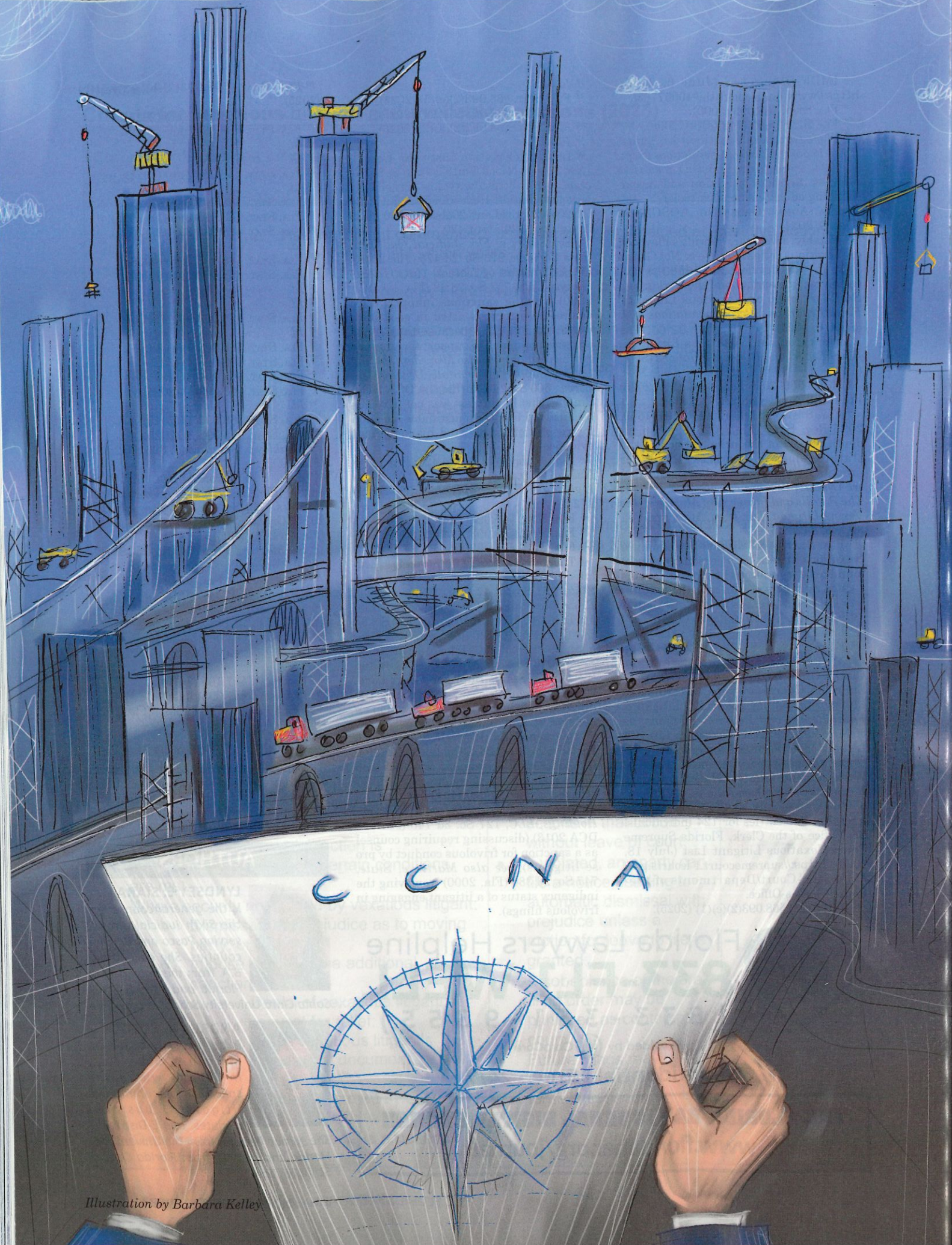




Primer on the Consultants' Competitive Negotiation Act's Processes and Pitfalls:

Including Advanced Topics on Design-Build, Construction Management, Integrated Project Delivery, and Public-Private Partnerships

by Robert Alfert, Jr., Lacey Corona, Karen Ryan, and Megan Schroder

Florida's public construction landscape is undergoing one of the largest expansions in decades. Gov. Ron DeSantis' Focus on Florida's Future Budget for Fiscal Year 2024-2025 committed a record \$14.5 billion to public transportation and infrastructure.¹ The success of Florida transportation and infrastructure projects requires an understanding of a complex Florida public procurement statute that has been on the books since the 1970s — the Consultants' Competitive Negotiation Act (CCNA). The CCNA set forth in F.S. §287.055 is a benchmark in Florida government law, governing the procurement of public works projects requiring professional services, such as architecture and engineering.² Passed in 1973, the CCNA sets forth detailed procurement methods, focusing on the qualifications and experience of the professional. Fees and costs are only negotiated after a final ranking occurs. The law was revelatory in the 1970s, as public procurements historically focused on price as the main component of selection, often deferring to hard bid procurement processes, which awarded the contract to the lowest bidder. However, while Florida has continued to grow and expand and the infrastructure and construction industry has evolved to introduce more creative delivery methods, the CCNA has remained stagnant. The disconnect between an old statute and a modern infrastructure boom creates tension for public entities and private partners as they attempt to deliver complex projects under an outdated framework.

Over the last decade, Florida (like the rest of the country) has entered the era of "mega-projects," which require greater collaboration and coordination from the start of design through construction. Starting with the \$1.4 billion Miami Tunnel completed in 2014,³ to Orlando Interna-

tional Airport's multi-billion-dollar international terminal (and incorporated higher-speed rail) and the Interstate 4 public-private partnership (P3), both of which went "live" in the 2022-24 timeframe, large-scale, multi-disciplinary public works projects have become the new normal. The enhanced scale and complexity of these projects, coupled with creative and customized project delivery methods, financing structures, operations and maintenance (O&M) terms, and contract methodologies, were not commonplace when the CCNA statute was originally drafted. Project delivery method innovations push the boundaries of the CCNA in its current legislative form and highlight its gaps and shortfalls. As recently as July 2024, an amendment to Florida's P3 statute, F.S. §255.065, which authorizes a project delivery methodology and financing structure thought to increase public and private sector collaboration, highlights yet another facet of CCNA's rigid and untouched requirements that creates tension with other public procurement statutes.

Despite the advancement and evolution of public projects, the last four amendments to the CCNA (2009, 2020, 2023, and 2024) have primarily only been to update the monetary thresholds defining a "continuing contract."⁴ There is also a dearth of caselaw or written guidance on the CCNA, other than a few attorney general opinions that are analyzed later in this article. The intent of this article is to assist the user in navigating the CCNA and its pitfalls by setting forth recommended approaches to harmonizing the CCNA with other existing Florida procurement statutes and foundational legal principles in the public procurement arena. State statutes on the procurement of P3s and construction managers at risk, and their interplay with the CCNA warrant particular attention. Moreover, the oft-

debated topic regarding procurement and use of continuing consultants and continuing contractors, which has been the subject of an attorney general opinion that many practitioners in this field believe contravenes the express wording of the statute, is worth examining. Ultimately, it is important to understand that the CCNA statute, which is titled and worded toward the procurement of professional consultants, has increasingly played a direct role in the competitive procurement of specific construction services. As contractors and public entities continue to devise and refine project delivery methods that fit the complex needs of modern projects, they must be aware of constraints and considerations imposed by the dated CCNA statute. Additionally, the Florida Legislature should be aware that, perhaps, it is time for a more global overhaul of the CCNA.

At its core, public procurement is about more than selecting contractors. It is the mechanism by which governments safeguard public funds, maintain transparency in decision-making, and ensure that essential projects are delivered in a manner that promotes confidence, fairness, and value for taxpayers. Yet, the tension between Florida's modern infrastructure demands and the CCNA's outdated framework makes it increasingly difficult for agencies to achieve these objectives. This article examines those shortcomings and provides both a primer on how project delivery methods operate within the CCNA framework and a discussion of the pitfalls that arise in practice.

The CCNA Process: A Primer

Government agencies⁵ must follow the CCNA⁶ when they require professional services for a project and the estimated construction cost for that project exceeds \$325,000, or for a planning or study activity when the fee for professional services exceeds \$35,000.⁷ Notably, price is not considered until after the agency selects what it considers to be the most qualified firm for the project. Only after this selection is price then considered and negotiated.

