Florida's Consultants' Competitive Negotiation Act (CCNA): Guidance for Design-Build Projects

By T. Bennett Acuff, Hill Ward Henderson

The Consultants' Competitive Negotiation Act (CCNA), Section 287.055, Florida Statutes, sets forth requirements for the procurement of professional architectural, engineering, landscape architectural or land surveying services by government agencies. While the CCNA is not applicable to all state agency design-build (DB) contracts, municipalities, political subdivisions, school districts and school boards must comply with the CCNA when awarding DB contracts. Although the statute appears cumbersome at first glance, the distilled law actually provides a practical and flexible method for public entities to award DB contracts. As applied to DB contracts, the CCNA reflects the impracticality of a hard-bid selection process, as well as the nationwide transition from a hard-bid selection process to those grounded in competitive negotiation for governmental DB projects.

Public projects are often funded by tax revenue or publicly issued bonds, so naturally public entities strive to keep project costs as low as possible. The widespread use of generic hard bidding, which awards the contract to the lowest bidder, assumes that this procurement process will result in the lowest project cost to the public. However, projects are often more complex and require greater collaboration and coordination between design and construction that cannot be achieved using traditional, low-bid procurement processes. CCNA provides public entities with the flexibility they often need in selecting a contractor to implement a capital improvement project. The complexity of performing a DB project necessitates a contract being awarded to the most qualified firm, not just the lowest bidder. Prior to the enactment of the CCNA, qualified firms could be undercut by less-qualified firms, and public entities wound up having to work with unqualified firms. CCNA affords public entities the flexibility to choose DB firms based on quality, rather than price alone.

The Process
When a public entity seeks to award a DB contract, it must follow the steps outlined in Florida Statute Subsections 287.055(3)-(5), which are summarized here.

Step One: Public Notice
Subsection (3) requires the public entity to publicly announce when professional services are needed whenever the entity estimates the project will cost more than $250,000. The public notice must include a general description of the project and must indicate how interested firms may apply for consideration. Public entities need not give such notice "in cases of valid public emergencies." §287.055(3)(a)(1).

To be considered, a DB firm must either be certified under Section 489.119 to engage in contracting, or certified under Sections 471.023, 481.210 or 481.319 to offer practice in engineering, architecture or landscape architecture, respectively. Additionally, Subsection (3)(c) requires that firms be "fully qualified" to render the required service. The CCNA does not define "fully qualified"; however, it lists a number of factors a public entity can consider when determining whether or not a firm is "fully qualified": "the capabilities, adequacy of personnel, past record and experience of the firm" may all properly be considered. §287.055(3)(c).

Additionally, Subsection 287.055(3)(d) allows public entities to consider any "other factors determined by the agency to be applicable to its particular requirements." The vague language of "fully qualified" and the discretion in setting project criteria inject subjectivity into the process and afford public entities flexibility in awarding DB contracts.

Step Two: Quality Review
Subsection (4) sets forth the standards for reviewing firms. This subsection gives public entities plenty of flexibility and allows the entities to rank firms based on a host of subjective criteria. The public entity must review submitting firms and select and rank three firms for further consideration. At this stage in the process, public entities may not request, accept or consider proposals for compensation (or negotiate compensation, for that matter) until they have chosen at least three firms through this preliminary review. This step in the bid process solely relates to evaluating the quality of the firms—it is this cornerstone of quality determination that supports the entire statutory structure. In determining a firm's quality, public entities can consider the following factors:

- Ability of 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 workload of the firm
• Volume of work previously awarded to each firm by the public entity

To garner such information and evaluate a firm’s quality, the public entity can evaluate current statements of qualifications and performance data that the entity has on file, as well as request a firm to deliver public presentations regarding their qualifications, approach to the project, and ability to furnish the required services. Once again, the CCNA affords public entities flexibility in that they can consider an array of information in making a determination. Once submitting firms have been reviewed and ranked, the public entity can then move into the compensation negotiation process.

**Step Three: Contract Negotiation**

Subsection (5) requires a public entity to engage the most qualified firm at compensation the public entity “determines is fair, competitive and reasonable.” §287.055(5)(a). Again, the unquantifiable standards of “fair” and “reasonable” afford public entities flexibility and wide discretion in choosing a firm. During this process, the public entity must conduct a detailed analysis of the cost of services required. If a public entity is unable to negotiate a successful contract with the top-ranked DB firm, the public entity can then move to the second-ranked firm, and so on. §287.055(5)(b). If a public entity is unable to negotiate a successful contract with any of the three obligatory firms, the entity must select additional firms in order of their competence and qualifications until an agreement is reached. §287.055(5)(c).

**The Benefits**

There is a great amount of flexibility and discretion throughout the entire negotiation process, achieved through qualitatively subjective negotiation and selection, as set forth in Subsections (3)-(5). Public entities have a wide range of criteria to evaluate firms, and may create additional criteria of their own depending on the nature of the project. Public entities can even require firms to produce information and give public presentations to answer any questions the public entity may have.

With this flexibility, public entities can select firms that are the most qualified, but not necessarily the least expensive. The Florida Attorney General has recognized this, stating that the Legislature chose not to include a requirement that a contract be awarded to the lowest bidder. In the Florida Attorney General Opinion 2002-03, the School Board of Alachua County asked the Attorney General if it could award a construction management contract to a contractor other than the bidder who submitted the lowest bid. The Attorney General answered in the positive and wrote that there was no requirement in the CCNA that a public entity must award a contract to the lowest bidder. Therefore, according to both the express language of the statute and the Attorney General of Florida, the CCNA successfully removes the rigidity of a hard-bid process in favor of a subjective, quality-driven negotiation process.

**The Challenges**

The same qualities of the CCNA that create flexibility for public entities can also create challenges for DB firms. Generally speaking, where there is great latitude in criteria, such as the standards for determining whether a firm is “qualified,” firms may have difficulty understanding their own obligations and the public entity’s benchmarks for awarding the contract. Moreover, recourse may be unavailable, as an award is difficult to challenge. While identifying some of the criteria, the CCNA allows public entities to use “other factors determined by the agency to be applicable to its particular requirements.” Simply put, it is hard to study for a test when you do not know what material will be covered.

Furthermore, DB firms should be aware that public entities will almost always require a payment and performance bond. Typically, these bonds will need to cover not only the construction costs, but the design costs as well. Thus, firms should clearly communicate with, and gain adequate assurance from, their bonding company that bonds will be available to cover the entire DB contract.

Overall, the CCNA is a well-written statute that provides public entities with a practical, flexible method of choosing qualified DB firms.

**About the Author:**

T. Bennett Acuff is an associate in Hill Ward Henderson’s Construction Group and a member of the firm’s Litigation Group. His practice primarily involves construction litigation; concentrating on defect cases, contract bond litigation, design errors and construction liens.

---

**Quality Assessment of Piles and Shafts**

*by the Foundation Testing Experts*

Unmatched expertise in:

- PDA Testing of Driven Piles
- Wave Equation Analysis (GRLWEAP)
- Pulse Echo (PIT) Integrity Testing
- APPLE Load Testing of Shafts or Piles
- Evaluation of SPT Hammer Energy
- Crosshole Sonic Logging of Drilled Shafts

GRL engineers, inc.

[Website: www.pile.com]

Email: GRL-FL@pile.com

Florida........407-826-9539
Main Office..216-831-6131
Other offices nationwide.