

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 441 Public Procurement of Services

SPONSOR(S): State Affairs Committee; Oversight, Transparency & Public Management Subcommittee; DiCeglie and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 506

FINAL HOUSE FLOOR ACTION: 117 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/CS/HB 441 passed the House on February 13, 2020, and subsequently passed the Senate on March 11, 2020.

In 1973, the Florida Legislature enacted the Consultants' Competitive Negotiation Act (CCNA), which requires state and local government agencies to procure the "professional services" of an architect, professional engineer, landscape architect, or registered surveyor and mapper using a qualifications-based selection process. Qualifications-based selection is a process whereby service providers are retained on the basis of competency, qualifications, and experience, rather than price.

The CCNA explicitly states it does not prohibit a continuing contract between a firm and an agency. A continuing contract is a contract for professional services entered into in accordance with the CCNA between an agency and a firm whereby the firm provides professional services to the agency for several projects. The CCNA prohibits firms that are parties to a continuing contract from being required to bid against one another. Current law authorizes the use of a continuing contract for construction projects in which the estimated construction cost of each project does not exceed \$2 million, for study activities if the fee for professional services for each study does not exceed \$200,000, or for work of a specified nature as outlined in the contract required by the agency, with the contract being for a fixed term or with no time limitation except the contract must include a termination clause.

The bill increases the maximum limit for continuing contracts covered by the CCNA from an estimated per-project construction cost of \$2 million to \$4 million. The bill also increases the maximum limit for procuring a study using a continuing contract from \$200,000 per study to \$500,000.

The bill may have a positive, yet indeterminate fiscal impact on state and local government expenditures. See Fiscal Comments.

The bill was approved by the Governor on June 29, 2020, ch. 2020-127, L.O.F., and became effective on July 1, 2020.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Consultants' Competitive Negotiation Act

In 1972, Congress passed the Brooks Act,¹ which requires federal agencies to use a qualifications-based selection process for architectural, engineering, and associated services, such as mapping and surveying. Qualifications-based selection is a process whereby service providers are retained on the basis of competency, qualifications, and experience, rather than price. According to the National Society of Professional Engineers, 46 states and numerous localities have implemented a qualifications-based selection process similar to the process outlined in the Brooks Act for procuring design services.²

In 1973, the Florida Legislature enacted the Consultants' Competitive Negotiation Act (CCNA),³ which is modeled after the Brooks Act. The CCNA requires state and local government agencies to procure the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper using a qualifications-based selection process.⁴

CCNA Procurement Process

The CCNA establishes a three-phase process for procuring professional services:

- Phase 1 – Public announcement and qualification.
- Phase 2 – Competitive selection.
- Phase 3 – Competitive negotiation.

During Phase 1, the public announcement and qualification phase, state and local agencies must publicly announce each occasion when professional services will be purchased for one of the following:

- A project, when the basic construction cost is estimated by the agency to exceed \$325,000; or
- A planning or study activity, when the fee for professional services exceeds \$35,000.⁵

The public notice must include a general description of the project and indicate how interested firms or individuals (consultants) may apply for consideration.⁶

A consultant who wishes to provide professional services to an agency must first be certified by the agency as qualified to provide the needed services pursuant to law and the agency's regulations.⁷ In determining whether a consultant is qualified, the agency must consider the capabilities, adequacy of personnel, past record, and experience of the consultant as well as whether the consultant is a certified minority business enterprise.⁸ Each agency must encourage consultants desiring to provide professional services to the agency to annually submit statements of qualifications and performance data.⁹

During Phase 2, the competitive selection phase, an agency must evaluate the qualifications and past performance of interested consultants and conduct discussions with at least three consultants

¹ Public Law 92-582, 86 Stat. 1278 (1972).

² *Qualifications-Based Selection of Engineering Services*, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, <https://www.nspe.org/resources/issues-and-advocacy/action-issues/qualifications-based-selection-engineering-services> (last visited Nov. 26, 2019).

³ Chapter 73-19, L.O.F., codified as s. 287.055, F.S.

⁴ Section 287.055, F.S.

⁵ Section 287.055(3)(a)1., F.S.

⁶ *Id.*

⁷ Section 287.055(3)(c), F.S.

⁸ Section 287.055(3)(d), F.S.