Under the CCNA procedures,

the agency will first publicly advertise its needs for professional services, providing at least a general description of the project and how interested consultants can apply for consideration.⁸ The agency will ask the applicants to detail their various qualifications, such as certifications, capabilities, personnel, past record, experience, and other factors the agency determines to be applicable to the particular project. The submission from applicants is typically called a statement of qualifications (SOQ). The agency, often through a specialized selection or evaluation committee, will then evaluate the SOQs and the advertised evaluation criteria, and select (shortlist) no fewer than the three most qualified firms to conduct further discussions regarding qualifications, approach to the project, and ability to furnish the required services. The agency must also require the shortlisted consultants to give a presentation or to answer the questions of the selection committee.⁹

After the shortlisting (and presentations or question/answer sessions), the agency will rank, in order of preference, no fewer than three firms it considers to be the most highly qualified to provide the requested services. In determining whether a firm is the most qualified, the agency must consider factors such as the ability of professional personnel; past performance; willingness to meet time and budget requirements; and recent, current, and projected workloads of the firms.¹⁰

The agency will then negotiate a contract with its top-ranked firm for a fair, reasonable, and competitive price.¹¹ If the agency and its top-ranked firm cannot agree on compensation, the agency may terminate negotiations with that firm and move on to negotiate with its second-ranked firm, and so on down the agency's ranking until an agreement is reached or the agency elects to terminate the procurement.¹²

The CCNA Process: Pitfalls and Best Practices

In practice today, there are a variety of recurring and ever-evolving issues with CCNA procurements and

the resulting contracts for which the statute offers no guidance. There is little to no caselaw or attorney general opinions to turn to for further interpretation. Nevertheless, consistent patterns in agency practice and procurement challenges, together with attorney general opinions, statutory cross-references, and the authors' collective experience advising public and private sector clients on CCNA procurements, demonstrate what, in the authors' view, constitute best practices to avoid the CCNA's pitfalls in practice:

- *Public Announcements vs. Advertisements* — Subsection (3)(a) of the CCNA requires the agency to "publicly announce in a uniform and consistent manner, each occasion when professional services must be purchased."¹³ Unlike Ch. 255, which governs public construction projects in Florida, the CCNA does not use the term "advertise" and does not specify a timeframe or vehicle for the public announcement. While, arguably, the posting of public notice in an open and transparent manner would suffice, best practices suggest that following the guidance in F.S. §255.0525, with its advertising timeframes and stated publication requirements for construction projects, achieves the laudatory goal of outreach and transparency. Best practices should also entail, in addition to advertising in the required newspaper of general circulation, posting notice on the agency's website and linking the solicitation to procurement platforms such as DemandStar or OpenGov, where public entities regularly publish open procurement and bids. Procurements involving more specialized services may also benefit from additional advertising in platforms or periodicals that are sector specific.

- *Shortlisting Requirements* — The CCNA's subsections (4)(a) and (b), use the mandatory terminology "shall" in requiring the shortlisting and ranking of no fewer than three qualified firms.¹⁴ The CCNA, however, does not advise what the agency should do if less than three firms propose, or less than three firms are actually qualified to perform the services. Given the cost, time, and potential

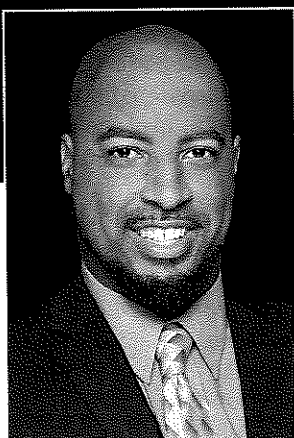
futility of restarting the procurement, including staff resources, publication expenses, and schedule delays, to the extent that the public announcement accorded proper outreach, and the requested services and qualifications were not too narrowly drafted to limit reasonable competition, proceeding with the procurement should be acceptable. However, a lack of caselaw guidance on this subject leaves it subject to some risk of contest through a bid protest or state audit findings. If an agency's public announcement garnered less than three qualified firms, the agency's best practice is to meticulously notate in the public records all the efforts made to spur competition and outline why it was reasonable to proceed with less than three qualified firms over cancelling and restarting the procurement. If there is a legitimate question regarding whether the agency could take additional reasonable action to foster greater competition and interest, the agency should consider re-advertising.

