Consultants' Competitive Negotiation Act

Number: INFORMAL

Date: August 06, 2008

The Honorable D. Alan Hays
Representative, House District 25
Post Office Box 2326
Umatilla, Florida 32784

Dear Representative Hays:

You have requested my comments regarding a report of the Florida Auditor General questioning a practice of the Duval County School District relating to the Consultants' Competitive Negotiation Act, section 287.055, Florida Statutes. Apparently the school district recently received an audit criticism relating to its method of calculating costs on construction related services under a continuing contract. While this office will not comment on findings of the Florida Auditor General, I offer the following informal comments to you for purposes of amendatory legislation. I also enclose copies of several previously issued Attorney General Opinions that address the continuing contract provisions of the statute.

Section 287.055, Florida Statutes, the Consultants' Competitive Negotiation Act (CCNA), sets forth requirements for procuring and contracting for professional architectural, engineering, landscape architectural, or land surveying and mapping services. Under the act, an agency, including a school district, must competitively select and negotiate with the most qualified firm to provide these professional services for a project.[1]

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.[2] The CCNA applies to any agency subject to the act with the power or duty to contract for professional services as set forth in section 287.055, Florida Statutes. This office has determined that the CCNA applies to various governmental entities, including a municipality in accomplishing the purposes for which a grant is received;[3] the state fair authority;[4] a county civic facilities authority;[5] a hospital taxing district;[6] a multi-county airport authority;[7] and a county housing authority.[8] The CCNA was enacted for the public benefit and should be interpreted most favorably to the public.[9]

The original legislation creating the CCNA, Chapter 73-19, Laws of Florida, speaks directly to problems of conflict with other laws. The act specifically provides that "[a]ny laws, or parts of law in conflict with the provisions of this act are hereby repealed."[10] Thus, to the extent that any provision of the Sebring Airport Authority legislation conflicts with the CCNA, those sections were repealed, effective July 1, 1973.[11]

The CCNA provides that "[n]othing in this act shall be construed to prohibit a continuing contract between a firm and an agency."[12] A "continuing contract" is defined in the statute 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 $1 million, for study activity when the fee for such professional service does not exceed $50,000, or for work of a specified nature as outlined in the contract required by the agency, 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]

Nothing in section 287.055, Florida Statutes, limits the number of continuing contracts into which an agency may enter at one time. In fact, the statute appears to recognize that multiple contracts may be in effect simultaneously; otherwise, the statutory language precluding firms from being required to bid against one another would be superfluous.

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.[14] 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.[15]

I trust that these informal comments and the copies of previously issued Attorney General Opinions I am enclosing will be of assistance to you.

Sincerely,

Gerry Hammond
Senior Assistant Attorney General

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Enclosures: Ops. Att'y Gen. Fla. 07-07 (2007), 07- 49 (2007), 93-56 (1993), and 88-55 (1988)

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[1] *See* s. 287.055(2)(b), Fla. Stat., which defines "[a]gency" as "the state, [or] a state agency, 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.

[2] *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.

[3] *See* Op. Att'y Gen. Fla. 91-34 (1991).

[4] *See* Op. Att'y Gen. Fla. 83-20 (1983).

[5] *See* Op. Att'y Gen. Fla. 74-308 (1974).

[6] *See* Op. Att'y Gen. Fla. 74-89 (1974).

[7] *See* Op. Att'y Gen. Fla. 75-56 (1975).

[8] *See* Op. Att'y Gen. Fla. 78-19 (1978).

[9] *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).

[10] *See* s. 8(4), Ch. 73-19, Laws of Fla.

[11] *See* s. 9, Chapter 73-19, Laws of Fla., providing the effective date of the act.

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

[13] Section 287.055(2)(g), Fla. Stat.

[14] *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).

[15] *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).