement process and the average compensation proposed by the firms is in excess of the appropriate threshold amount proposed by the act, then the agency must reject all proposals and reinitiate the procurement pursuant to the CCNA.

The bill adds immediate family members to the list of persons authorized to accompany designated state officials pursuant to s. 287.17(6), F.S.

This bill would take effect July 1, 2005.

This bill substantially amends section 287.055, and amends section 287.17, Florida Statutes.

II. Present Situation:

The Consultants' Competitive Negotiations Act (CCNA) in s. 287.055, F.S., provides a competitive negotiation process for state and local government agencies when procuring the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper. The CCNA requires that state agencies publicly announce, in a consistent and uniform manner, each occasion when professional services must be purchased for the following:

- a project when the basic construction cost is estimated by the agency to exceed \$250,000;¹ or
- a planning or study activity when the fee for professional services exceeds \$25,000.

The public notice must provide a general description of the project and describe how the interested consultants may apply for consideration.

The CCNA provides a two-phase selection process.² In the first phase, the agency evaluates the qualifications and past performance of the bidders. In the second phase, the agency selects the three bidders, ranked in order of preference, it considers most highly qualified to perform the required services. The CCNA requires consideration of several factors in determining the three most highly qualified bidders, including willingness to meet time and budget requirements, past performance, location, recent, current, and projected firm workloads, volume of work previously awarded to the firm, and whether the firm is certified as a minority business.³

¹The CCNA references the purchasing categories in s. 287.017(1), F.S., which establishes the following purchasing categories for state agencies:

- Category One: \$15,000.
- Category Two: \$25,000.
- Category Three: \$50,000.
- Category Four: \$150,000.
- Category Five: \$250,000.

² See s. 287.055(4), F.S.

³ The following is a full listing of the factors that s. 287.055(4)(b), F.S., requires that the agency consider: the ability of professional personnel; whether a firm is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the firms; and the volume of work previously awarded to each firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms.

The CCNA prohibits the agency from requesting, accepting, and considering during the selection process proposals for the compensation to be paid. Section 287.055(2)(d), F.S., defines the term "compensation" to mean "the total amount paid by the agency for professional services."

The agency then negotiates compensation with the most qualified of the three selected firms. If a satisfactory contract cannot be negotiated, the agency may then negotiate with the second most qualified firm. The agency may negotiate with the third most qualified firm if that negotiation fails to produce a satisfactory contract. If a satisfactory contract cannot be negotiated with either of the three selected, the agency must begin the selection process again.

Section 487.055(4)(d), F.S., provides that the CCNA does not prohibit a continuing contract between a firm and an agency.⁴ Section 287.055(2)(g), F.S., defines the term "continuing contract" to mean:

...a contract for professional services entered into in accordance with all the procedures of this act between an agency and a firm whereby the firm provides professional services to the agency for projects in which construction costs do not exceed \$1 million, for study activity when the fee for such professional service does not exceed \$50,000, or for work of a specified nature as outlined in the contract required by the agency, with no time limitation except that the contract must provide a termination clause.

III. Effect of Proposed Changes:

The bill amends s. 287.055, F.S., to revise certain definitions and provide additional criteria for the acquisition of the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper.

The bill amends the definition of "compensation" in s. 287.055, F.S., to provide that the term means the amount, instead of the total amount, paid by the agency for the professional services regardless of whether stated as compensation or stated as hourly rates, overhead rates, or other figures or formulas from which compensation can be calculated.

The bill amends the definition of "continuing contract" in s. 287.055(2)(g), F.S., to provide that firms providing professional services under continuing contracts shall not be required to bid against one another.

The bill defines the term "negotiate" to mean to conduct legitimate, arms length discussions and conferences to reach an agreement on a term or price. The bill excludes from this definition the presentation of flat-fee schedules with no alternative or discussion. According to industry representatives, certain local agencies have used set fee schedules as a means to impose price constraints on firms at the expense of good-faith negotiations.

The bill amends the acquisition process in s. 287.055(3)(a), F.S., to require that each agency provide a good faith estimate in determining whether the proposed activity meets the threshold

⁴ Section 287.055(2)(c), F.S., defines the term "firm" to mean:

...any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice architecture, engineering, or surveying and mapping in the state.

amounts for the competitive negotiation process. According to industry representatives, a common practice, used by certain agencies to avoid the competitive negotiation process in this section, is to determine that the proposed project is below the threshold cost amounts.

The bill requires agencies to consider proven capability, and location, if the agency has adopted a local preference program when determining the qualifications of a firm. It deletes willingness and recent, current, and projected firm workloads from consideration. According to a representative for local governments, several local governments have adopted ordinances that require consideration of whether a firm is headquartered in the local government's jurisdiction as a factor in determining the firm's qualifications.

The bill requires that, if an agency has used another procurement process and the majority of the compensation proposed by the firms is in excess of the threshold amounts, the agency must reject all proposals and reinitiate procurement pursuant to the CCNA.

The bill amends s. 287.017(6), F.S., to provide that immediate family members of any official authorized in the subsection may accompany the authorized official pursuant to the provisions of the subsection.

This bill would take effect July 1, 2005.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The definition of “negotiate” added in s. 287.055(2)(1), F.S., includes the word “legitimate,” which is neither a commonly used legal burden in administrative or judicial proceedings, nor defined in the statute. The Legislature may want to consider replacing “legitimate” with “good faith,” which is routinely used in legal analysis. Though “good faith” has no technical meaning, it encompasses honest belief, absence of malice, and the absence of design to defraud or to seek an unconscionable advantage.⁵

This Senate staff analysis does not reflect the intent or official position of the bill’s sponsor or the Florida Senate.

⁵ *Blacks Law Dictionary* 623 (5th ed. 1979)

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
