

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 149 Continuing Contracts

SPONSOR(S): Constitutional Rights, Rule of Law & Government Operations Subcommittee, Alvarez

TIED BILLS: IDEN./SIM. BILLS: SB 656

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Constitutional Rights, Rule of Law & Government Operations Subcommittee	15 Y, 0 N, As CS	Villa	Miller
2) State Administration & Technology Appropriations Subcommittee		Mullins	Topp
3) State Affairs Committee			

SUMMARY ANALYSIS

In 1973, the Florida Legislature enacted the Consultants' Competitive Negotiation Act (CCNA), which requires state and local government agencies to procure the professional services of an architect, professional engineer, landscape architect, or registered surveyor and mapper using a qualifications-based selection process. Qualifications-based selection is a process whereby service providers are retained on the basis of competency, qualifications, and experience, rather than price.

The CCNA explicitly states it does not prohibit a continuing contract between a firm and an agency. A continuing contract is a contract for professional services entered into in accordance with the CCNA between a government agency and a firm whereby the firm provides professional services to the agency for several projects. The CCNA prohibits firms that are parties to a continuing contract from being required to bid against one another. Current law authorizes the use of a continuing contract for construction projects in which the estimated construction cost of each project does not exceed \$4 million, for study activities if the fee for professional services for each study does not exceed \$500,000, or for work of a specified nature as outlined in the contract required by the agency, with the contract being for a fixed term or with no time limitation except the contract must include a termination clause.

Rules adopted by the Florida Department of Transportation (FDOT) establish minimum qualification standards by type of work for consultants who seek to provide professional services to FDOT, including for geotechnical and materials testing. Geotechnical testing involves testing soil and rock for the purpose of classifying materials and identifying their physical properties. Materials testing involves testing or investigating various types of highway materials and products and reporting results and recommendations.

The bill increases the maximum limit for continuing contracts covered by the CCNA from an estimated per-project construction cost of \$4 million to \$7.5 million plus an annual increase based on the Consumer Price Index (CPI) beginning with the CPI announced for the year 2026.

The bill also provides that, for a geotechnical and materials testing continuing contract, FDOT must select at least three qualified firms and award work to the selected firms on a sequential, rotating basis provided such distribution is not detrimental to the state interests. If the work is not awarded on such basis, FDOT must certify in writing the reasons for awarding the project out-of-sequence and publish the certification on its website and provide a copy to each selected firm.

The bill may have a positive, yet indeterminate fiscal impact on state and local government expenditures by increasing the dollar threshold for entering into continuing contracts. There is a minimal fiscal impact of requiring FDOT to select three qualified firms for geotechnical and materials testing continuing contracts and award work on a sequential, rotational basis. See Fiscal Comments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Consultant's Competitive Negotiation Act

In 1972, Congress passed the Brooks Act,¹ which requires federal agencies to use a qualifications-based selection process for architectural, engineering, and associated services, such as mapping and surveying. Qualifications-based selection is a process whereby service providers are retained on the basis of competency, qualifications, and experience, rather than price.

In 1973, the Florida Legislature enacted the Consultants' Competitive Negotiation Act (CCNA),² which is modeled after the Brooks Act. The CCNA requires state and local government agencies³ to procure the professional services⁴ of an architect, professional engineer, landscape architect, or registered surveyor and mapper using a qualifications-based selection process.⁵

CCNA Procurement Process

The CCNA establishes a three-phase process for procuring professional services:

- Phase 1 – Public announcement and qualification.
- Phase 2 – Competitive solicitation.
- Phase 3 – Competitive negotiation.

During Phase 1, the public announcement and qualification phase, state and local agencies must publicly announce each occasion when professional services will be purchased for one of the following:

- A project,⁶ when the basic construction cost is estimated by the agency to exceed \$325,000; or
- A planning or study activity, when the fee for professional services exceeds \$35,000.⁷

The public notice must include a general description of the project and indicate how interested firms⁸ may apply for consideration.⁹ A firm that wishes to provide professional services to an agency must first be certified by the agency as qualified to provide the needed services pursuant to law and the agency's regulations.¹⁰ In determining whether a firm is qualified, the agency must consider the capabilities, adequacy of personnel, past record, and experience of the firm as well as whether the firm is a certified minority business enterprise.¹¹ Each agency must encourage firms desiring to provide professional services to the agency to submit annual statements of qualifications and performance data.¹²

¹ Pub. L. 92-582, 86 Stat. 1278 (1972).