⁹ Section 287.055(3)(b), F.S.

regarding their qualifications, approach to the project, and ability to furnish the required services.¹⁰ The agency must then select at least three consultants, ranked in order of preference, that it considers the most highly qualified to perform the required services. In determining whether a consultant is qualified, the agency must consider such factors as the ability of professional personnel; whether a consultant is a certified minority business enterprise; past performance; willingness to meet time and budget requirements; location; recent, current, and projected workloads of the consultant; and the volume of work previously awarded to each consultant by the agency, with the object of effecting an equitable distribution of contracts among qualified consultants, provided such distribution does not violate the principle of selecting the most highly qualified consultants. During this phase, the CCNA prohibits the agency from requesting, accepting, or considering proposals for the compensation to be paid.¹¹

During Phase 3, the competitive negotiation phase, an agency must first negotiate compensation with the highest ranked consultant. If the agency is unable to negotiate a satisfactory contract with that consultant at a price the agency determines to be fair, competitive, and reasonable, negotiations with the consultant must be formally terminated. The agency must then negotiate with the remaining ranked consultants, in order of rank, and follow the same process until an agreement is reached. If the agency is unable to negotiate a satisfactory contract with any of the ranked consultants, the agency must select additional consultants, ranked in the order of competence and qualification without regard to price, and continue negotiations until an agreement is reached.¹² Once the agency terminates negotiations with a consultant at any point in the process, the agency may not resume negotiations with that consultant for that particular project.

Continuing Contracts under the CCNA

The CCNA explicitly states it does not prohibit a continuing contract¹³ between a firm and an agency.¹⁴ A continuing contract is a contract for professional services entered into in accordance with the CCNA between an agency and a firm whereby the firm provides professional services to the agency for projects.¹⁵ The CCNA prohibits firms that are parties to a continuing contract from being required to bid against one another.¹⁶

Current law authorizes the use of a continuing contract for construction projects in which the estimated construction cost of each project does not exceed \$2 million, for study activities if the fee for professional services for each study does not exceed \$200,000, or for work of a specified nature as outlined in the contract required by the agency, with the contract being for a fixed term or with no time limitation except the contract must include a termination clause.¹⁷ The maximum per-project and per-study limits were put in place by the Legislature in 1988 and have been increased twice since.¹⁸ In 1988, the maximum per-project and per-study limits were \$500,000 and \$25,000 respectively.¹⁹ In 2002, the limits were increased to \$1 million and \$50,000²⁰ and in 2009, the date of the last revision, to \$2 million and \$200,000.²¹

Construction and Program Management Entities

¹⁰ Section 287.055(4)(a), F.S.

¹¹ The CCNA did not prohibit discussion of compensation in the initial vendor selection phase until 1988, when the Legislature enacted a provision that allows consideration of compensation to occur only during the negotiation phase. Chapter 88-108, L.O.F.

¹² Section 287.055(5), F.S.

¹³ Section 287.055(2)(g), F.S.

¹⁴ Section 287.055(4)(d), F.S.

¹⁵ Section 287.055(2)(g), F.S.

¹⁶ *Id.*

¹⁷ Section 287.055(2)(g), F.S. An entity may not use a continuing contract for work of a specified nature to exceed the monetary limits placed on construction projects and study activities. Op. Fla. Att'y Gen. 2013-28 (2013).

¹⁸ Chapter 88-108, L.O.F.

¹⁹ *Id.*

²⁰ Chapter 2002-20, L.O.F.

²¹ Chapter 2009-227, L.O.F.

Current law allows governmental entities²² to contract with a construction management entity or a program management entity.²³ A construction management entity is responsible for construction project scheduling and coordination in both preconstruction and construction phases and is generally responsible for the successful, timely, and economical completion of a construction project.²⁴ A program management entity is responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services.²⁵ Both construction and program management entities must be procured pursuant to the CCNA and must consist of, or contract with, licensed or registered professionals for the specific fields or areas of construction.²⁶ The governmental entity procuring the services of a construction management or program management entity may choose to enter into a continuing contract²⁷ pursuant to the CCNA.²⁸

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive, yet indeterminate fiscal impact on private sector businesses that provide professional services as defined in the CCNA, or that provide construction management or project management services, by allowing those entities to enter into larger contracts for projects and studies under a continuing contract. Specifically, increasing the threshold for entering into continuing contracts would save those entities contractual and workload expenditures associated with having to undergo the CCNA procurement process for projects or studies that exceed the current statutory threshold.

D. FISCAL COMMENTS:

²² The term "governmental entity" means a county, municipality, school district, special district as defined in chapter 189, F.S., or political subdivision of the state. Section 255.103(1), F.S.

²³ Section 255.103, F.S.

²⁴ Section 255.103(2), F.S.

²⁵ Section 255.103(3), F.S.

²⁶ Section 255.103, F.S.

²⁷ A continuing contract, for purposes of procuring a construction or program management entity, means a contract for work during a defined period on construction projects described by type, which may or may not be identified at the time of entering into the contract. Section 255.103(4), F.S.

²⁸ Section 255.103(4), F.S.

The bill may have a positive, yet indeterminate fiscal impact on state²⁹ and local government expenditures by allowing the state or local government to enter into larger continuing contracts under the CCNA. By retaining a larger continuing contract under the CCNA, the state or a local government could potentially save on contractual and workload expenditures associated with the procurement of services on a per-project and per-study basis.

²⁹ Email from Cody Farrill, Deputy Chief of Staff, Department of Management Services, RE: CS/HB 441 Public Procurement of Services Questions (Jan. 9, 2020) (on file with the Oversight, Transparency & Public Management Subcommittee).