• *Florida Sunshine Laws* — Sub-

section (4)(a) specifically requires that the agency "shall conduct discussions with, and may require *public* presentations by, no fewer than three firms regarding their qualifications, approach to the project, and ability to furnish the required services."¹⁵ This subsection of the CCNA was not amended, perhaps by oversight, following the 2011 amendments to Florida's Sunshine Law exemptions,¹⁶ which require that such presentations, question/answer sessions, and negotiations performed under a competitive solicitation,¹⁷ be conducted — not publicly — but in a closed, recorded, session. The effect of the amendments to Florida's Sunshine Law exemptions is the preservation, during the procurement process, of the confidentiality of the presentations so that one proposer cannot observe the presentation of its competition and, thus, gain a competitive advantage. Best practice is to conduct the presentations during closed sessions, which are recorded and later made available under F.S. §286.0113, for

public posterity. This is the only fair way of harmonizing the two statutes.

• *Continuing Contracts* — Sometimes an agency requires recurring or smaller-scale professional services without the need to conduct a full competitive solicitation for each individual assignment. In those instances, the CCNA allows the agency to enter into what is known as a "continuing contract." A continuing contract is a contract for professional services entered into in accordance with the CCNA that permits the firm to provide services for multiple projects on an as-needed basis, subject to the statutory monetary thresholds. The CCNA allows the agency to enter into a continuing contract in three instances: 1) whereby the firm provides professional services to the agency for projects in which the estimated construction cost of each individual project under the contract does not exceed \$7.5 million; 2) for study activity if the fee for professional services for each individual study under the contract does not exceed \$500,000;



William Harris
Director
ASA, CFA

Harris testified and the judge said...

“ Having determined the valuation date, the Court is bound to follow the unimpeached and un rebutted testimony of XXX Corp’s expert, Mr. William Harris. There was no other valuation proposed for the June 23, 2023, date. Mr. Harris applied the correct methodology, fair value, which is required under Fla. Stat. s. 605.0706(1), and did not apply any discount for lack of marketability of the interest – which decision favored the Plaintiffs and shows additional credibility on the part of Mr. Harris. ”

This quote is taken directly from an Order on Intervenor’s Request for Valuation pursuant to Florida Statute 605.0706(4). William Harris is a respected business valuation and litigation expert with more than 15 years of valuation experience.

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or 3) 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 that the contract must provide a termination clause.¹⁸

These three instances create an exception to the general competitive bidding requirements of the CCNA, as the statute provides that “[f]irms providing professional services under continuing contracts may not be required to bid against one another.”¹⁹ Agencies may read these three categories independently (*i.e.*, disjunctively). However, the attorney general of Florida has opined that there is ambiguity in this statutory language and that the monetary threshold provided in the first category also applies to the third category of continuing contracts.²⁰ Thus, a contract for “professional services of a specific nature as outlined in the contract” and in excess of the threshold set forth in the first category, is “outside the scope of the ‘continuing contract’ exception of section 287.055(2)(g), Florida Statutes, and any such contract would be subject to the other competitive procedures of the CCNA.”²¹ The attorney general opinion (AGO) inexplicably overlooks that the term “or” is disjunctive, not conjunctive and this misreading can create confusion in administrative practice leaving agencies uncertain about how to apply the continuing contract provisions in subsection (c). The more appropriate interpretation of the CCNA is that subsection (c) is its own exception and is not constrained by the monetary limitations in subsections (a) and (b). However, there is no caselaw on this subject, and while AGOs are highly persuasive, they are not binding on the courts.²²

Advance Topics on CCNA: Applicability to Construction Services

Most public works construction projects are procured through invitations to bid, using the traditional “design-bid-build” project delivery method. In the design-bid-build project delivery method, the public owner hires professional consultants to design the project, the project is

advertised, the plans are issued to interested contractors, and then contractors submit a sealed lump-sum bid. The public owner does not generally weigh qualifications (beyond minimum licensure requirements), experience, or any design or value-engineering suggestions. Thus, for all intents and purposes, the award goes to the contractor with the lowest price (the standard is the lowest responsive, responsible bidder). Unsurprisingly, many public officials believe this is the only method to award construction projects, or simply assume that the public and media demand that government seeks the lowest price for services.