² Ch. 73-19, Laws of Fla., codified as s. 287.055, F.S.

³ "Agency" means the state, a state agency, a municipality, a political subdivision, a school district, or a school board. The term "agency" does not extend to a nongovernmental developer that contributes public facilities to a political subdivision under s. 380.06, F.S., or ss. 163.3220-163.3243, F.S. S. 287.055(2)(b), F.S.

⁴ "Professional services" means those services within the scope of the practice of architecture, professional engineering, landscape architecture, or registered surveying and mapping, as defined by the laws of the state, or those performed by any architect, professional engineer, landscape architect, or registered surveyor and mapper in connection with his or her professional employment or practice. S. 287.055(2)(a), F.S.

⁵ S. 287.055, F.S.

⁶ (f) "Project" means that fixed capital outlay study or planning activity described in the public notice of the state or a state agency under s. 287.055(3)(a), F.S. A project may include:

- A grouping of minor construction, rehabilitation, or renovation activities.
- A grouping of substantially similar construction, rehabilitation, or renovation activities. S. 287.055(2)(f), F.S.

⁷ S. 287.055(3)(a)1., F.S. As used in the statute, CATEGORY TWO refers to purchases of \$35,000 or more and CATEGORY FIVE refers to purchases of \$325,000 or more. S. 287.017, F.S.

⁸ "Firm" means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice architecture, engineering, or surveying and mapping in the state. S. 287.055(2)(c), F.S.

⁹ S. 287.055(3)(a)1., F.S.

¹⁰ S. 287.055(3)(c), F.S.

¹¹ S. 287.055(3)(c) and (d), F.S.

¹² S. 287.055(3)(b), F.S.

During Phase 2, the competitive selection phase, an agency must evaluate the qualifications and past performance of interested firms and conduct discussions with at least three firms regarding their qualifications, approach to the project, and ability to furnish the required services.¹³ The agency must then select at least three firms, ranked in order of preference, that it considers the most highly qualified to perform the required services. In determining whether a firm is qualified, the agency must consider such factors as the 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 workloads of the firm; and the volume of work previously awarded to each firm by the agency, with the goal of equitably distributing contracts among qualified firms, provided such distribution does not violate the principle of selecting the most highly qualified firms. During this phase, the CCNA prohibits the agency from requesting, accepting, or considering proposals for the compensation¹⁴ to be paid.^{15,16}

During Phase 3, the competitive negotiation phase, an agency must first negotiate compensation with the highest ranked firm. If the agency is unable to negotiate a satisfactory contract with that firm at a price the agency determines to be fair, competitive, and reasonable, negotiations with the firm must be formally terminated. The agency must then negotiate with the remaining ranked firms, in order of rank, and follow the same process until an agreement is reached. If the agency is unable to negotiate a satisfactory contract with any of the ranked firms, the agency must select additional firms, ranked in the order of competence and qualification without regard to price, and continue negotiations until an agreement is reached.¹⁷

Continuing Contracts under the CCNA

The CCNA expressly does not prohibit a continuing contract¹⁸ between a firm and an agency.¹⁹ A continuing contract is one for professional services entered into in accordance with the CCNA between an agency and a firm whereby the firm provides professional services to the agency for projects where the estimated cost of each project does not exceed a specified amount.²⁰ The CCNA prohibits firms that are parties to a continuing contract from being required to bid against one another.²¹

Current law authorizes the use of a continuing contract for construction projects in which the estimated construction cost of each individual project under the contract does not exceed \$4 million, for study activities if the fee for professional services for each individual study under the contract does not exceed \$500,000, or for work of a specified nature as outlined in the contract required by the agency, with the contract being for a fixed term or with no time limitation except the contract must include a termination clause.²² The maximum per-project and per-study limits were put in place by the Legislature in 1988²³ and subsequently increased three times. In 1988, the maximum per-project and per-study limits were \$500,000 and \$25,000, respectively.²⁴ In 2002, the limits were increased to \$1 million and \$50,000,²⁵ in 2009, the limits were increased to \$2 million and \$200,000,²⁶ and in 2020, the last revision, the limits were increased to \$4 million and \$500,000.²⁷

¹³ S. 287.055(4)(a), F.S.

