How Public Projects Differ from Private Work



Presented to:

2019 Construction Law Institute

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TRENAM LAW

Government in the Sunshine



- A proper "sunshine" meeting:
  - duly constituted quorum present,
  - held in a facility that is accessible to disabled individuals;
  - minutes must be taken;
  - advertised in advance; and
  - must afford the public a "reasonable" opportunity to speak.
- Fla. Stat. § 286.011 et. seq. (2017).

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Public Records



FLA. STAT. §. 119.

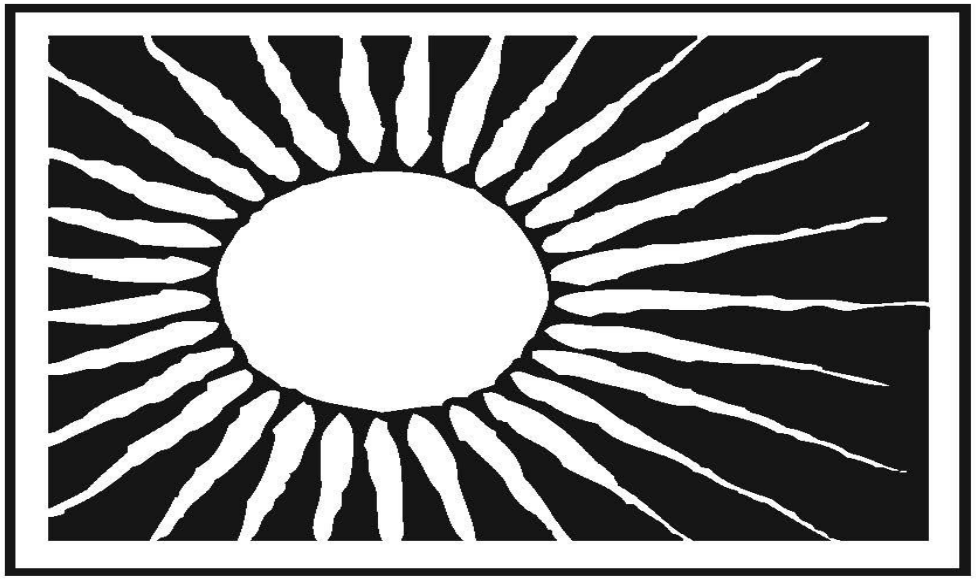


FLA. STAT. § 119.071.

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Public Records (Continued)

