

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 Committee on Governmental Oversight and Accountability

BILL: SB 506

INTRODUCER: Senator Perry

SUBJECT: Public Procurement of Services

DATE: January 10, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Ponder	McVaney	GO	Pre-meeting
2.			AEG	
3.			AP	

I. Summary:

SB 506 amends the definition of “continuing contract” under the Consultants’ Competitive Negotiation Act (CCNA) to increase the maximum dollar amount for each individual project and each individual study under the contract for construction projects. The bill requires the Department of Management Services (DMS) to adjust those maximum dollar amounts, via annual rulemaking, and to base the adjustments on the Engineering News-Record’s Construction Cost Index. The maximum dollar amount for each individual project is increased from \$2 million to \$5 million, or the dollar amount as adjusted annually by DMS, and the maximum dollar amount for each individual study is increased from \$200,000 to \$500,000, or the dollar amount as adjusted annually by DMS.

The bill makes conforming revisions to s. 255.103(4), F.S. (authorizing local governmental entities to use the CCNA selection process), increasing the maximum dollar amount for continuing contracts of local governments from \$2 million to \$5 million, or the dollar amount as adjusted annually by the DMS.

With the enactment of a higher monetary threshold for these continuing contracts, the state and local governments may have fewer procurements of these services, resulting in lower overall costs.

The bill takes effect July 1, 2020.

II. Present Situation:

State Agency Construction and DMS

Section 255.29, F.S., authorizes DMS to adopt rules pursuant to Chapter 120 for bidding on building construction contracts. Specifically, DMS is required to establish procedures:

- Determining the qualifications and responsibility of potential bidders prior to advertisement for and receipt of bids for building construction contracts, including procedures for the rejection of bidders who are reasonably determined from prior experience to be unqualified or irresponsible to perform the work required by a proposed contract.
- Awarding each state agency construction project to the lowest qualified bidder as well as procedures for waiver of the rules in an emergency.
- Negotiating and modifying construction contracts.
- Entering into performance-based contracts for the development of public facilities when determined to be in the best interest of the state.¹

Competitive Procurement Generally

Chapter 255, F.S., provides the procurement process for public construction works.² Section 255.103, F.S., authorizes a “governmental entity”³ to select a construction management entity or program management entity pursuant to s. 287.055, F.S., and at the option of the governmental entity, to require a guaranteed maximum price or a guaranteed completion date.⁴ If a project includes a grouping of substantially similar construction, rehabilitation, or renovation activities, the public subdivision may require a separate guaranteed maximum price and a separate guaranteed completion date for each grouping of substantially similar construction, rehabilitation, or renovation activities.⁵

Section 255.103(4), F.S., authorizes a governmental entity to enter into a continuing contract for construction projects, in accordance with s. 287.055, F.S., in which the estimated contract does not exceed \$2 million. The term “continuing contract” is defined in s. 255.103(4), F.S., to mean “a contract with a construction management or program management entity 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.”

Part I of Chapter 287, F.S., provides “a system of uniform procedures to be utilized by state agencies in managing and procuring commodities and contractual services” to protect the public by promoting “fair and open competition,” thereby reducing the appearance and opportunity for favoritism and misconduct.⁶ The term “agency” is defined to mean “any of the various state officers, departments, board commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive boards of state government.”⁷ University and college boards of trustees, and the state universities and colleges are excluded from this definition.⁸ Agencies, pursuant to s. 287.057, may procure commodities and contractual services via competitive solicitation processes that include: (i) the invitation to bid; (ii) the request for proposals; and (iii) the invitation to negotiate.

¹ Section 255.29, F.S.

² Section 255.065(2), F.S.

³ Section 255.103(1), F.S. defines the term “governmental entity” to mean “a county, municipality, school district, special district, special district as defined in chapter 189, or political subdivision of the state.”

⁴ Section 255.103(2), F.S.

⁵ *Id.*

⁶ Section 287.001, F.S.

⁷ Section 287.012(1), F.S.