F.S. §255.20 is the primary starting point for the public procurement of construction services and requires that they be competitively awarded through a litany of methods.²³ This procurement statute expressly allows public contracts for construction management services and design-build contracts, and, while not mentioning P3s expressly, does allow for any “contract arrangement with a private sector contractor permitted by any applicable municipal or county ordinance, by district resolution, or by state law.”²⁴ The CCNA is not referenced by this precedent statute, but any public entity seeking to procure these specialty-type construction services or contract arrangements must coordinate with and harmonize the requirements of the CCNA and the subsequently enacted laws for construction management and P3s, both of which expressly reference the CCNA.²⁵ The interplay between statutes creates both tension and confusion, especially since the CCNA is often viewed as just a procurement process for a limited field of professional services; but in reality, it encapsulates certain specialty construction contracts as well.

Design-Build

Design-build is a construction delivery method where one party is charged with the responsibility to both design and build a project. To be considered for a design-build contract, the firm must be certified under F.S. §489.119 to engage in contracting or

under §§471.023, 481.219, or 481.319 to practice engineering, architecture, or landscape architecture.²⁶

The design-build delivery method has a myriad of uses and applications, but it tends to be best suited for specialty projects, generally when there is a critical need to accelerate the project schedule, involves a less sophisticated owner seeking to shift risk and responsibility, or some combination thereof. Section 255.20 allows for design-build, but does not advise on the procurement of such services. Instead, the public process for procuring design-build services is set forth in subsection (9) of the CCNA, which starts off with an awkward disclaimer: “Except as provided in this subsection, this section is not applicable to the procurement of design-build contracts by any agency, and the agency must award design-build contracts in accordance with the procurement laws, rules, and ordinances applicable to the agency.”²⁷ Thus, agencies should develop their own procurement processes for design-build contracts, subject to, and built around, the foundational procurement requirements set forth in subsection (9) of the CCNA.

The CCNA provides two options for design-build procurement methods. The first is a pure qualifications-based approach as outlined above, which authorizes selection and ranking based qualifications and then negotiations with the top-ranked firm. The second method of selection is a competitive proposal, which, unlike the qualifications-based approach, provides for the consideration of pricing during the selection and ranking process.

The competitive proposal process is multi-step, starting with an advertisement seeking SOQs. From these SOQs, the agency must shortlist “no fewer than three design-build firms as the most qualified, based on the qualifications, availability, and past work of the firms, including the partners or members thereof.”²⁸ The shortlisted proposers are then issued a design criteria package, from which they must submit a proposal for the design and construction of the project. The proposals must be evaluated on at least three factors: design, technical, and

price.²⁹ Flexibility exists in how the public entity chooses to define what comprises each factor. For example, the technical factor can include things such as schedule and maintenance terms, in addition to engineering elements. Flexibility is also allowed for exactly how the agency weighs and evaluates each factor.

The intent of the competitive price proposal process is to achieve an award that is the “best value” to the public — that is, a weighing of design, qualifications, and price that is appropriate for the specific project.³⁰ Various scoring methodologies using different weighted factors can be used. For example, if a unique and eye-catching design is of the utmost importance for the project, then various design elements can be accorded more weight than price.

The CCNA process for design-build contracts is also flexible enough to allow for more sophisticated procurements where the agency seeks to procure an operations and maintenance contract in connection with the design-build award (generally referred to as a “DBOM” for design-build-operate-maintain). This type of integrated contract is typically found on specialty system projects where the designer and builder of the system is often the only party, or the most qualified party, to provide the long-term operations and maintenance for

the system. Examples of these types of projects could involve vertical and horizontal conveyance systems, rail and automated people movers/monorail, and baggage handling systems.