GOVERNMENT-
IN-THE-SUNSHINE



Solicitation Requirements

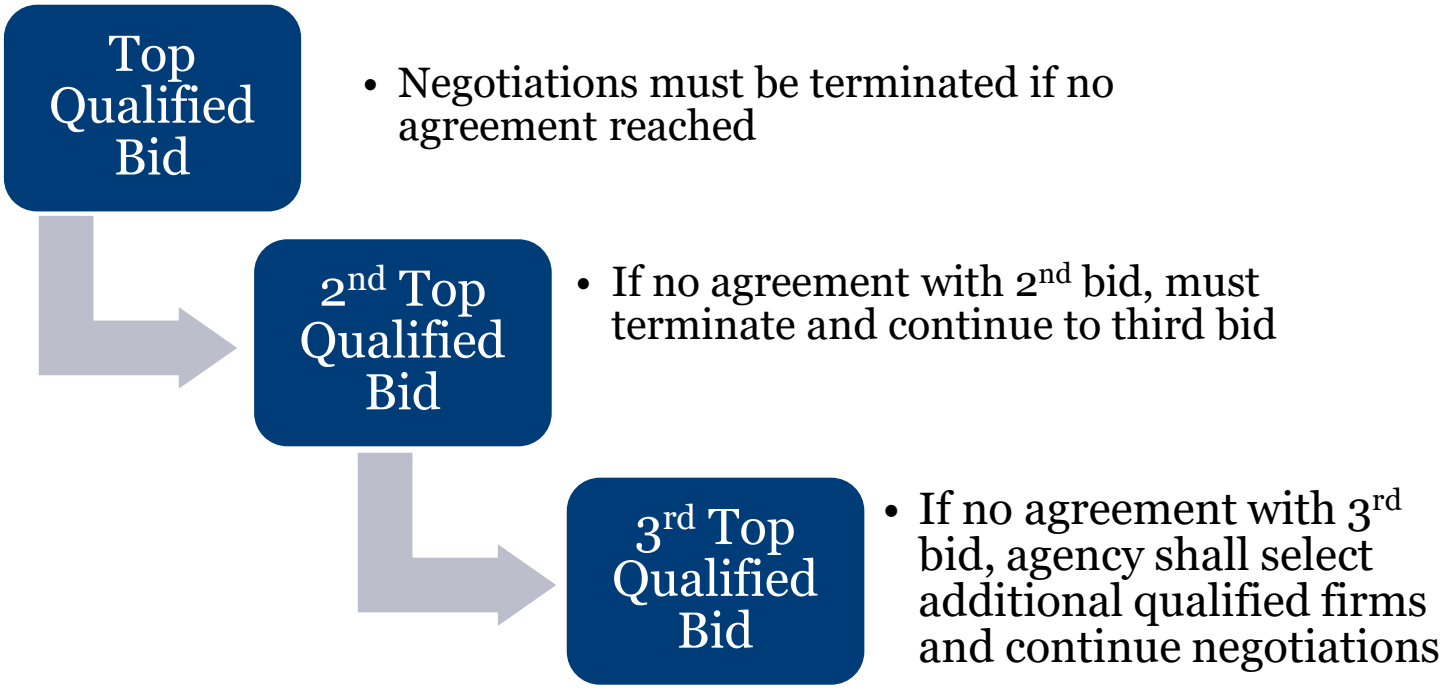
~ Design Services

- The Florida Consultants Competitive Negotiation Act ("CCNA")
  - FLA. STAT. § 287.055.
- Public Announcement required for:
  - Construction >$325k
  - Planning/Study > $35k
- Minimum of three (3) firms must be identified, evaluated, and selected from.

Solicitation Requirements

~ Design Services (Continued)

- The agency shall negotiate a contract…it determines is fair, competitive, and reasonable.



Solicitation Requirements

~ Construction Services



- Section 255.20 of the Florida Statutes requires that public construction contracts in excess of $300,000 be competitively selected, unless the project falls within one of the specific exceptions listed.

Solicitation Requirements

~ Construction Services





See FLA. STAT. §§ 255.20, 287.055.

Solicitation Requirements

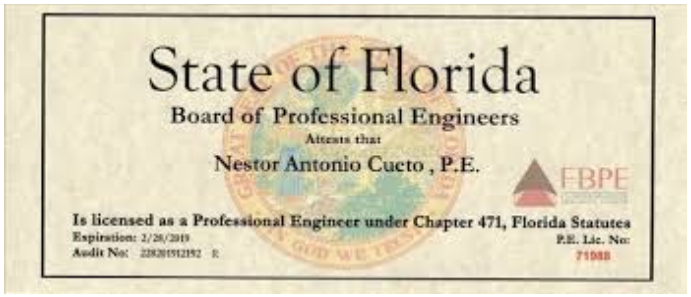
~ Limitations on Authority of Public Owner to Award a Contract

- *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982)
- *Marriot v. Metropolitan Dade County*, 383 So. 2d 662 (Fla. 3rd DCA 1980)
- *City of Sweetwater v. Solo Construction Corp.*, 823 So. 2d 798 (Fla. 2d DCA 2002) FLA. STAT. § 255.20(1)(d)
- FLA. STAT. § 255.20(1)(d)
- FLA. STAT. § 255.248(6):
- FLA. STAT. § 255.248(8).
  - *American Engineering and Development Corp. v. Town of Highland Beach*, 20 So. 3d 1000 (Fla. 4th DCA 2009).

Solicitation Requirements

~ Licenses







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Mandatory Contract Provisions

~ Termination for Convenience for Multi-Year Contracts

- Public owners are prohibited from committing to expenditures that extend beyond one fiscal year.
- Contract for purchase of services or tangible personal property for a period in excess of one fiscal year must have the following statement included in the contract:
  - "The State of Florida's performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature."
- If contract contemplates that the public body will be making payments on the contract exceeding one fiscal year, the contract must contain provisions that give the public body an annual opportunity to terminate for convenience without penalty.

