Consultants' Competitive Negotiation Act

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Mr. Kenneth W. Edwards, Esq.
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250 Australian Avenue
Suite 600
West Palm Beach, FL 33401

Dear Mr. Edwards:

On behalf of the Board of Supervisors of the Northern Palm Beach County Improvement District you have requested this office's assistance in determining whether the continuing contract between the district and the district engineer may be extended by agreement of the parties without the necessity for renegotiating the contract pursuant to the Consultants' Competitive Negotiation Act, section 287.055, Florida Statutes. While this office has no authority to comment on the terms of contracts, [1] I offer the following informal comments relating to the Consultants' Competitive Negotiation Act (CCNA) and continuing contracts entered into pursuant to the CCNA.

The Consultants' Competitive Negotiation Act (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] 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 Consultant's Competitive Negotiation Act, 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 CCNA was enacted for the public benefit and should be interpreted most favorably to the public.[5] The statute provides that "[n]othing in this act shall be construed to prohibit a continuing contract between a firm and an agency."[6]

A "continuing contract" is defined in s. 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 construction costs do not exceed $2 million, for study activity when the fee for such professional service 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.[7]

By its terms, section 287.055(2)(g), Florida Statutes, distinguishes: 1) projects in which construction costs do not exceed $2 million; 2) a study activity when the fee for such service 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.[8] Thus, the statute, when read narrowly, provides that each type of project may, in itself, be the subject of a "continuing contract," but a combination of these elements does not fall within the scope of the exception.

I would note that this office, in Attorney General's Opinion 93-56, concluded that the CCNA does not provide criteria for negotiating an engagement to contract for professional services under a continuing contract, and a municipality may develop its own procedures for evaluating such a contract. Thus, as that opinion and subsequent opinions of this office have recognized, if an agency within the scope of the statute determines that it is appropriate to develop criteria for determining which firm under continuing contract with the city will be selected to perform a project, it may do so.[9] However, the opinion suggests that it may be advisable for governmental entities to adopt administrative rules of procedure to insure that these criteria are applied uniformly to all continuing contracts into which the entity is a party.[10]

You have advised this office that the subject contract, an employment contract with a professional engineer, includes a provision stating that the contract's term is for three years with two annual one-year renewal options, for a total duration term of up to five years. Thus, it appears that the contract in question is not a contract "with no time limitation" but is a contract with a fixed term of a maximum of 5 years and would be subject to renegotiation and renewal at that time. Because the Northern Palm Beach County Improvement District is subject to the provisions of the CCNA, any new contract for professional engineering services entered into between the district and an engineer or engineering firm should again be the subject of competitive negotiation under the CCNA.

I trust that these informal comments will be helpful to you in advising your client. Thank you for contacting the Florida Attorney General's Office for assistance.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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[1] *See* s. 16.01(3), Fla. Stat., authorizing the Attorney General to issue legal opinions on questions of state law.

[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] Sections 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.

[5] *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).

[6] Section 287.055(4)(d), Fla. Stat. (1995).

[7] *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 section 287.055(4), Fla. Stat.

[8] *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).

[9] *Pinellas County v. Woolley*, 189 So. 2d 217 (Fla. 2d DCA 1966), citing 82 C.J.S. *Statutes* s. 343; *Terrinoni v. Westward Ho!*, 418 So. 2d 1143 (Fla. 1st DCA 1982); *City of Pompano Beach v. Capalbo*, 455 So. 2d 468 (Fla. 4th DCA 1984) (words in a statute should not be construed as surplusage if reasonable construction which will give them some force and meaning is possible).

[10] *Cf. Marriott Corporation v. Metropolitan Dade County*, 383 So. 2d 662, 663 (Fla. 3d DCA 1980), which recognizes that even under competitive bidding requirements contracts must be awarded as a function of the reasonable exercise of power by municipal governmental authorities as a matter of public policy and fidelity to the public trust; *William A. Berbusse, Jr., Incorporated v. North Broward Hospital District*, 117 So. 2d 550 (Fla. 2d DCA 1960) (where statute requires that public body award contracts to low bidder, proper municipal authorities have wide discretion in determination of lowest responsible bidder).