¹⁴ "Compensation" means the amount paid by the agency for professional services regardless of whether stated as compensation or stated as hourly rates, overhead rates, or other figures or formulas from which compensation can be calculated. S. 287.055(2) (d), F.S.

¹⁵ S. 287.055(4)(b), F.S.

¹⁶ The CCNA did not prohibit discussion of compensation in the competitive selection phase until 1988, when the Legislature enacted a provision that allows consideration of compensation to occur only during the competitive negotiation phase. Ch. 88-108, L.O.F.

¹⁷ S. 287.055(5), F.S.

¹⁸ See s. 287.055(2)(g), F.S.

¹⁹ S. 287.055(4)(d), F.S.

²⁰ S. 287.055(2)(g), F.S.

²¹ *Id.*

²² S. 287.055(2)(g), F.S. An entity may not use a continuing contract for work of a specified nature to exceed the monetary limits placed on construction projects and study activities. Op. Fla. Att'y Gen. 2013-28 (2013).

²³ Ch. 88-108, Laws of Fla.

²⁴ *Id.*

²⁵ Ch. 2002-20, Laws of Fla.

²⁶ Ch. 2009-227, Laws of Fla.

²⁷ Ch. 2020-127, Laws of Fla.

Construction and Program Management Entities

Current law authorizes governmental entities²⁸ to contract with a construction management entity or a program management entity.²⁹ A construction management entity is responsible for construction project scheduling and coordination in both preconstruction and construction phases and is generally responsible for the successful, timely, and economical completion of a construction project.³⁰ A program management entity is responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services.³¹ Both construction and program management entities must be procured pursuant to the CCNA and must consist of, or contract with, licensed or registered professionals for the specific fields or areas of construction.³² The governmental entity procuring the services of a construction management or program management entity may choose to enter into a continuing contract³³ pursuant to the CCNA for construction projects where the estimated construction cost of each project does not exceed \$4 million.³⁴

Construction Cost

Construction costs have seen an upswing since 2020, largely driven by a confluence of factors exacerbated by the COVID-19 pandemic.³⁵ Escalating prices of essential materials, such as steel and lumber, influenced by disruptions in global supply chains, are prominent contributors as well as general inflation in the economy. In addition, labor shortages have led to higher wages, further impacting costs. However, construction input prices³⁶ have stabilized recently, falling about one percentage point from October 2022 to October 2023. The following chart shows the percent change to certain construction input and commodity prices as of October 2023:³⁷

²⁸ “Governmental entity” means a county, municipality, school district, special district as defined in ch. 189, F.S., or political subdivision of the state. S. 255.103(1), F.S.

²⁹ S. 255.103, F.S.

³⁰ S. 255.103(2), F.S.

³¹ S. 255.103(3), F.S.

³² S. 255.103, F.S.

³³ A continuing contract, for purposes of procuring a construction or program management entity, means a contract for work during a defined period on construction projects described by type, which may or may not be identified at the time of entering into the contract. S. 255.103(4), F.S.

³⁴ S. 255.103(4), F.S.

³⁵ Point Acquisitions, *Construction Costs Rising in 2022: Here's Why It's Happening*, <https://pointacquisitions.com/2022-rising-construction-costs/> (last visited November 30, 2023).

³⁶ Construction input prices refer to the costs associated with materials, labor, and other resources used in the construction industry.

³⁷ See United States Department of Labor Bureau of Labor Statistics, *Producer Price Index Detailed Reports for February 2020 and October 2023*, available at: <https://www.bls.gov/ppi/detailed-report/#2023> (last visited December 1, 2023).

