

# **Procurement Substance and Procedure**

**Construction Law Certification  
Review Course  
Orlando, Florida**

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# Goals of Public Procurement

- FS 287.001 Legislative Intent
  - Fair and open competition
  - Reduces appearance and opportunity for favoritism
  - Inspires public confidence
- Create a Uniform System for purchases

# Statutes and Regulations

Three primary factors to consider:

1. What type of **Agency**
2. What type of **Goods or Services**
3. What type of **Solicitation**

# Type of Public Entity/Agency

## State Entities/Agencies:

Chapter 287, F.S. includes the primary statutory provisions for the general procurement of goods and services

## Counties and Municipalities:

Statutorily authorized to procure goods and services, but the **method of procurement** is not prescribed.

# Construction Services

For State agencies, construction procurements are governed by various sections within **Chapter 255, F.S.** and the rules adopted by agencies to implement those statutory provisions

For local government,\* construction procurements are governed by **Section 255.20, F.S.**

\* A county, municipality, special district (as defined in Chapter 189, F.S.) or other political subdivisions of the state

# Construction Services

Section 255.20, F.S. requires a political subdivision of the State seeking to perform public construction work to award the work competitively for projects that cost more than **\$300,000\***.

However, Section 255.20(1)(c), F.S. also provides for **eleven (11)** stated **exceptions** to the **"competition"** requirement.

# “Competitively” means ...

- If based on price, the submission of sealed bids
- Request for proposal or qualifications
- If subject to competitive negotiation, pursuant to 287.055

# Professional Services

An important statute related to construction is the **Consultants' Competitive Negotiation Act** ("CCNA"). Section 287.055, F.S.

Although local government is generally not subject to Chapter 287, F.S. **This Act applies** to all State agencies, municipalities, political subdivisions, school districts, and school boards.



# What is CCNA?

- In 1973, the Legislature adopted the Act after considerable lobbying from engineers and architects
- Identified a need to competitively select firms on **qualifications and not price** due to the “professional” nature of the services

# What is CCNA?

The Act sets forth the following:

- **Who** it applies to
- **What** process to follow
- **How** to evaluate the firms

# What type of professional services does it apply to ?

- Engineers
- Architects
- Landscape Architects
- Registered Surveyors and Mappers



# Competitive Selection

An agency is required to:

- Evaluate the firms which have submitted qualifications
- Conduct discussions with no fewer than three
- May require public presentations by the firms
- Must select, in order of preference, no fewer than three firms

# Evaluation Criteria

The factors that **must** be considered include:

- the **ability** of the 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**
- the **volume of work previously awarded\***

# What “projects” does it apply to?

Pursuant to the 287.055(3)(a) of the Act, agencies must publicly announce, competitively select and negotiate professional services for a project when:

(1) the basic construction cost of which is estimated by the agency to exceed the threshold amount of \$ 325,000

or

(2) for a planning or study activity when the fee for professional services exceeds the threshold amount of \$ 35,000.

# Are there any exceptions to these requirements?

- Continuing Contract

and

- Grouping of projects as defined in 287.055(2)(f)(2)

## But there are limitations when using a Continuing Contract

- (1) for projects in which **construction costs** do not exceed \$2 million,
- (2) for **study activity** when the fee for such professional service does not exceed \$200,000, or
- (3) for **work of a specified nature ...**, with no time limitation except that the contract must provide a termination clause.\*



# What does Project really mean

- 287.055 (2)(f)(2) Project means:
  - An activity under (3)(a) [thresholds] and:
    - 1) A grouping of minor construction, rehabilitation, or renovation activities, or
    - 2) A grouping of substantially similar construction, rehabilitation, or renovation activities.

# D/B

The CCNA also addresses the process and general requirements in soliciting design-build services.

The Act requires each local jurisdiction to adopt rules or ordinances for the award of design-build contracts.

# Other Legal Authorities

## ■ Florida Administrative Code

- Chapter 60A-1 - DMS regulations that apply to all State procurements for commodities or contractual services
  - Chapter 60D-5 - DMS rules specific to construction contract bidding
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- State agencies and Local governments have separate ordinances, resolutions or rules related to procurement.

# Types of Procurement Solicitations

- Invitation to Bid
- Request for Proposals
- Invitation to Negotiate

# Invitation to Bid

- **Most common** method for construction
- Rigid and identifies the resolution to the problem
- Defines scope and solicits bids to detailed plans and specifications
- Service/commodity easy to define, price is the sole determining factor
- The **lowest responsive, responsible bidder**

# Request for Proposals

- Incapable of completely defining the scope of work required
- Service may be provided in several different ways
- **Qualifications and quality of service** are considered the primary factors instead of price

