

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 1520

INTRODUCER: Senator Gruters

SUBJECT: Acquisition of Professional Services

DATE: January 25, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Ponder</u>	<u>McVaney</u>	<u>GO</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>CA</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 1520 amends s. 287.055(4)(b), F.S., related to an agency’s determination of whether a firm is qualified under the Consultants’ Competitive Negotiation Act (CCNA)¹ to perform the required services by removing the following language:

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.

Under current law, this language qualifies one of the seven statutory considerations an agency must use in determining whether a firm is qualified – “the volume of work previously awarded to each firm.” Currently, an agency is required, when making this consideration, to do so with the objective of effectuating an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms. Thus, under the bill, when an agency considers the volume of work previously awarded to a firm, it may do so without balancing the equitable distribution of contracts with the selection of the most highly qualified firms.

The bill may have an indeterminate positive fiscal impact on the government sector. The private sector may experience both an indeterminate positive and negative fiscal impact.

The bill takes effect July 1, 2022.

¹ Section 287.055, F.S.

II. Present Situation:

State Agency Construction and DMS

Section 255.29, F.S., authorizes DMS to adopt rules pursuant to Chapter 120, F.S., 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.²

Competitive Procurement Generally

Chapter 255, F.S., provides the procurement process for public construction works.³ Section 255.103, F.S., authorizes a “governmental entity”⁴ 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.⁵ 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.⁶

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.⁷ 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

² Section 255.29, F.S.

³ Section 255.065(2), F.S.

⁴ 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.”

⁵ Section 255.103(2), F.S.

⁶ *Id.*

⁷ Section 287.001, F.S.

organization, however designated, of the executive boards of state government.⁸ University and college boards of trustees, and the state universities and colleges are excluded from this definition.⁹ Agencies, pursuant to s. 287.057, F.S., 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.

The Consultants' Competitive Negotiation Act

The CCNA, s. 287.055, F.S., deviates from the remainder of part I chapter 287, F.S., 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.¹⁰ Additionally, the CCNA applies to local governments as well as state agencies and defines providing its own definition of agency.¹¹ "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."¹²

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 and 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."¹³

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.¹⁴

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:

⁸ Section 287.012(1), F.S.

⁹ *Id.*

¹⁰ *See* Section 287.055, F.S.

¹¹ *See* Section 287.055(1)(b), F.S.

¹² 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."

¹³ Section 287.055(2)(g), F.S.

¹⁴ *See* Section 287.055, F.S.

- A project when the basic construction cost of which is estimated by the agency to exceed \$325,000;¹⁵ or
- A planning or study activity for professional services that exceeds \$35,000.¹⁶

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

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.¹⁷ 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.¹⁸

During the competitive selection phase, the agency must evaluate current statements of qualifications and performance data of the bidders.¹⁹ The agency must select no fewer than three firms deemed to be the most highly qualified to perform the required services.²⁰

Section 287.055(4)(b), F.S., directs agencies to consider the following seven factors 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.

The agency is prohibited from requesting, accepting and considering proposals for the compensation²¹ to be paid during the competitive selection process.²²

Next, the agency negotiates compensation to be paid under the contract with the most qualified of the three selected firms.²³ 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.²⁴

¹⁵ The amount provided in Category Five from the purchasing categories in s. 287.017, F.S.

¹⁶ The amount provide in Category Two from the purchasing categories in s. 287.017, F.S.

¹⁷ Section 287.055(3)(c) F.S.

¹⁸ Section 287.055(3)(d), F.S.

¹⁹ Section 287.055(4)(a), F.S.

²⁰ Section 287.055(4)(b), F.S.

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."

²² *Id.*

²³ Section 287.055(5)(a), F.S.

²⁴ Section 287.055(5)(b), F.S.

The agency may negotiate with the third most qualified firm if the negotiation with the second fails to produce a satisfactory contract.²⁵ If a satisfactory contract cannot be negotiated with any of the three firms selected, the agency must begin the qualifications-based selection process again.²⁶

Thus, the CCNA is a statutory procurement system that contemplates a four step process: public announcement of the work, qualifications-based selection of the professional firm, arms-length negotiations with the most qualified firm and, ultimately, execution of the contract. The CCNA tries to effectuate an equitable distribution of contracts among the most qualified firms to ensure that the professional service fees are fair, competitive and reasonable.²⁷

III. Effect of Proposed Changes:

Section 1 amends s. 287.055(4)(b), F.S., related to an agency's determination of whether a firm is qualified under the CCNA to remove the following language:

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.

Under current law, this language qualifies one of the seven statutory considerations an agency must use in determining whether a firm is qualified – the volume of work previously awarded to each firm. Current law requires when an agency makes this consideration it do so with the objective of effectuating an equitable distribution of contracts among qualified firms, provided such distribution does not violate the principle of selection of the most highly qualified firms. Thus, under the bill, an agency considering the volume of work previously awarded to a firm will no longer have to weigh in the balance of the equitable distribution of contracts against selection of the most highly qualified firms.

Section 2 provides an effective date of July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Not applicable. The bill does not require counties and municipalities to take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, or reduce the percentage of state tax shared with counties or municipalities.

B. Public Records/Open Meetings Issues:

None.

²⁵ *Id.*

²⁶ Section 287.055(5)(c), F.S.

²⁷ *City of Lynn Haven v. Bay County Council of Registered Architects, Inc.*, 528 So. 2d 1244, 1246 (Fla. 1st DCA 1988).

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill removes the balance of the equitable distribution of contracts against the principle of selection of the most highly qualified firms when an agency is considering the volume of work previously awarded. This may have a positive fiscal impact on the private sector to the extent a firm was previously excluded due to the balancing of such interests. On the other hand, it may also have negative fiscal impact for firms who will now be excluded as a result of its removal.

C. Government Sector Impact:

The bill removes the balance of the equitable distribution of contracts against the principle of selection of the most highly qualified firms when an agency is considering the volume of work previously awarded. This may have a positive fiscal impact on the governmental sector if it results in its ability to contract with a qualified firm - that would have previously been excluded due to the balancing of such interests - at a lower cost.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following section of the Florida Statutes: 287.055.

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.
