

Contract Management

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Overview – Contract Management

- I. Contracts, generally
- II. Bidding Process
 - a. Contracts for Construction Projects
 - b. Contracts for Professional Services
 - c. Contract Awards for Goods and Services other than Professional Services
- II. Other Bid Considerations
 - a. Piggy Backing
 - b. Prompt Payment Act
- III. Contracts and Other Considerations
 - a. Interlocal Agreements
 - b. Governmental Conflict Resolution
 - c. Sunshine Law
 - d. Public Records Law



Contracts Defined

- An agreement between people or entities in which one party agrees to provide goods/services in exchange for the payment of money or other goods/services.
- Formation is accomplished when there is an offer and acceptance between the parties and the exchange of “consideration”.
- Must be a “meeting of the minds” to be enforceable.



Contract Principles

- Cannot contract for illegal or impossible act.
- Contracting parties must have capacity or legal ability to enter contract.
- “Consideration” is essential. There must be an exchange of something of value between the parties, *i.e.* exchange of promises to act and/or provide goods, services or money.



Enforceable Contracts

- Can be written or oral.
- Certain contracts must be in writing (*i.e.* real estate contracts).
- Written contracts preferred as they document the terms of the agreement and avoid future disputes.
- Contracts should be as specific as possible.



Contract Disputes

- In Florida, breach of contract actions must generally be brought within 5 years of the date the contract was executed.
- The general remedy in breach of contract actions is for the court to compel the party to fulfill its promise or pay money instead of providing the good/service.



Mediation

- With the assistance of a mediator, parties attempt to negotiate an amicable resolution of the matter.
- Courts typically require mediation before trial.
- Mediation can save the costly expense of a trial.
- Some contracts require mediation before litigation can be filed.
- Mediation discussions are confidential and privileged.
- Disclosures made during litigation cannot be shared with anyone other than mediation participants and counsel.
- Violations can result in sanctions like attorney's fees, court costs and mediator fees.



Arbitration

- Forum where parties choose to have an arbitrator decide the matter instead of a judge/jury.
- Some contracts require arbitration rather than litigation.
- Arbitration clauses are valid and enforceable.
- Arbitration may or may not be less expensive than litigation.



Purpose of Competitive Procurement

Purpose of public bid statutes/laws is:

1. Preventing favoritism toward certain contractors by public officials; and
2. Ensuring fair competition by providing equal terms/criteria for award of contracts.



Competitively Award

“Competitively Award” means to award contracts based on the submission of sealed bids, proposals submitted in response to a request for proposal, proposals submitted in response to a request for qualifications, or proposals submitted for competitive negotiations. - Fla. Stat. § 255.20(1)



Terms Defined

- Bids - Used for purchase of commodities (goods and supplies) and construction
- RFP = Request for Proposals – Used for professional or consulting services
- RFQ = Request for Qualifications – Used to pre-qualify a pool of vendors for use on future projects
- RFI = Request for Information – Used for a project when there is not enough information to write a detailed RFP.



Contracts for Construction Projects

- Construction projects of a certain magnitude must be competitively awarded by all special districts pursuant to § 255.20, Fla. Stat.
 1. Construction projects that cost \$300,000.00 or more;
 2. Electrical projects costing \$75,000.00 or more; and
 3. Contracts to construct or improve bridges, roads, streets, highways, railroads and services that are incidental to those projects that will equal or exceed \$250,000.00.
- Construction costs include the cost of all labor, equipment and materials for the project. Fla. Stat. § 255.20.



Contracts for Construction Projects

- Construction projects that are less than \$300,000.00 or \$75,000.00 are not subject to competitive award requirements, but should be subject to some reasonably rigorous procedure for selection of the appropriate contractor.
- Many special districts have adopted policies that set thresholds in dollar amounts beneath the statutory standards for construction projects; some require formal competitive bidding for construction projects greater than \$25,000.00.



Contracts for Construction Projects

- Contracts for construction projects that are less than \$300,000.00 or \$75,000.00 plus CPI adjustments may be awarded in a variety of ways including:
 1. Authorization for the chief executive officer to acquire quotations; and
 2. Invitation for contractors to submit price lists or rates for daily work.



Six Criteria for the Competitive Award of a Contract

1. Price
2. Request for Proposal
3. Competitive Negotiations
4. Construction Performed by Local Government Employees
5. Contract Segmentation
6. Timber Products



A Closer Look at the 6 Criteria

1. **Price:** The lowest qualified and responsive bidder. The district may reject all bids and re-bid the project or elect not to proceed.
2. **Request for Proposal (RFP)**
3. **Competitive Negotiations:** A contract awarded by competitive negotiation must be processed in accordance with § 287.055, Fla. Stat., the Consultant's Competitive Negotiations Act (CCNA). CCNA requires advertisement, review of qualifications, a determination of the three most qualified bidders and negotiations in serial fashion with candidates rated number 1, 2 and 3 respectively.



