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

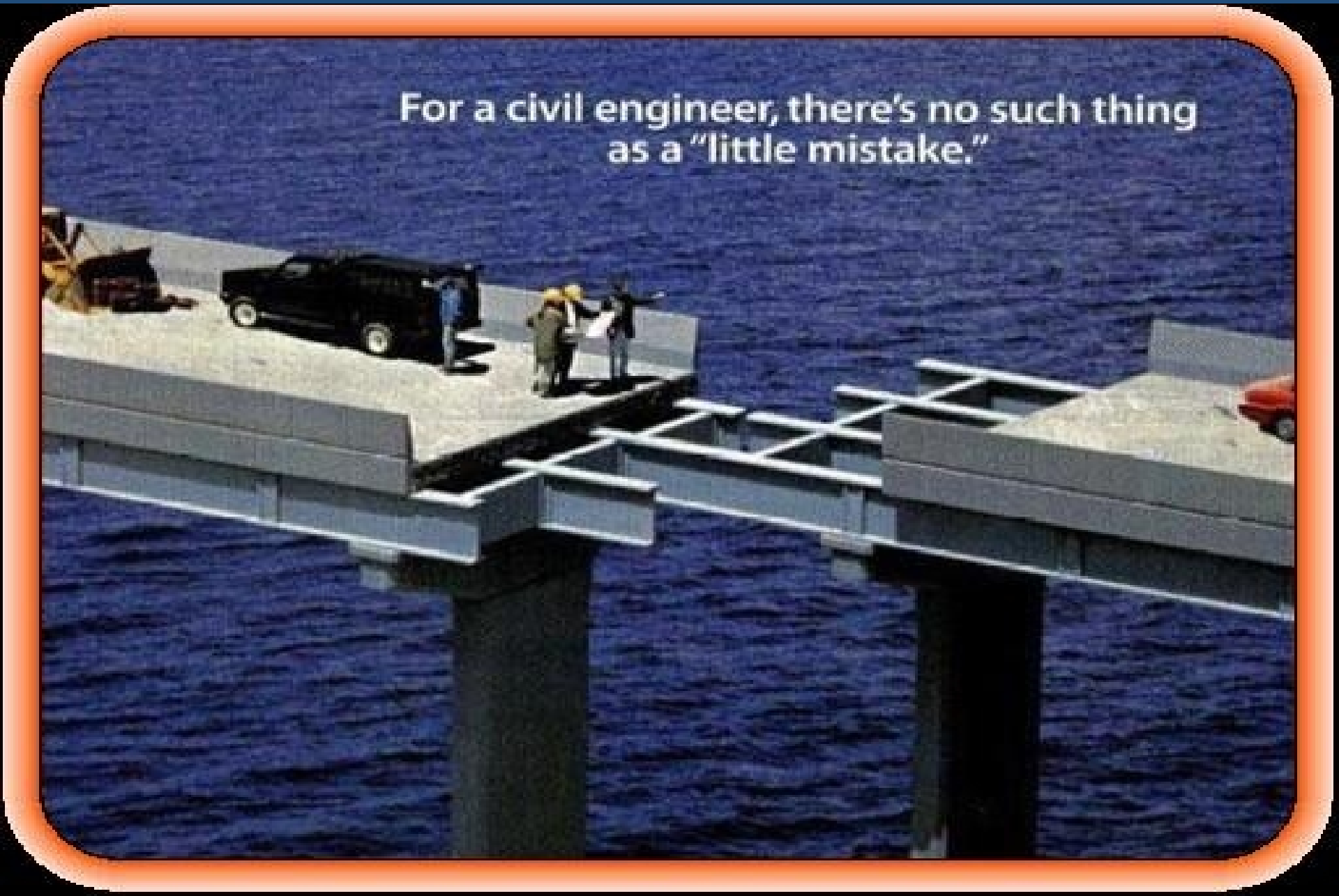
An important statute related to construction is the Consultants' Competitive Negotiation Act ("CCNA"). Section 287.055, F.S.

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

A/E based upon Low Bid?



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 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

- 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

Procurement Methods

The appropriate procurement method depends on the commodity or service needed. The three basic methods are:



Quote/Bid

- Specifications must be completely defined
- Award based on price to the low, responsive, responsible, bidder
- No negotiations
- Bid document is the "contract"



Request for Proposal (RFP)

- Specific solution is known
- Multiple factors (not just price) determine best vendor
- Evaluation Committee rates vendor/proposals (out of 100 points)
- Negotiation proceeds with highest rated vendor/proposal



Request for Letter of Interest (RLI)

- Specific solution is unknown
- Solutions are proposed by vendors
- Selection Committee ranks vendor/proposals (1st, 2nd, 3rd etc.)
- Negotiation proceeds with top ranked vendor/proposal

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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 Connectors $149 Million
Terminal 2 $177 Million
T1
B/C Connector
Concourse A
Terminal 1 $376 Million
T2
Terminal 3 $257 Million
T3
Terminal 4 $688 Million
T4
Gate Expansion $100 Million
South Runway $826 Million
Part of a $3.3 billion airport expansion/development program

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 ???