	1-month	12-month	Since Feb. 2020
Inputs to Industries			
Inputs to construction	-1.2%	-1.1%	33.1%
Inputs to multifamily construction	-0.9%	0.8%	32.4%
Inputs to nonresidential construction	-1.1%	-0.7%	33.6%
Inputs to commercial construction	-0.7%	-0.3%	33.6%
Inputs to healthcare construction	-0.7%	-0.2%	33.4%
Inputs to industrial construction	-0.9%	1.1%	30.7%
Inputs to other nonresidential construction	-1.2%	-0.9%	33.7%
Inputs to maintenance and repair construction	-1.3%	-2.0%	31.8%
Inputs to highway and street construction	-1.2%	0.0%	31.4%
Commodities			
Adhesives and sealants	0.1%	1.8%	28.9%
Concrete products	0.7%	9.7%	30.5%
Construction machinery and equipment	0.0%	6.0%	23.6%
Copper wire and cable	-1.3%	2.7%	24.2%
Crude petroleum	-2.9%	-3.0%	56.9%
Fabricated structural metal products	0.8%	-0.7%	42.3%
Insulation materials	-0.3%	1.6%	31.0%
Iron and Steel	-2.3%	-6.1%	40.79%
Lumber and wood products	-0.3%	-6.5%	22.3%
Natural gas	10.9%	-54.9%	40.8%
Plumbing fixtures and brass fittings	0.5%	1.4%	16.1%
Prepared asphalt, tar roofing, and siding products	0.7%	3.9%	34.4%
Steel mill products	-2.5%	-9.9%	47.0%
Switchgear, switchboard, industrial controls equipment	0.2%	6.3%	32.0%
Unprocessed energy materials	-0.3%	-16.2%	60.2%

Consumer Price Index

The Consumer Price Index (CPI) compiled by the United States Department of Labor, measures the average change over time in the prices paid by urban consumers for a specified grouping of consumer goods and services. The CPI encompasses various categories including food, housing, clothing, medical care, and transportation, providing a comprehensive view of price movements. It serves as a key indicator of inflation and aids policymakers, businesses, and the public by offering insights into inflation trends and potential economic impacts.³⁸ The CPI increased by approximately 19 percent from February 2020 to October 2023. Comparatively, the CPI increased approximately three percent from October 2022 to October 2023.³⁹

Department of Transportation

The Florida Department of Transportation (FDOT) is a decentralized agency⁴⁰ headed by the Secretary of Transportation. The Secretary is appointed by the Governor from among three persons nominated by the Florida Transportation Commission and subject to confirmation by the Senate.⁴¹ FDOT is the primary agency responsible for planning, designing, building, operating, and maintaining Florida's transportation system, including the state's roadways, bridges, airports, seaports, and other transportation-related infrastructure.⁴²

FDOT rules establish minimum qualification standards by type of work for consultants who seek to provide professional services to FDOT, including the following:

³⁸ United States Department of Labor Bureau of Labor Statistics, *Consumer Price Indexes Overview*, <https://www.bls.gov/cpi/overview.htm> (last visited December 1, 2023).

³⁹ See United States Department of Labor Bureau of Labor Statistics, *CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm (last visited December 1, 2023).

⁴⁰ S. 20.23, F.S.

⁴¹ S. 20.23(1)(a), F.S.

⁴² See s. 334.044, F.S.; see also Florida Department of Transportation, *About FDOT*, <https://www.fdot.gov/agencyresources/aboutfdot.shtml> (last visited November 28, 2023).

- Geotechnical Classification Lab Testing, which includes conducting tests on soil and rock according to FDOT specifications for the purpose of classifying materials. This type of work requires one professional engineer with a minimum of five years of experience in activities normally associated with geotechnical testing. In addition, the consultant must have at least one technician with a limerock bearing ratio technician qualification with at least two years of experience in geotechnical testing, and certain specialized equipment.⁴³
- Geotechnical Specialty Lab Testing, which includes conducting tests on soil and rock according to FDOT specifications for the purpose of identifying their physical properties. FDOT requires the consultant to have at least one staff member with four years of experience performing such tests, or an equivalent bachelor's degree, and certain specialized equipment.⁴⁴
- Highway Materials Testing, which includes sampling and testing various materials and reporting results and recommendations. This type of work requires one professional engineer with a minimum of five years of experience in activities normally associated with highway materials testing. In addition, the consultant's personnel must include an individual with a limerock bearing ratio technician qualification, an asphalt plant level I qualification, a concrete field-testing technician level I qualification, and a nuclear gauge operator certification as provided by a gauge manufacturer, as well as certain specialized equipment.⁴⁵
- Construction Materials Testing, which includes conducting inspections and investigations of various highway materials or products and reporting results and recommendations. This type of work requires one professional engineer with at least three years of experience in bridge or roadway construction inspection.⁴⁶

As of December 4, 2023, approximately 183 entities are qualified to do types of geotechnical and materials testing for FDOT, with many qualified to perform multiple types of work, including:

- Geotechnical Classification Lab Testing: approximately 58 companies.
- Geotechnical Specialty Lab Testing: approximately 30 companies.
- Highway Materials Testing: approximately 43 companies.
- Construction Materials Testing: approximately 155 companies.⁴⁷

Effect of the Bill

The bill increases the maximum limit for continuing contracts covered by the CCNA from an estimated per-project construction cost of \$4 million to \$7.5 million plus an annual percentage increase based on the Annual Consumer Price Index compiled by the United States Department of Labor, beginning with the Annual Consumer Price Index announced by the United States Department of Labor for the year 2026.