Mandatory Contract Provisions

~ Indemnification

- FLA. STAT. § 725.06(2) – Indemnification for Construction Contracts

- Fla. Stat § 725.08(1) – Indemnification for Design Contracts

Mandatory Contract Provisions

~Other Mandated Contract Provisions





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Local Government Prompt Payment



- FLA. STAT. §§ 218.70–218.80: Local Government Prompt Payment Law



- Contractor to Sub Contractor = 10 days
- Funds can be held pending releases; disputed funds can also be withheld
- Subcontractors to Subcontractors = 7 days

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Local Government Prompt Payment (Continued)

- PPA also covers the withholding of retention.
- Except for contracts of $200,000.00 or less, or projects which are federally funded, local governments may not hold retainage from progress payments to contractors of more than 10%, exclusive of any amounts based on the good faith dispute.
- The 10% may be withheld up to 50% completion of the project, after which retainage is not to exceed 5% of subsequent payments.
- A governmental entity is never required to withhold retainage.

Local Government Prompt Payment (Continued)





FLA. STAT. § 715.12

Sovereign Immunity



- *County of Brevard v. Miorelli Engineering, Inc.*, 703 So. 2d 1049 (Fla. 1997).
- *Financial Healthcare Associates, Inc. v. Public Health Trust of Miami-Dade County*, 488 F. Supp. 2d 1231 (S.D. Fla. 2007)
- *Dept. of Health & Rehabilitative Services v. Law Offices of Donald W. Belveal, 663 So. 2d 650, 651 (Fla. 2d DCA 1995)*

Sovereign Immunity

~ Limitations Regarding Claims to Public Property



- *Florida Department of Environmental Protection v. ContractPoint Florida Parks, LLC*, 986 So. 2d. 1260 (Fla. 2008)
- FLA. STAT. § 55.11.
- *See* FLA. STAT. § 255.05.
- *Little River Bank & Trust Co. v. Johnson*, 141 So. 141 (Fla. 1932).
- Article VII, section 10 of the Florida Constitution
- *Florida Tomato Packers, Inc. v. Wilson*, 296 So. 2d 536 (Fla. 3d DCA 1974).

Sovereign Immunity

~ Claims Against a Public Owner for Negligence or Intentional Torts



- Article X, section 13 of the Florida Constitution
- *See Arnold v. Shumpert*, 217 So. 2d 116 (Fla. 1968).
- FLA. STAT. § 768.28(5).
- Economic Loss Rule (ELR)

Sovereign Immunity

~ Claims Against a Public Owner for Negligence or Intentional Torts

- Further, the *Tiara* Court arguably left intact the independent-tort doctrine.
  - *Tiara Condo. Ass'n Inc. v. Marsh & McLennan Cos.*, 110 So.3d 399, 408–09 (Fla. 2013) (Pariente, J., concurring).
  - *See, e.g., Certain Underwriters at Lloyd's of London, UK Subscribing to Policy No. B1230AP56189A14 v. Ocean Walk Resort Condo. Assn., Inc.*, 2017 WL 3034069, at *10 (M.D. Fla. July 18, 2017); *Indem. Ins. Co. v. Am. Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004) (citing *Weimar v. Yacht Club Point Estates, Inc.*, 223 So. 2d 100, 103 (Fla. 4th DCA 1969)); *Casa Clara*, 620 So. 2d 1244.
  - *But see Epic Hotel, LLC v. Culligan Int'l Co.*, 159 So. 3d 1014 (Fla. 3d DCA 2015); *2711 Hollywood Beach Condo. Ass'n, Inc. v. TRG Holiday Ltd.*, No. 2013-035751-CA-01 (Fla. 11th Cir. Ct. Sept. 2, 2015).

Contract Administration and Changes

~ Right to Recover for Changes from the Original Contract Terms



Contract Administration and Changes

~ Authority of the Public Owner's Representative to Modify a Contract



However,

- An entity contracting with a public owner cannot rely on the authority of the owner's project team to approve a change order or otherwise to modify the terms of an agreement, unless the modification is expressly approved by the board.
  - *Frankenmuth Mutual Ins. Co.*, 769 So. 2d. 1012.

