CCNA -- Design Services -- Construction

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Subject:
CCNA -- Design Services -- Construction

Mr. Usher L. Brown
Brown, Garganese, Weiss & D'Agresta, P.A.
Post Office Box 2873
Orlando, Florida 32802-2873

RE: CONSULTANTS' COMPETITIVE NEGOTIATION ACT – CCNA – CONTRACTS – DESIGN SERVICES – PROFESSIONAL SERVICES – CONSTRUCTION – whether contract for work of specified nature with cost estimate exceeding $2 million is "continuing contract" for purposes of CCNA; whether "construction costs" include design services. s. 287.055 (2)(g), Fla. Stat.

Dear Mr. Brown:

On behalf of the School Board and the Superintendent of Schools of Osceola County, you have asked for my opinion on the following questions relating to the Consultants' Competitive Negotiation Act (the CCNA):

1. Is it compliant with CCNA for a government entity to award a contract for continuing services for professional services of a specified nature as outlined in the contract, with the contract being for a fixed term or with no time limitation, except that the contract must provide a termination clause, even if the estimated construction cost of an individual project exceeds $2,000,000.00?

2. In determining the $2,000,000.00 threshold under section 287.055(2)(g), Florida Statutes, should the School Board of Osceola County include only the estimated cost of construction exclusive of the professional fees for the design of the project?[1]

In sum:

1. The Legislature intended, by amending the CCNA in 1988, to include monetary limitations on "continuing contracts" and to extend those monetary limitations to "continuing contracts" for individual construction projects within the scope of the act. A contract "for professional services of a specified nature as outlined in the contract" and exceeding $2 million would, therefore, be outside the scope of the "continuing contract" exception of section 287.055(2)(g), Florida Statutes, and any such contract would be subject to the other competitive procedures of the CCNA.

2. Section 287.055(2)(g), Florida Statutes, requires that a "continuing contract" for professional services involve "projects in which the estimated construction cost" of each individual project does not exceed $2 million. The statute limits consideration to "construction costs" and would not

include professional fees for such things as design services.

Question One

The CCNA, section 287.055, Florida Statutes, sets forth requirements for the procurement and contracting of professional architectural, engineering, landscape architectural, or land surveying services by governmental agencies.[2] The act creates a two-step process for agencies or political subdivisions to use when hiring architects and engineers. The first is competitive selection, the second is competitive negotiation with those firms selected in the first step. Under the act, an agency, including a special district, must competitively select and negotiate with the most qualified firm to provide these professional services for a project.[3]

In opinions applying the CCNA, this office has noted that the CCNA was designed to provide procedures for state and local governmental agencies to follow in the employment of professional service consultants to make the contracting for professional services more competitive and to require the employment of the most qualified and competent individuals and firms at fair, competitive, and reasonable compensation.[4] The statute provides that "[n]othing in this act shall be construed to prohibit a continuing contract between a firm and an agency."[5]

A "continuing contract" is defined in section 287.055(2)(g), Florida Statutes, in relevant part as:

"[A] contract for professional services entered into in accordance with all the 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."

While nothing in section 287.055, Florida Statutes, purports to regulate the terms of a continuing contract, the continuing contract provision of section 287.055, Florida Statutes, represents an exception to the general competitive bidding provisions of the act and should be read narrowly and utilized sparingly in order to avoid an appearance of circumventing the requirements of the statute.[6]

By its terms, section 287.055(2)(g), Florida Statutes, distinguishes: 1) construction costs for individual projects which do not exceed $2 million; 2) a study activity when the fee for the individual project does not exceed $200,000; or 3) work of a specified nature as outlined in the contract with no time limitation except for a termination clause. The word "or" is generally construed in the disjunctive when it is used in a statute or rule and normally indicates that alternatives were intended.[7]

You have asked whether the school board may enter into a "continuing contract" for a construction project with costs in excess of the $2,000,000.00 monetary limit if that project is characterized as a continuing contract "for work of a specified nature . . . ." My review of the legislative history developed during consideration and passage of the amendment suggests that these monetary limitations would apply to such a contract.