⁸ *Id.*

The Consultants' Competitive Negotiation Act

The CCNA, s. 287.055, F.S., deviates from the remainder of part I chapter 287 in two ways. First, unlike the competitive solicitation process outlined in s. 287.057, F.S., the CCNA creates a qualifications based process - for the procurement of professional architectural, engineering, landscape architectural, or registered surveyor and mapper services.⁹ Additionally, the CCNA applies to local governments as well as state agencies and defines providing its own definition of agency.¹⁰ "Agency" is defined by the CCNA to mean the "state, a state agency, a municipality, a political subdivision, a school district or a school board."¹¹

The CCNA permits the use of continuing contracts for professional services defining the term "continuing contract" as:

A contract for professional services entered into in accordance with all procedures of this act between an agency and a firm whereby the firm provides professional services to the agency for projects in which the estimated construction cost of each individual project under the contract does not exceed \$2 million, for study activity if the fee for professional services for each individual study under the contract 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 that the contract must provide a termination clause. Firms providing professional services under continuing contracts shall not be required to bid against one another."¹²

The qualifications based selection process of the CCNA contemplates a three-step process: public announcement of the project, qualifications-based selection of the professional firm, and arms-length competitive negotiations with the most qualified firm.¹³

The public announcement is to be conducted by agencies in a consistent and uniform manner and is to occur on each occasion when professional services are required to be purchased for:

- a project when the basic construction cost of which is estimated by the agency to exceed \$325,000;¹⁴ or
- a planning or study activity for professional services that exceeds \$35,000.¹⁵

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

⁹ See Section 287.055, F.S.

¹⁰ See. Section 287.055(1)(b), F.S.

¹¹ Section 287.055(2)(b), F.S. See Section 1.01(8), F.S., defining "political subdivision" to include "counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state."

¹² Section 287.055(2)(g), F.S.

¹³ See Section 287.055, F.S.

¹⁴ The amount provided in Category Five from the purchasing categories in s. 287.017, F.S.

¹⁵ The amount provide in Category Two from the purchasing categories in s. 287.017, F.S.

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.¹⁶ In determining a firm or individual to be qualified, the agency must consider the capabilities, adequacy of personnel, past record, experience as well as whether the firm or individual is a certified minority business enterprise.¹⁷

During the competitive selection phase, the agency must evaluate current statements of qualifications and performance data of the bidders.¹⁸ The agency must select no fewer than three firms deemed to be the most highly qualified to perform the required services.¹⁹ The statute directs agencies to consider the following when determining whether a firm is qualified:

- 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.²⁰

The agency is prohibited from requesting, accepting and considering proposals for the compensation to be paid during the competitive selection process.²¹ Section 287.055(d), F.S., defines "compensation" to mean "the amount paid by the agency for 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."

Next, the agency negotiates compensation to be paid under the contract with the most qualified of the three selected firms.²² Should the agency be unable to negotiate a satisfactory contract with the firm considered to be the most qualified at a price the agency determines to be fair, competitive, and reasonable, negotiations may be made with the second most qualified firm.²³ The agency may negotiate with the third most qualified firm if the negotiation with the second fails to produce a satisfactory contract.²⁴ If a satisfactory contract cannot be negotiated with any of the three firms selected, the agency must begin the qualifications-based selection process again.²⁵

¹⁶ Section 287.055(3)(c) F.S.

¹⁷ Section 287.055(3)(d), F.S.

¹⁸ Section 287.055(4)(a), F.S.

¹⁹ Section 287.055(4)(b), F.S.

²⁰ *Id.*

²¹ *Id.*

²² Section 287.055(5)(a), F.S.

²³ Section 287.055(5)(b), F.S.

²⁴ *Id.*

²⁵ Section 287.055(5)(c), F.S.