# Request for Proposals

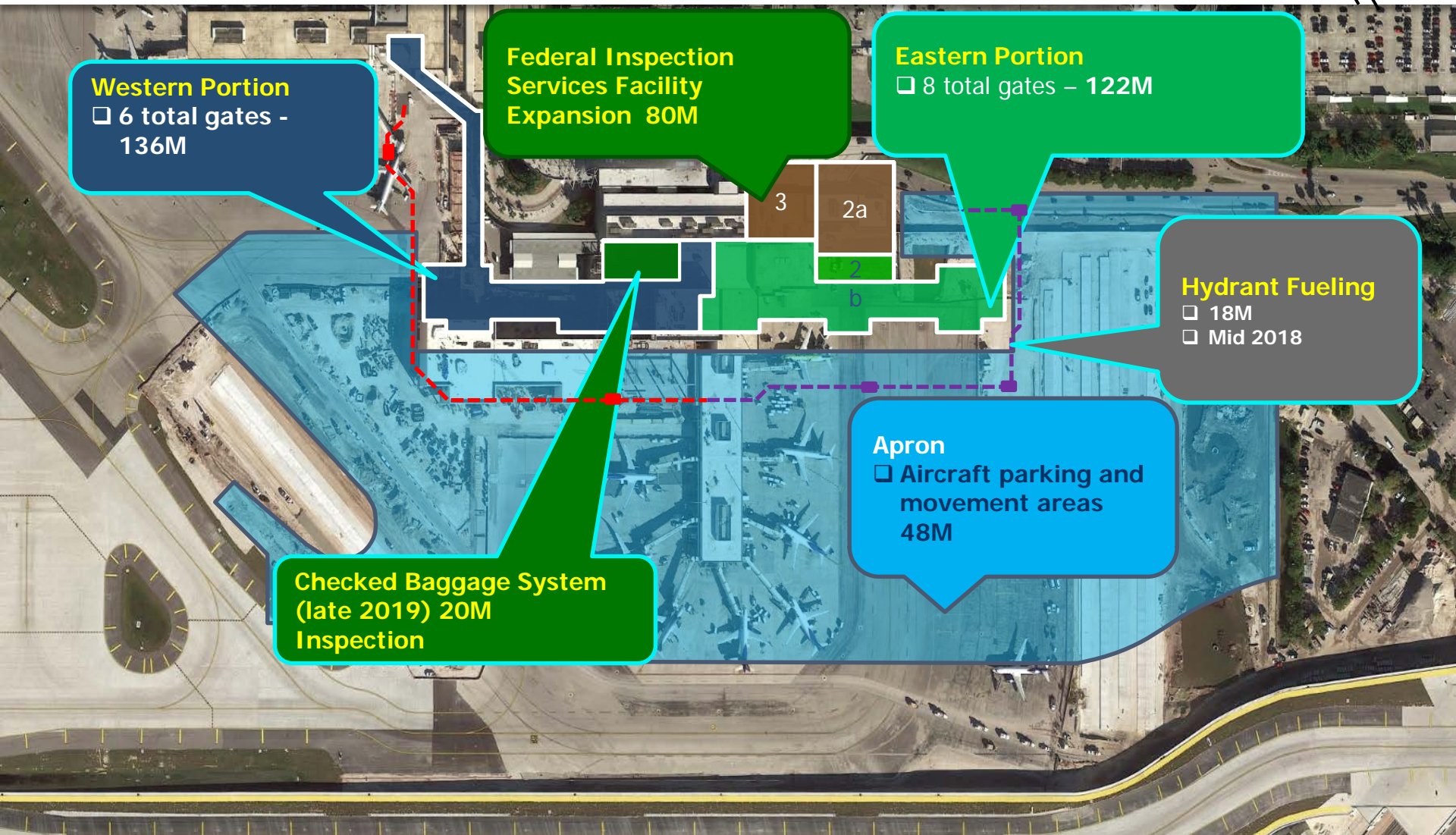
- Extensive evaluation which includes varied criteria:
  - Qualifications and Experience of principals and staff
  - Methodology and Management approach
  - Understanding of the project and agency's objectives
  - Technical superiority
  - Financial stability
  - References
- Award to the responsive and responsible offeror whose proposal is determined to be the most advantageous to the agency

# Invitation to Negotiate

- Agency must determine ITB or RFP is not practicable.
- Used to determine **best method for achieving a specific goal or solving a particular problem**
- Identifies one or more responsive vendors with which the agency may **negotiate** in order to receive the best value.
- “**Best value**” is defined as the highest overall value based on objective factors that include, but are not limited to, price, quality, design, and workmanship.