As related in the Final Staff Analysis & Economic Impact Statement on HB 270 (Chapter 88-108, Laws of Florida, which amended section 287.055[2][g], Florida Statutes):

"House Bill 270 amends the definition of the term "continuing contract" (as contained in s. 287.055(2)(g), F.S.) by placing a monetary limit on projects which fall within the definition. The sponsor's intent is that construction projects costing more than $500,000 or studies costing more than $25,000 may not be covered by a continuing contract. However, firms retained under continuing contract could perform as many different projects as a given agency wishes so long as the individual project cost is below the $500,000 / $25,000 limit. Thus, large or major construction or study projects requiring engineering / architectural type services would need to be competitively selected and negotiated as set out in the statute and could not be covered by a continuing contract. This limitation would apply to architectural, engineering, landscape architectural, and land surveying services contracted for by any state or local governmental agency . . . ."[8]

The staff analysis recognizes the potential ambiguity which you have identified in your question and reiterates that "the monetary limitations be added to the existing limitations in the law" and that "the bill intends, and does make it clear, that monetary limits are to be applied in cases involving construction projects or study activity":

"An apparent ambiguity exists in the bill as to the effect of the monetary limitations on continuing contracts. This is caused by use of the word 'or' on page 1, line 22 of the bill. It would appear that in addition to the two parallel phrases containing monetary limitations, a third parallel phrase is set up which describes a 'continuing contract'. Thus, 'continuing contracts' can be '. . . for projects . . . not exceed(ing) $500,000, OR for stud(ies) . . . not exceed(ing) $25,000, OR for work of a specified nature as outlined in the contract. . .", (s. 287.055(2)(g), F.S., Emphasis added). However, the sponsor intended that the monetary limitations be added to the existing limitations in the law.

On the other hand, the problem may be misinterpretation of the current statutory phrase ". . . for work of a specified nature as outlined in the contract . . ." as used to describe a "continuing contract". Despite two Attorney General's Opinions that shed light in this area (AGO 075-131, May 5, 1975; AGO 076-142, June 18, 1976), the term 'continuing contract' may have simply been misinterpreted by some governmental entities allowing them to circumvent the competitive selection process. If that is true, then the primary shortcoming in this area of the CCNA (even as amended by the bill) may be a lack of judicial interpretation and enforcement. However, the bill intends, and does make it clear, that monetary limits are to be applied in cases involving construction projects or study activity."[9]

Thus, it appears that the Legislature intended, despite ambiguity in the language employed, to impose monetary limitations on "continuing contracts" involving construction projects coming within the scope of section 287.055(2)(g), Florida Statutes. To read the exception for "continuing contracts" for work of a specified nature as subject to no monetary limitation would allow the circumvention of the CCNA and would vitiate the language of the exceptions imposing such monetary caps.

Thus, it is my opinion that the Legislature intended, by amending the CCNA in 1988, to include

monetary limitations on "continuing contracts" in cases involving construction projects and to extend those monetary limitations to such "continuing contracts" within the scope of the act. A construction contract "for professional services of a specified nature as outlined in the contract" and exceeding $2 million in the estimated construction cost of any individual project would, therefore, be outside the scope of the "continuing contract" exception of section 287.055(2)(g), Florida Statutes, and would then be subject to the other competitive procedures of the CCNA.

Question Two

You also ask whether, in computing the $2,000,000.00 threshold amount in section 287.055(2)(g), Florida Statutes, for a "continuing contract," the Osceola County School District should exclude or include professional fees for design of the construction work. Your letter suggests that you are concerned with "design fees for architects and engineers and other professional services that are not related to construction but instead are related to appraising property, surveying the land, and other professional fees that are not specifically tied to the purchase of materials to be incorporated into the project and the purchase of labor or services directly tied to incorporating materials into the project and building the project . . . ."

The statute itself distinguishes "professional services" from the definition of a "continuing contract." The term "[p]rofessional services" is defined in subparagraph (2)(a) of the statute as

"those services within the scope of the practice of architecture, professional engineering, landscape architecture, or registered surveying and mapping, as defined by the laws of the state, or those performed by any architect, professional engineer, landscape architect, or registered surveyor and mapper in connection with his or her professional employment or practice."