Engineering News-Record's Construction Cost Index

The Engineering News-Record (ENR) publishes both a Construction Cost Index (CCI) and Building Cost Index (BCI) that are used in the construction industry. The CCI generally represents construction costs where labor costs are a high proportion of total costs while the Building Cost Index is more applicable for structures.²⁶ The CCI has four components (inputs) – cement, lumber, structural steel, and labor.²⁷ The ENR collects data from 20 cities within the United States.²⁸ ENR reporters check prices locally, as quoted by the same suppliers each month, and ENR computes its latest indexes from these figures and local union wage rates.²⁹ ENR's indexes measure the trend in an individual city and in the United States as a whole, it does not measure cost differentials between cities.³⁰ The CCI uses 200 hours of common labor, multiplied by the 20-city average rate for wages and fringe benefits.³¹ The ENR advises that using the 20-city average index – rather than using an index that is closest to your home city – is generally more accurate because it has “more elements, it has a smoother trend” and “indexes for individual cities are more susceptible to price spikes.”³²

III. Effect of Proposed Changes:

The bill revises the maximum dollar amount for continuing contracts for construction projections.

Section 1 amends s. 255.103, F.S., to increase the maximum dollar amount for a continuing contract for construction projects from \$2 million to \$5 million, or the dollar amount as adjusted annually by DMS.

Section 2 revises s. 287.055, F.S., to increase the maximum dollar amount for a continuing contract for professional services from \$2 million to \$5 million, or the dollar amount as adjusted annually by DMS. Additionally, the bill increases the maximum amount for professional services for each individual study under the contract from \$200,000 to \$500,000, or the dollar amount as adjusted annually by DMS.

The bill amends s. 287.055, F.S., to require DMS, by annual rulemaking, to adjust the statutory maximum dollar amounts for continuing contracts based on the ENR's CCI. The bill instructs that the adjustment must be made July 1 of each year, beginning in 2021, using the most recent month for which data are available at the time of the adjustment.

Section 3 provides that the bill takes effect July 1, 2020.

²⁶ See *Using ENR Indexes*, <https://www.enr.com/economics/faq> (Last visited November 22, 2019.)

²⁷ *Id.*

²⁸ The 20 cities used for ENR's cost indexes (1978-2019) include: Atlanta, GA; Baltimore, MD; Birmingham, AL; Boston, MA; Cincinnati, OH; Cleveland, OH; Dallas, TX; Denver, CO; Detroit, MI; Kansas City, MO; Los Angeles, CA; Minneapolis, MN; New Orleans, LA; New York, NY; Philadelphia, PA; Pittsburgh, PA; San Francisco, CA; Seattle, WA; and St. Louis, MO. See *Historical Indices*, https://www.enr.com/economics/historical_indices (Last visited November 25, 2019.)

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

Not applicable. This bill does not require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

This bill does not impact state or local taxes or fees.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill may have an indeterminate positive fiscal impact on the private sector. The increased maximum dollar amount for continuing contracts for construction projects would theoretically allow for more projects to be covered under a continuing contract and reduce the frequency in which a firm must undergo the lengthy CCNA qualification process.

C. Government Sector Impact:

The competitive selection and negotiation process is time consuming and costly for the government sector. The bill, by increasing the maximum dollar amount for continuing contracts, captures more related services and may reduce costs with a more efficient delivery of services to market. Thus, the bill may have an indeterminate positive fiscal impact on the government sector.

DMS may experience insignificant costs in fulfilling the annual rulemaking requirement imposed by this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Because s. 287.055, F.S., and s. 255.103, F.S., are substantially similar, and Part 1 of Chapter 287 generally applies only state agencies, it is suggested consideration be given to moving s. 287.055, F.S. to Chapter 255.

Section 255.32, F.S., authorizes DMS to select and contract with a construction management entity pursuant to the process provided in s. 287.055, F.S. and to enter into continuing contracts³³ for projects in which construction costs do not exceed \$2 million. It is suggested that the monetary limitation for a continuing contract in s. 255.32(3), F.S., be revised to conform to the maximum dollar amount provided for in the bill for continuing contracts.

The ENR does not publish data on construction costs in Florida, thus, it may be beneficial to revise the bill to specify that the 20-city average index must be used as recommended by ENR – and not simply the Atlanta or New Orleans index - the cities closest to Florida for which there is data.³⁴

VIII. Statutes Affected:

This bill substantially amends sections 255.103 and 287.055 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

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

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

³³ Section 255.32, F.S., defines “continuing contract” as “a contract with a construction management entity for work during a defined time period on construction projects described by type, which may or may not be identified at the time of entering into the contract.”

³⁴ See *supra* note 28.