

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: SB 2666

INTRODUCER: Senator Haridopolos

SUBJECT: State Construction Management Contracting

DATE: March 26, 2009      REVISED: 03/31/09

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson	GO	<b>Fav/1 amendment</b>
2.			GA	
3.				
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input type="checkbox"/>            | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input checked="" type="checkbox"/> | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

The bill authorizes the Department of Management Services (DMS) to procure the services of construction management entities, and allows state agencies to use those services.

The bill creates section 255.32 of the Florida Statutes.

**II. Present Situation:**

**State Agency Construction and DMS**

Section 255.29, F.S., provides the authority for the DMS to establish, by rule, procedures for:

- Determining the qualifications and responsibility of potential bidders prior to advertisement for and receipt of bids for building construction contracts;
- Awarding each state agency construction project to the lowest qualified bidder, and procedures waiver of the rules in emergencies;
- Negotiating and modifying construction contracts; and,
- Entering into performance-based contracts for the development of public facilities, when determined to be in the best interest of the state.

The DMS performs oversight tasks related to the delivery of Fixed Capital Outlay projects such as construction, renovation, repair, modification, or demolition, and provides oversight of the competitive selection process.

### **The Consultants' Competitive Negotiation Act**

The Consultants' Competitive Negotiation 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,<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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 amount paid by the agency for professional services," regardless of whether stated as compensation or as other types of rates.

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 any of the three selected, the agency must begin the selection process again.

Section 287.055(9)(c), F.S., provides that the DMS must promulgate rules, except for design-build contracts undertaken by the DOT, for the award of design-build contracts to be followed by state agencies. Each other agency must adopt rules or ordinances for the award of design-build contracts. Municipalities, political subdivisions, school districts, and school boards shall award

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<sup>1</sup>Category Five from the purchasing categories in s. 287.017(1), F.S.

<sup>2</sup> See s. 287.055(4), F.S.

<sup>3</sup> 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.

design-build contracts by the use of a competitive proposal selection process as described in the subsection, or by the use of a qualifications-based selection process pursuant to subsections (3), (4), and (5) for entering into a contract whereby the selected firm will subsequently establish a guaranteed maximum price and guaranteed completion date.

### **Construction Management for School Boards and Local Governments**

Section 1013.45, F.S., provides that certain school boards may use any of the following procedures to construct new facilities or add to existing ones: competitive bids, design-build pursuant to s. 287.055, F.S., a construction management process, or a program management process. Construction and program management entities must be selected using the CCNA.

Subsequent to an operational audit by the Auditor General<sup>4</sup> that, in part, questioned whether a city project complied with the CCNA, a Florida city asked the Attorney General whether the use of a construction manager at risk or program manager at risk contract for the design and construction of a multi-phase project complies with s. 287.055(9)(c), F.S., when each phase of the project is separately negotiated for a guaranteed maximum price and completion date.<sup>5</sup> The Attorney General opined that “separately negotiating each phase of a multi-phase project that has been awarded to a construction manager at risk or program manager at risk does not comply with the plain language or intent” of s. 287.055(9)(c), F.S., and that the procedures of that section “clearly indicate that compensation will be negotiated prior to the selected firm beginning work under the contract.”

In 2007, the Legislature passed legislation allowing local governments to use construction management entities, to be procured pursuant to the CCNA. Pursuant to s. 255.103, F.S., after having been selected and after competitive negotiations, the construction management entity may be required to offer a guaranteed maximum price and a guaranteed completion date. The local government may require the construction management entity to provide for a separate guaranteed maximum price and a separate guaranteed completion date for each grouping of substantially similar construction, rehabilitation, or renovation activities included within the project without requiring a new competitive procurement for each activity within the project.<sup>6</sup>

### **III. Effect of Proposed Changes:**

This bill creates s. 255.32, F.S., which provides that the DMS may select and contract with construction management entities pursuant to the CCNA process provided in s. 287.055, F.S. This new section would apply for projects in which construction costs do not exceed \$1 million. Under the bill, the DMS would be authorized to engage construction management entities previously selected through competitive solicitation, without the requirement to repeat the competitive selection process throughout the project. Construction management entities would be required to comply with the competitive solicitation requirements that the DMS would be subject to, if the DMS was managing the construction project directly. At the option of the DMS, a guaranteed maximum price and a guaranteed completion date may be required. For each grouping of substantially similar construction, rehabilitation, or renovation activities included

<sup>4</sup> Auditor General Report No. 2006-182, May 2006.

<sup>5</sup> Florida Attorney General Advisory Legal Opinion 2007-12

<sup>6</sup> A project may include a grouping of minor construction, rehabilitation, or renovation activities, or a grouping of substantially similar construction, rehabilitation, or renovation activities.

within a project, a separate guaranteed maximum price and separate guaranteed completion date may be required. The bill also requires the DMS to adopt rules for state agency use of construction management entities.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Construction management entities would become eligible for contracts with DMS.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:****Barcode 758386 by Governmental Oversight and Accountability on March 31, 2009:**

The amendment amends the Consultants' Competitive Negotiation Act (CCNA) in s. 287.055, F.S., to include construction and program management services in the provisions of the CCNA. The amendment raises the bid threshold for projects from \$1 million to \$2 million, and the bid threshold for studies from \$50,000 to \$200,000. The definition of continuing contract is amended to include projects for which there is no limit on the aggregate values under the contract.

The amendment also raises the bid thresholds in the construction management statute for state universities in s. 1001.74, F.S., and changes the definition of continuing contract to include projects for which there is no limit on the aggregate values under the contract.  
(TITLE AMENDMENT)