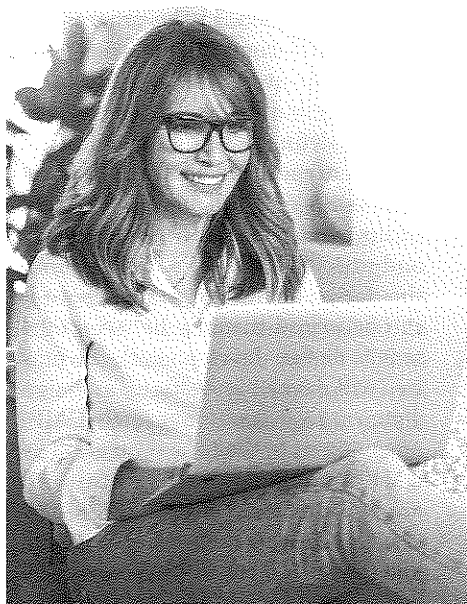
Construction Management

Construction management is a construction delivery method where the contractor serves in a more professional, management-type role, generally retained at project inception to assist the government entity and architect/engineer in planning, design, cost estimating, and construction. The arrangement can be “at risk,” where the construction manager holds the subcontracts, or “at agency,” where the construction manager serves more as an advisor and overseer of the work, while the owner or another entity holds the subcontracts for the construction.³¹ The “at risk” (CMAR) methodology is the predominant form of construction management, and this approach is most commonly used on larger scale public works projects like airports, where the project management skills, such as scheduling, estimating, design review, and computerized building information modeling, add considerable value to the project.

F.S. §255.20 expressly allows public contracts for construction management services, but does not set forth a specific process for selection, other than requiring competitive procure-

ment.³² Historically, construction managers have been selected and contracted predominantly on a negotiated basis as the qualifications, experience, and proposed team of the entity are more critical to the success of the project than achieving a competitive fee for the service. Moreover, all of the subcontract work, which comprises a substantial percentage of the project’s cost, can still be competitively bid. This approach to selection on qualifications has now been codified in F.S. §255.103, which lays out the process for construction management at risk, at agency, and a subset of continuing contractors for projects of a specific monetary scale.³³ The statute specifically incorporates the CCNA for the qualifications-based selection process, but then at the same time expressly indicates that a construction manager can also be picked under the requirements of F.S. §255.20.

The logical interpretation of these three statutes that each allow for construction management — §§255.103, 255.20, and 287.055 — is that construction managers can be chosen using a qualifications-based selection process, followed by negotiations, under the CCNA, or by using any of the competitive procurement methodologies allowed by §255.20, including hard bid or competitive proposals. The attorney general of Florida, however, has opined that a hybrid approach



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is not allowed when procuring construction management services. The government entity can only use one method.

On March 8, 2017, the Florida attorney general issued an opinion that local governments must comply with the CCNA when procuring contracts for construction CMAR services that contemplate a negotiation of the contract.³⁴ Accordingly, price could not be considered during the procurement selection process in such a circumstance. This is a significant departure from routine local government procurement of construction management services and CMAR services under F.S. §255.20, which allows public entities flexibility to follow their own policies and consider price when selecting firms with whom to negotiate a construction management contract. The AGO leaves this subject an open question, and while the authors of this article believe that the AGO is incorrect in its broad-ranging decision, especially given the language in §255.20, the authors are following the AGO edict.

In the scenario before the attorney general, the Town of Palm Beach proposed to use a two-step process to procure CMAR services. The town emphasized that the CMAR would not be performing any professional services, such as architectural or engineering services. In its two-step process, respondents would submit a qualifications proposal and, in a separate sealed envelope, submit a fee proposal. The selection committee would first rate the respondents on qualifications.³⁵ Then, the Purchasing Division would publicly open the

sealed CMAR fee proposal and award points based on the following specified formula. In step two, the Purchasing Division would add the proposer's fee points to each evaluation committee score then negotiate with the highest ranked firm first and, if necessary, proceed to the next highest ranking firm. The AGO opined that, "both individually and collectively, F.S. §§255.103, 255.20, and 287.055 do not allow the proposed hybrid competitive selection process in which the town would evaluate both qualifications *and price* prior to selecting the firms with whom to negotiate a potential CMAR contract."³⁶ The AGO concluded that because the town's contract for CMAR services "would be subject to competitive negotiations," the CCNA must be followed, and, thus, price could not be considered at the same stage as the consideration of qualifications or prior to selection of a firm based on qualifications alone.

