

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1131 University Construction Management

**SPONSOR(S):** Truenow

**TIED BILLS:** **IDEN./SIM. BILLS:**

| REFERENCE                           | ACTION    | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|-------------------------------------|-----------|---------|--|
| 1) State Affairs Committee          | 12 Y, 8 N | Toliver | Williamson                               |
| 2) Appropriations Committee         |           |         |  |
| 3) Education & Employment Committee |           |         |  |

### SUMMARY ANALYSIS

The Consultants' Competitive Negotiation Act (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. Qualifications-based selection is a process whereby service providers are retained based on competency, qualifications, and experience, rather than price. The CCNA establishes a three-phase process for procuring professional services: Phase 1 – Public announcement and qualification; Phase 2 – Competitive solicitation; and Phase 3 – Competitive negotiation.

During Phase 1, state and local agencies must publicly announce each occasion when professional services will be purchased for certain projects and activities. During Phase 2, an agency must evaluate the qualifications and past performance of interested consultants and conduct discussions with at least three consultants regarding their qualifications, approach to the project, and ability to furnish the required services. During Phase 3, the competitive negotiation phase, an agency must negotiate compensation with each consultant in order of rank, beginning with the highest ranked, until an agreement is reached. An agency is prohibited from considering price until Phase 3.

Current law allows governmental entities to contract with a construction management entity or a program management entity through the CCNA process. 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. A program management entity is responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services.

Current law allows district school boards, State University and Florida College System boards of trustees, and the Board of Trustees for the Florida School for the Deaf and the Blind to use certain procedures to construct new facilities or add to existing ones. Those procedures include competitive bids, design-build pursuant to the CCNA, a construction management process, or a program management process. Construction and program management entities must be selected using the CCNA.

The bill allows state university boards of trustees to use other factors, including price, for selecting a construction or program management entity in accordance with regulations of the Board of Governors of the State University System. The bill also removes a prohibition against boards modifying rules regarding construction management contracts or the design-build process.

The bill may have an indeterminate positive fiscal impact on state government. See Fiscal Comments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Consultants' Competitive Negotiation Act

In 1972, Congress passed the Brooks Act,<sup>1</sup> 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 based on 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.<sup>2</sup>

In 1973, the Florida Legislature enacted the Consultants' Competitive Negotiation Act (CCNA),<sup>3</sup> 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.<sup>4</sup>

##### *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.<sup>5</sup>

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

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.<sup>7</sup> 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.<sup>8</sup> Each agency must encourage consultants desiring to provide professional services to the agency to annually submit statements of qualifications and performance data.<sup>9</sup>

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 regarding their qualifications, approach to the project, and ability to furnish the required services.<sup>10</sup> The

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<sup>1</sup> Public Law 92-582, 86 Stat. 1278 (1972).

<sup>2</sup> *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 Mar. 29, 2021).

<sup>3</sup> Chapter 73-19, L.O.F., codified as s. 287.055, F.S.

<sup>4</sup> Section 287.055, F.S.

<sup>5</sup> Section 287.055(3)(a)1., F.S.; see also s. 287.017, F.S.

<sup>6</sup> Section 287.055(3)(a)1., F.S.

<sup>7</sup> Section 287.055(3)(c), F.S.

<sup>8</sup> Section 287.055(3)(d), F.S.

<sup>9</sup> Section 287.055(3)(b), F.S.

<sup>10</sup> Section 287.055(4)(a), F.S.

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.<sup>11</sup>

During Phase 3, the competitive negotiation phase, an agency must first negotiate compensation with the highest ranked consultant.<sup>12</sup> 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.<sup>13</sup> The agency must then negotiate with the remaining ranked consultants, in order of rank, and follow the same process until an agreement is reached.<sup>14</sup> 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.<sup>15</sup> 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.

### Construction and Program Management Entities

Current law allows governmental entities<sup>16</sup> to contract with a construction management entity or a program management entity to oversee and coordinate construction projects.<sup>17</sup> 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.<sup>18</sup> A program management entity is responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services.<sup>19</sup> 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.<sup>20</sup> If a project<sup>21</sup> solicited by a governmental entity includes a grouping of substantially similar construction, rehabilitation, or renovation activities, the governmental entity, after competitive negotiations, may require the construction management entity to provide for a separate guaranteed maximum price or a separate lump-sum price and a separate guaranteed completion date for each grouping of substantially similar construction, rehabilitation, or renovation activities included within the project.<sup>22</sup>

### *Construction and Program Management Entities for constructing certain Educational Facilities*

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<sup>11</sup> Section 287.055(4)(b), F.S.; 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.

<sup>12</sup> Section 287.055(5)(a), F.S.

<sup>13</sup> Section 287.055(5)(b), F.S.

<sup>14</sup> Section 287.055(5)(b)-(c), F.S.

<sup>15</sup> Section 287.055(5)(c), F.S.

<sup>16</sup> 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.

<sup>17</sup> Section 255.103, F.S.

<sup>18</sup> Section 255.103(2), F.S.

<sup>19</sup> Section 255.103(3), F.S.

<sup>20</sup> Section 255.103, F.S.

<sup>21</sup> The term "project" means that fixed capital outlay study or planning activity described in the public notice of the state or a state agency under paragraph (3)(a). A project may include:

1. A grouping of minor construction, rehabilitation, or renovation activities.
2. A grouping of substantially similar construction, rehabilitation, or renovation activities.

Section 287.055(2)(f), F.S.

<sup>22</sup> Section 255.103(2)-(3), F.S.

Current law provides that district school boards, State University and Florida College System boards of trustees, and the Board of Trustees for the Florida School for the Deaf and the Blind may use certain procedures to construct new facilities or add to existing ones.<sup>23</sup> Those procedures include, but are not limited to competitive bids, design-build pursuant to the CCNA, a construction management process, or a program management process. Construction and program management entities procured to oversee and coordinate the construction of educational facilities must be selected in the same way that those entities are selected for other projects, through the CCNA procurement process.<sup>24</sup>

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, in which case the construction management entity must secure an appropriate surety bond and must hold construction subcontracts.<sup>25</sup> Contract management and program management entities are permitted to use any construction techniques allowed by contract and not prohibited by law, including, but not limited to, those techniques known as fast-track construction scheduling, use of components, and systems building process.<sup>26</sup> Boards are prohibited from modifying rules regarding construction management contracts or the design-build process.<sup>27</sup>

### **Effect of the Bill**

The bill allows state university boards of trustees to use other factors, including price, for selecting a construction or program management entity as specified in, and in accordance with, regulations of the Board of Governors of the State University System. Under the bill, a state university board of trustees would be able to consider price at any point during the CCNA procurement process for a construction or program management entity, as opposed to the current procedure that restricts the consideration of price to phase 3, the competitive negotiation phase.

The bill also removes references to negotiation procedures applicable to construction management contracts and removes a prohibition against boards modifying rules regarding construction management contracts or the design-build process.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 1013.45, F.S., relating to educational facilities contracting and construction techniques.

Section 2 provides an effective date of July 1, 2021.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

The bill may have an indeterminate positive fiscal impact on state government expenditures by allowing the consideration of price earlier in the CCNA process.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

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<sup>23</sup> Section 1013.45, F.S.

<sup>24</sup> Section 1013.45(1)(c)-(d), F.S.

<sup>25</sup> *Id.*

<sup>26</sup> Section 1013.45(3), F.S.

<sup>27</sup> Section 1013.45(4), F.S.

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not grant nor require rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.