Contract Administration and Changes

~Authority of the Public Owner's Representative to Modify a Contract



- There are five major points to keep in mind regarding changes when the owner is a public entity:
  - (1) the authority of the public owner's representative to modify a contract;
  - (2) a delegation of authority by after-the-fact ratification;
  - (3) a delegation of authority by prior board action;
  - (4) limitations regarding claims to public property; and
  - (5) rights to recover for changes from the original contract terms.

Contract Administration and Changes

~Right to Recover for Changes from the Original Contract Terms



- *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984).
- *See also Southern Road Builders, Inc. v. Lee County*, 495 So. 2d 189 (Fla. 2d DCA 1986).

Contract Administration and Changes

~Right to Recover for Changes from the Original Contract Terms

- *See Southern Gulf Utilities Inc. v. Boca Ciega Sanitary Dist.*, 238 So. 2d 458 (Fla. 2d DCA 1970);
- *Artec Group, Inc. v. City of Tampa*, 1997 Fla. App LEXIS 11530 (Fla. 2d DCA 1997);
- *Ajax Paving Indus. Inc. v. Charlotte County*, 752 So. 2d 143 (Fla. 2d DCA 2000);
- *Hypower, Inc. v. Department of Transportation*, 839 So. 2d 856 (Fla. 1st DCA 2003);
- *Amec Civil, LLC v. State Dept of Transp.*, 878 So. 2d 468 (Fla. 1st DCA 2004);
- *City of Orlando v. W. Orange Country Club, Inc.*, 9 So. 3d 1268 (Fla. 5th DCA 2009).

Contract Administration and Changes

- Implied Obligations vs. Perceived Extra Work

Implied Obligations

- Implied covenants such as:
  - Covenant to act in a reasonable manner
  - Covenant to act in good faith
  - Obligation to not do anything to hinder or obstruct performance
  - Obligation not to knowingly delay unreasonably the performance of duties
  - Obligation to furnish information which would not mislead bidders
- As well as changes within the scope of the contract.

Perceived Extra Work

- Extra work "totally outside the terms of the contract."

Contract Administration and Changes

~ Public Owner Can't Wrongfully Refuse to Issue Change Order



- *W & J Construction Corp. v. Fanning/Howey Associates*

Contract Administration and Changes

~ Recovery for Pre-Contract Costs

- Recovery has been denied for costs incurred by a contractor prior to the contract award because there was no contract in place at the time the services were rendered, and so the doctrine of sovereign immunity barred recovery against the city.
  - *Frenz Enterprises, Inc. v. Port Everglades*, 746 So. 2d 498 (Fla. 4th DCA 1999).
  - *Broward County v. Brooks Builders, Inc.*, 908 So. 2d 536 (Fla. 4th DCA 2005).
  - *Martin County v. Polivka Paving, Inc.*, 44 So. 3d 126 (Fla. 4th DCA 2010).
  - *City of Miami v. Tarafa Const., Inc.*, 696 So. 2d 1275 (Fla. 3d DCA 1997).

Contract Administration and Changes

~ Doctrine of Apparent Authority Not Applicable to Public Entity

- A public officer or employee cannot bind the public entity—the doctrine of apparent authority does not apply to governmental entities or employees. One contracting with a public body has a duty to inquire as to limitations of authority of public officials.
- *Ramsey v. City of Kissimmee*, 139 Fla. 107, 190 So. 474 (Fla. 1939). ("Persons contracting with a municipality must at their peril inquire into the power of the municipality, and of its officers, to make the contract contemplated.").
- *See Town of Madison v. Newsome*, 39 Fla. 149, 22 So. 270 (1897);
- *Jones v. Pinellas County*, 81 Fla. 613, 88 So. 388 (1921);
- *Fruchtl v. Foley*, 84 So. 2d 906 (Fla. 1956);
- *Town of Indian River Shores v. Coll*, 378 So. 2d 53 (Fla. 4th DCA 1979).

Ethical Issues: Lobbying & Gifts





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How Public Projects Differ From Private Work

- Questions?
- Thank you!



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