A Closer Look at the 6 Criteria Continued

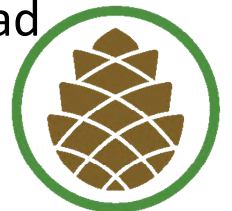
4. **Construction Performed by Local Government Employees:** Such work must be conducted by employees that are appropriately licensed.
5. **Contract Segmentation:** A special district is not permitted to construct a project in segments to avoid the dollar limit on construction costs.
6. **Timber Products:** Projects that utilize forestry or lumber products must include a specification in the bid criteria that state forestry products must be used if such materials are available.



Exceptions to Section 255.20

Section 255.20, Fla. Stat., does not apply in the following circumstances:

1. Acts of God;
2. No responsive bids;
3. Utility system repair by personnel of the system;
4. Improvements to a public electric utility system;
5. Repair or maintenance to an existing public facility;
6. Public education system;
7. Funding source timing problems;
8. Approved Contractor abandons the project;
9. District using its own services, employees and equipment;
10. District procedures that pre-date § 255.20, Fla. Stat. (1994); or
11. Projects subject to Chapter 336, Florida Statutes (County Road System).



Consultants Competitive Negotiations Act (CCNA)

- CCNA covers all contracting above a certain monetary level for a variety of professional services required by local governments, including special districts.
- Premised upon the hiring of a professional based upon qualifications, not lowest bid.
- Price is NOT a selection factor and cannot be considered or discussed during selection process.



CCNA Continued

1. **Professional Services:** Services within the scope of the practices of architecture, professional engineering, landscape architecture or registered surveying and mapping as defined by state law.
2. **Project:** Include fixed capital outlay studies or planning activities described in the CCNA.
3. **Continuing Contract:** A continuing contract is a contract for professional services that is entered into in accordance with Section 287.055, Fla. Stat., for professional services for projects in which construction costs will not exceed \$4,000,000.00 or for study activity when the fee for the professional services will not exceed \$500,000.00.



Thresholds for CCNA

- Special districts must utilize the CCNA for professional services for:
 - Planning or study activity where fee exceeds Category Two (\$35,000), Section 287.017.
 - Design-build construction projects that exceed Category Five (\$325,000), Section 287.107.



CCNA Continued

- CCNA 4-Step Process
 1. Public Announcement
 2. Qualification and Certification of Firms
 3. Competitive Selection
 4. Competitive Negotiation



CCNA Continued

1. Public Announcement

- Publicly announce in a uniform and consistent manner whenever professional services must be purchased for construction projects or professional services that exceed Categories Two or Five, respectively. Fla. Stat. § 287.055(3).
- Notice must include a general description of the project and indicate how interested consultants may apply for consideration.
- Each agency announcing the need for consultant services must provide a good faith estimate in determining whether the proposed activity meets the thresholds of CCNA.



CCNA Continued

2. Qualification and Certification of Firms

- Consulting firms submit qualifications indicating their interest in the contract.
- Any firm/individual desiring to provide professional services must first be certified by the agency as qualified pursuant to applicable registration or licensing laws.



CCNA Continued

3. Competitive Selection

- For each proposed project, a district is obligated to:
- evaluate statements of qualifications of the professionals; and
- conduct discussions which may require public presentations by no fewer than three firms.



CCNA Continued

- A district must then select in order of preference no fewer than three firms deemed to be the most qualified. Selection must include factors such as:
 - a. whether the firm is a certified minority business enterprise;
 - b. past performance;
 - c. willingness to meet time and budget requirements;
 - d. location;
 - e. recent, current and projected workloads of the firms; and
 - f. the volume of work previously awarded to the firm by the agency.
- A district may only request, accept and consider proposals for compensation to be paid under the contract during competitive negotiations with short listed applicants.



CCNA Continued

4. Competitive Negotiation

- A district must select a minimum of three firms ranked respectively 1, 2 and 3 with respect to qualifications.
- The district should negotiate contract with top-ranked firm for fair, competitive and reasonable compensation.
- If a project exceeds the Category Four costs (\$195,000.00 plus CPI), the applicant must sign a Truth In Negotiations certificate stating that the wage rates and other factual unit costs supporting compensation are accurate and complete.