The bill also provides that FDOT must, for a geotechnical and materials testing continuing contract, select at least three qualified firms and award work to the selected firms on a sequential, rotating basis with the goal of equally distributing the work amongst the selected firms, provided such distribution is not detrimental to the interests of the state. If a project is not awarded on a sequential, rotating basis, at the time the project is awarded FDOT must certify in writing the reasons for awarding the project out-of-sequence, must publish the certification on its website for at least 30 days, and must provide a copy to each of the selected firms under the contract.

B. SECTION DIRECTORY:

Section 1 amends s. 255.103, F.S., relating to construction management or program management entities.

⁴³ R. 14-75.003(5)(h)1.b. and (5)(h)2.b., F.A.C.

⁴⁴ R. 14-75.003(5)(h)1.e. and (5)(h)2.d.(III), F.A.C.

⁴⁵ R. 14-75.003(5)(h)1.c. and (5)(h)2.c., F.A.C.

⁴⁶ R. 14-75.003(5)(i)1.c. and (5)(i)2.c., F.A.C.

⁴⁷ See Florida Department of Transportation Consultant Information (12/4/2023), at

<https://srs.fdot.gov/Reports/report/PDA%20Reports/Public%20Reports/InternetGroupX> (last visited Dec. 4, 2023).

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Section 2 amends s. 287.055, F.S., relating to acquisition of professional architectural, engineering, landscape architectural, or surveying and mapping services; definitions; procedures; contingent fees prohibited; penalties.

Section 3 provides an effective date of July 1, 2024.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a positive, yet indeterminate fiscal impact on private sector businesses that provide professional services as defined in the CCNA, or that provide construction management or project management services, by allowing those entities to enter into larger contracts for projects under a continuing contract. Specifically, increasing the threshold for entering into continuing contracts would save those entities contractual and workload expenditures associated with having to undergo the CCNA procurement process for projects that exceed the current statutory threshold.

The fiscal impact on the private sector of requiring FDOT to select at least three qualified firms and award work on a sequential, rotational basis for certain continuing contracts is indeterminate at this time. Tying continuing contract limits to the Consumer Price Index (CPI) could ensure that contractors are compensated fairly over time, considering the impact of inflation on the cost of goods and services.

D. FISCAL COMMENTS:

The bill may have a positive, yet indeterminate fiscal impact on state and local government expenditures by allowing the state or local government to enter into larger continuing contracts under the CCNA. By retaining a larger continuing contract under the CCNA, the state or a local government could potentially save on contractual and workload expenditures associated with the procurement of services on a per-project basis. Governments, however, may spend more on these contracts as they are adjusted based on CPI increases.

The fiscal impact on the state of requiring FDOT to select at least three qualified firms and award work on a sequential, rotational basis for geotechnical and materials testing continuing contracts is indeterminate at this time. The requirement for FDOT to certify in writing its reasons for awarding certain contracts out-of-sequence and publish the certification on its website and provide a copy to the selected firms will have a minimal fiscal impact on the agency that will be absorbed as part of its day-to-day operations.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill neither provides nor requires any additional rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On January 11, 2024, the Constitutional Rights, Rule of Law & Government Operations Subcommittee adopted a proposed committee substitute (PCS) and reported the bill favorably as a committee substitute. The PCS differs from the bill in that it increases the maximum limit for continuing contracts covered by the CCNA to an estimated per-project construction cost of \$7.5 million plus an annual percentage increase based on the Annual Consumer Price Index. The PCS also requires FDOT, for certain continuing contracts, to select at least three firms and award work on a rotating basis provided the distribution is not detrimental to the state interest. If work is awarded other than in the established rotation, FDOT must publish on its website a written explanation for the award for at least 30 days and provide a copy to each firm in the rotation.