By its terms, a "continuing contract," as defined in section 287.055(2)(g), Florida Statutes, is a contract for "professional services," but those services are provided based on the estimated construction cost of each individual project. Moreover, the text of the CCNA explicitly distinguishes between "design" and "construction."[10] The clearly expressed intent of the statutory language must given effect.[11]

The CCNA, section 287.055, Florida Statutes, sets forth requirements for the procurement and contracting of professional architectural, engineering, landscape architectural, or land surveying services by governmental agencies.[12] The act creates a two-step process for agencies or political subdivisions to use when hiring architects and engineers. The first is competitive selection of the most qualified firms, the second is competitive negotiation with those firms selected in the first step. Under the act, an agency, including a special district, must competitively select and negotiate with the most qualified firm to provide these professional services for a project.[13] The CCNA is specifically designed to preclude a consideration of the fees for "professional services" (defined to include architecture, professional engineering, landscape architecture, or registered surveying and mapping) until the competitive negotiation phase of this process. To include such fees within the initial calculation of a project would defeat the provisions of the act.

Thus, based on the language of the statute itself requiring that a "continuing contract" for professional services involve "projects in which the estimated construction cost" of each

individual project does not exceed $2 million, and the intent of the CCNA, it is my opinion that the statute limits consideration to "construction costs" and would not include professional fees for such things as design services.

Sincerely,

Pam Bondi
Attorney General

PB/tgh

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[1] You have asked two additional questions dependent upon my answers to your first two questions. In light of the conclusions to Questions One and Two, no discussion of your other two questions is necessary. In addition, I would note that this office cannot rule on the reasonableness of an agency's interpretation or construction of a statute – that is a judicial matter.

[2] *See* s. 287.055(2)(b), Fla. Stat., which defines "[a]gency" as "the state, [or] a state agency, [or] a municipality, [or] a political subdivision, [or] a school district, or a school board[;]" and s. 1.01(8), Fla. Stat., defining "political subdivision" to include "all other districts in this state." *And see* s. 287.055(4) and (5), Fla. Stat.

[3] Section 287.055(4) and (5), Fla. Stat.

[4] *See, e.g.*, Ops. Att'y Gen. Fla. 73-216 (1973), 74-308 (1974), and 75-56 (1975); and see "Whereas" clauses, Ch. 73-19, Laws of Fla. The CCNA was enacted for the public benefit and should be interpreted most favorably to the public. *Cf. Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d. 260, 263 (Fla. 1973); Op. Att'y Gen. Fla. 74-308 (1974).

[5] Section 287.055(4)(d), Fla. Stat.

[6] *Cf. City of Lynn Haven v. Bay County Council of Registered Architects, Inc.*, 528 So. 2d 1244, 1246 (Fla. 1st DCA 1988), in which the court determined that the city's procedures contravened the legislative intent and undermined the effectiveness of the CCNA. Specifically, the city's bidding procedure would not have effectuated an equitable distribution of contracts among the most qualified firms pursuant to s. 287.055(4), Fla. Stat.

[7] *Sparkman v. McClure*, 498 So. 2d 892 (Fla. 1986). *And see Telophase Society of Florida, Inc. v. State Board of Funeral Directors and Embalmers*, 334 So. 2d 563, 564 (Fla. 1976) (word "or" when used in a statute is generally to be construed in the disjunctive); *Kirksey v. State*, 433 So. 2d 1236, 1237 (Fla. 1st DCA 1983) (generally, use of disjunctive in statute indicates alternatives and requires that such alternatives be treated separately); *Linkous v. Department of Professional Regulation*, 417 So. 2d 802 (Fla. 5th DCA 1982).

[8] *See* s. I.B., "Effect of Proposed Changes," House of Representatives, House Commerce Committee, Final Staff Analysis & Economic Impact Statement on HB 270, dated June 6, 1988.

[9] *See* s. IV, "Comments," House of Representatives Commerce Committee Staff Analysis for HB 270, dated April 18, 1988.

[10] *See, e.g.*, s. 287.055(2)(I), Fla. Stat.

[11] *See, e. g., M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000); *McLaughlin v. State*, 721 So. 2d 1170 (Fla. 1998); *Osborne v. Simpson*, 114 So. 543, 544 (Fla. 1927).

[12] *Supra* n.2.

[13] *Supra* n.3.