CCNA Continued

- If a district is unable to reach a contract with Applicant Number 1, then the agency must proceed to negotiate with Applicant Number 2.
- If a district is unable to negotiate successfully with Applicant Number 2, the agency then must negotiate with Applicant Number 3.
- If a satisfactory agreement cannot be reached, the district should select additional firms in order of competence and qualification and continue negotiations until agreement is reached.



Other Considerations

- It is a violation of the CCNA for any professional service provider to hire someone to secure a professional services contract and utilize a contingent fee contract to do so.
- Design/build contracts are authorized provided the service provider provides a maximum price and a guaranteed completion date.



CCNA Exception

- CCNA does not have to be applied in the event of an emergency.
- The governing board of a special district must meet in a public session and declare the emergency (usually following a declaration by the Governor and/or applicable county government).



Contract Awards for Goods and Services Other Than Professional Services

- There is no statute dictating cost thresholds for special districts purchasing goods or services. Districts should develop and adopt consistent policies for the acquisition of goods and services.





Questions?



Piggy Backing

- Section 189.053, F.S. was passed in 2009. Priority FASD legislation.
- It permits special districts to purchase commodities and contractual services (except those services covered by the CCNA) from the purchasing agreements of other special districts, municipalities or counties which have been procured competitively.
- Special districts can “piggy back” on the procurement process used by another local government **when the process used by the other local government would have met the special district’s procurement requirements.**



Piggy Backing Continued

- If you are going to use the piggy back statute, your district needs to make sure that your legal counsel has reviewed all the relevant procurement documents from the local government whose process and agreement you want to adopt.
- Your district needs to maintain the bid request and response for the commodity or service submitted to the other local government.
- In other words, maintain the evidence/facts that supported the decision to use this process.



Local District Purchasing Policies

There Is No Requirement To Adopt a Local Purchasing Policy

- Florida has a strong public policy which requires that even in the absence of controlling statutes, expenditures of public funds should be made on competitive bids whenever possible. 1966 Op. Att'y. Gen. Fla. 66-9 (February 7, 1966); *City of Sweetwater v. Solo Construction Corp.*, 823 So. 2d 798 (Fla.3d DCA 2002).
- In the absence of a legislative requirements regarding the method of awarding public contracts, a special district may adopt a local purchasing policy.
- The adoption of such local policies is a purely legislative decision and to be enforceable should be adopted by the legislative branch of the local government. *City of Port Orange v. Leechase Corp.* 430 So. 2d 534 (Fla. 5th DCA 1983).



Florida's Prompt Payment Act

- Florida Statutes § § 218.70 - 218.80 set forth the Local Government Prompt Payment Act which requires payment for all purchases by local governmental entities, including special districts, be made in a timely manner.
- The Prompt Payment Act sets forth timeframes when payments are due by a special district following receipt of an invoice for purchases relating to services rendered, rental periods, contracts, and construction services. Fla. Stat. § § 218.73, 218.735.



Florida's Intergovernmental Cooperation Act

- Section 163.01, F.S. – Encourages greater cooperation between all levels of Florida government.
- Applies to all public agencies, including special districts.
- Allows joint exercise of power to occur through interlocal agreement (a written contract) relating to any power the agencies share in common.
- *Halifax* case says special districts can only exercise such powers within their boundaries unless otherwise authorized.
- Independent fire districts may operate outside their boundaries pursuant to Section 191.006.



Interlocal Agreements

- The written agreement should clearly and unambiguously provide the obligations of the parties.
- The agreement should provide for termination in a reasonable manner.
- The agreement must be filed with the local clerk of court.



Florida Governmental Conflict Resolution Act – Ch. 164, F.S.

- Mandates a process for local governments to use to avoid litigation.
- Applies to conflicts involving:
 - Local comprehensive plan amendment
 - Municipal annexations
 - Service provision areas
 - Allocation of resources
 - Siting of schools and hazardous waste facilities
 - Governmental Entity Permitting
- Does not apply if other dispute resolution processes are required by law or interlocal agreement.



Florida Governmental Conflict Resolution Act – Ch. 164, F.S.

- Requires 2-3 phases:
 - Conflict Assessment
 - Joint Public Meeting
 - Mediation (unless consolidated with other phases)
- Must begin either before suit is filed or immediately after.
- Can be cumbersome, expensive, lengthy and unproductive.
- Districts should consider specific language in interlocal agreements to provide other methods of conflict resolution to avoid this process.



Sunshine Law

- The purpose of the Sunshine Law is to provide the public a right of access to government proceedings.
- All public agencies including special districts are subject to the Sunshine Law.