## Terminal 4 Expansion Update



**Western Portion**  
□ 6 total gates -  
136M

**Federal Inspection  
Services Facility  
Expansion 80M**

**Eastern Portion**  
□ 8 total gates – 122M

**Hydrant Fueling**  
□ 18M  
□ Mid 2018

**Apron**  
□ Aircraft parking and  
movement areas  
48M

**Checked Baggage System  
(late 2019) 20M  
Inspection**

# Pre-Solicitation Considerations

- Lobbying and Gift Regulations
- Solicitation Development

# Solicitation Development

Not eligible to contract with the agency for any contracts dealing with subject matter of a solicitation if:

- Performed **feasibility study** of implementation of a subsequent contract
- Participated in **drafting solicitation**
- **Develops a program** for future implementation

# State Funding Considerations

- 255.099 - Preference to state residents, enacted 2010
- 255.0991 – Prohibits local government preferences, enacted 2015

# 255.099 Requires contract to include Florida preference

- Construction contract
- State funded, any amount
- Contractor must give preference to FL residents with substantially equal qualifications
- Federal funds exception

# 255.0991 - Prohibition of local preferences

- Construction services
- > 50 % State funded
- Prohibits preferences based on:
  - Office location
  - Employing locals
  - Local taxes



# Other Solicitation Considerations

- Cone of Silence
- Public Records Act
- Sunshine Law
- Specification Challenges

# Cone of Silence

## What is it?

Period of time when prospective vendors are **prohibited from communicating** with representatives of the procuring agency



# Cone of Silence

- All State procurements and many local governments subject to a cone of silence.
- Section 287.057(23), FS. provides communication must be in writing and limited to the procurement officer, or as provided in the solicitation documents.
- Violation may be grounds for rejecting a response.

# Cone of Silence

**Who** does it apply to?

# Cone of Silence

- Typically applies to **representatives involved** in the review and evaluation of submittals and/or the contract approval process
- Read the solicitation rules as to specifics
- Read the applicable legal authority

# Solicitation Process

- Competition
- Advertisement
- Pre-Bid Conference
- Q&A Period
- Submission Deadline
- Bid Opening
- Evaluation of Bids

# Competition

- Statutes requires a public body to award construction contracts only after competitive bidding
- Public body has **wide discretion** in accepting bids ... absent finding award arbitrary and capricious
- So long as the public agency acts in good faith, the courts will not generally interfere with agency judgment

# Evaluation of Bids

Public competitive bidding  
mandates award be made to the  
lowest “responsive” and  
“responsible” bidder

# Evaluation of Bids

- Responsiveness
- Responsibility
- Bid Mistakes & Withdrawal
- Rejection of All

# Responsiveness

A responsive bid - is a bid, proposal or reply that **conforms in all material respects** to a solicitation. Bid is submitted on the correct forms, contains all required information, signatures, and notarizations.



# Responsiveness

**Bidder** will not be permitted to alter its bid after opening, except to cure a **minor irregularity**.

A deviation or irregularity is minor if the bidder does **not obtain a competitive advantage** over the other bidders as a result of the deviation in its response.

# Responsiveness

When must an **agency reject** a bid and be prohibited from waiving a deviation as a **minor irregularity**?

Case law provides a deviation is sufficiently **material** to destroy its competitive nature when the variation affects the bid amount by giving the bidder an advantage or benefit not enjoyed by others.

# Responsibility

- In contrast to responsiveness, responsibility relates to the issue of performance by the contractor in terms of the **skill, experience, financial resources, and integrity** necessary to complete the requirements of the contract.
- Responsiveness - compare the bid to the specifications
- Responsibility focuses on the **qualifications and characteristics** of the bidder.

# Responsibility

Generally, requirements pertaining to the responsibility of the bidder **may not be waived**.

Does the bidder does possess the required skill, experience, financial resources, and integrity necessary to complete the requirements of the contract, **AT THE TIME OF BID**.

# Bid Mistakes

Given the nature of the bidding environment, not unusual for contractors to make mistakes:

- Mathematical errors
- Clerical mistakes
- Errors in judgment
- Failure to conduct a proper site investigation

A **material** mistake may deem the bid **nonresponsive**.

# Bid Mistakes

A material error **cannot be corrected** even when it would suit the agency to do so.

Correction of a material error in a bid creates an **unfair advantage** and creates the **potential for collusion** and **abuse** of the competitive bidding process.

# Bid Withdrawal

- Generally, owners **allow** a contractor to withdraw a bid, without recourse, if the **mistake is one of fact**.
- This encompasses **clerical errors** and **erroneous assumptions**.
- Specific situations have included **faulty math, misreading of plans, or transposition of numbers**.

# Bid Withdrawal

Public owners **do not allow** withdrawal of bids when the "mistake" is based on:

- Mistakes in law
- Mistakes in personal judgments
- Wrongful assumptions of contract obligations



# Rejection of All

**An agency may desire to reject all bids:**

- Ambiguous specifications
- Bids higher than budget
- Defect in the plan design

**Agency has *wide*, but not unrestricted, *discretion*.  
Arbitrary/capricious standard. The decision to reject  
all bids must be grounded on a *legitimate basis*.**

# Conclusion

- Governmental entities in Florida routinely contract for construction services
- Different and often more lengthy process than private contracting
- Requires knowledge and understanding of various, overlapping laws, rules and policies

**THANK YOU**  
**ANY ???**