Sunshine Law

Sunshine Laws extends to discussions and deliberations taken by a public board and is applicable to any gathering (formal or casual) of 2 or more members of the same board or commission, **including meetings with or attended by any person elected to such board or commission, but who has not yet taken office** to discuss some matter on which foreseeable action will be taken by the public board or commission. Fla. Stat. § 286.011 and Art. 1, Sec. 24 of the Florida Constitution; HB 1305 (LOF Chapter 2012-25).



Sunshine Law Requirements

Pursuant to Section 286.001, Fla. Stat., there are three (3) basic requirements to comply with the Sunshine Law:

1. Meetings of the public must be open to the public;
2. Reasonable notice of such meetings must be provided;
and
3. Minutes of the meeting must be taken.



Sunshine Law Considerations

- The Sunshine Law generally applies to purchasing matters.
- Meetings with agency staff are not ordinarily subject to Sunshine Laws unless staff ceases to function in a staff capacity and is delegated authority normally within the public agencies discretion (*i.e.*, committee composed of staff to select or rank a candidate or contractor). *See News-Press Publishing Co., Inc. v. Carlson*, 410 So. 2d 546 (Fla. 2d DCA 1982).
- The Sunshine Law is applicable to bid evaluation meetings. *Leach-Wells v. City of Bradenton*, 734 So. 2d 1168.
- However, pursuant to § 286.0113(2)(a), Fla. Stat., there is an exemption from the public meeting requirement for negotiation meetings. *See Godheim v. City of Tampa*, 426 So. 2d. 1084 (Fla. 3d DCA 1983).



Consequences of Sunshine Law Violations

Violations of the Sunshine Law can result in the following:

1. Criminal penalties. Any member of a board or commission who knowingly violates the Sunshine Law is guilty of a misdemeanor of the second degree. Fla. Stat. § 286.011(3)(b).
2. In some cases the public official who is indicted for any misdemeanor arising of his/her official duties may be removed or suspended from office.
3. The Sunshine Law provides that a fine not exceeding \$500 may be imposed for noncriminal infractions.
4. Reasonable attorneys fees will be assessed against any board or commission found to have violated the Sunshine Laws.



Public Records

- Chapter 119, Florida Statutes and Art. I, Section 24 of the Florida Constitution set forth Florida's Public Records laws. Special districts are subject to the Public Records Laws. Article I, section 24 of the Florida Constitution states:

Every person has the right to inspect or copy **any public record made or received in connection with the official business** of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.



Public Records Defined

"Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Fla. Stat. § 119.011(12).



Public Records Continued

- Any person is authorized to inspect and receive copies of public records and they do not need to have a special or legitimate interest related to their request.
- Also, requests do not have to be made in writing.
- The records custodian of the special district or his/her designee is responsible for making public records available for inspection and/or copying “at any reasonable time, under reasonable conditions.” Fla. Stat. § 119.07.
- Further, private entities acting on behalf of any public entity are considered an agency as defined by the public records act and are subject to same.



Public Records – Exemptions Related to Bids

- Any exemption from the public records laws must be stated in writing. Fla. Stat. § 119.07(1)(e). The public records laws are construed in favor of open government, so exemptions are **strictly construed**.
- Financial statements of prospective bidders on public works projects are exempt from public records law.
- There is a temporary exemption from the public records act for sealed bids or proposals received by the special district pursuant to a bid or request. The sealed bid/proposals are not subject to the public records law until the special district provides notice of its decision or within 30 days after the bid is opened, whichever is earlier. The 30-day period does not include the date of the notice or opening. Fla. Stat. § 119.071.



Consequences of Public Record Law Violations

Violations of the Public Record Law can result in the following:

1. Any member of a board or commission who knowingly violates the Public Records Law is guilty of a misdemeanor of the first degree. Fla. Stat. § 119.10.
2. In some cases the public official who is indicted for any misdemeanor arising of his/her official duties may be removed or suspended from office.
3. The Public Records Law provides that a fine not exceeding \$500 may be imposed for noncriminal infractions. Fla. Stat. § 119.10.



Consequences of Public Record Law Violations Continued

If a civil action is filed against an agency and the court determines that the agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award attorneys' fees against the agency responsible for the reasonable costs of enforcement including reasonable attorneys' fees. Fla. Stat. § 119.12.

- *Lorenzo v. City of Venice*, Case No. 2008 CA 8108 SC (Fla. 12th Cir. Ct. Oct. 7, 2009) - Judge Robert Bennett ordered the City of Venice to pay **\$777,114.42** in attorneys' fees and costs to the Plaintiffs' attorney.





Questions?





THANK YOU!

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