The AGO focused on the proposed procurement process instead of the type of services actually being procured. Thus, even though the town emphasized that the CMAR would not provide any "professional services" as defined by the CCNA, the AGO concluded that the CCNA still must be followed because the town would negotiate with the highest-ranked firm first. This interpretation does not address the fact that F.S. §255.103 expressly allows for CMAR services to be procured under F.S. §255.20 — which permits the use of requests for proposals or qualifications, provided the procurement is competitively advertised and awarded in accordance with local ordinances. The AGO's

view also presents challenges in the federal context, where consideration of price may be required when local governments procure CMAR services. For projects with a combination of federal and state funding, public owners should consider prioritizing compliance with federal requirements while coordinating with the applicable state granting authority to confirm that the procurement approach is appropriate.

This AGO highlights the continued complexity of interpreting Florida's procurement statutes and the potential tension between statutory language and administrative interpretation. Public entities navigating CMAR procurements — particularly in hybrid funding scenarios where federal money may also be involved — should be mindful of these issues and proceed with both legal caution and practical flexibility.

Progressive Design-Build

Tension between CCNA's qualifications-based procurement method and federal pricing considerations not only exist in the context of CMAR projects, but also in the context of progressive design-build projects.

Progressive design-build is a variant of the design-build methodology described above, in which the same entity is responsible for both designing and constructing a project. Unlike a traditional design-build project, where proposals include technical and pricing considerations for both design and construction, in the progressive model the design-builder is selected early in the project's planning stage, generally before the project scope is fully defined. The parties form a base contract to commence the relationship with all necessary legal terms, and then with a base scope and price to evolve the design. Once the design achieves a stage where it can be priced (usually between 60% to 90% design development), the parties will develop, negotiate, and sign a guaranteed maximum price (GMP) amendment to the base contract. The GMP amendment will contain all final design and construction scope, total pricing (schedule of values), and the project schedule. Progressive design-build projects are becoming

increasingly popular, both nationally and in Florida, for projects in which the scope is not fully definable at the project's planning phase and the owner seeks to collaborate with the design-builder to *progress* toward a completed design.

Since the design-builder is selected so early in the process of the progressive model and is selected before a project scope or design exists, construction costs, fees, and scheduling typically cannot be a part of the competitive procurement process. Thus, the design-builder on a progressive design-build project is selected based on qualifications.

Despite the CCNA's lack of an express reference to the progressive design-build model in its subsection on application to design-build contracts, a close read of the CCNA shows the natural allowance of the progressive design-build method under its qualifications-based selection process. However, as mentioned above, the specifics of the qualifications-based selection process can put the procurement of a progressive design-builder at odds with federal procurement requirements where federal grants or federal funding is involved. Federal grants and funding for projects often require consideration of pricing during the procurement process — a consideration not allowed under the qualifications-based selection process of the CCNA. This leaves an open question of how to structure the procurement of the progressive design-builds under the CCNA where the project is also subject to federal funding requirements. One solution is to look at the types of federal funding or hybrid funding (some combination of local or state and federal funding) and evaluate whether the federal grant instrument and the requirements of the CCNA can be harmonized. In the event they are at odds with one another, it is likely that the federal requirements govern and should be implemented while also following the requirements of the CCNA as closely as possible. Recent legislative developments may offer additional clarity. The FAA Reauthorization Act of 2024 expressly authorizes

the use of the progressive design-build method for airport projects receiving federal funding, marking a significant shift in federal procurement policy. This legislative change demonstrates growing federal recognition of progressive design-build as a viable project delivery method and may ease tensions between state qualifications-based selection statutes like the CCNA and federal funding requirements.

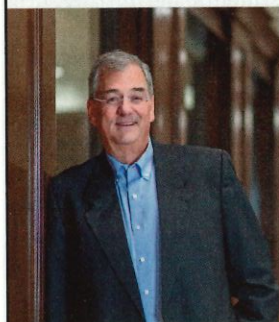
Integrated Project Delivery

Integrated Project Delivery (IPD) is a concept for project delivery that has gained serious ground in some sectors — such as health care — given the collaborative structure to the contracting relationship. IPD is a fully integrated contracting and project delivery method where all stakeholders — generally the owner, architect, engineer, and contractor — are under a single contract, all working collaboratively toward a common goal, all applying their skill and expertise, and their acceptance of allocated risk,

from project inception to completion, and perhaps even through operations and maintenance. In theory, this form of delivery, which some call a philosophy to project development, leads to a more efficiently delivered, quality project with less risk of conflict or error due to early, comprehensive collaboration and risk-sharing.

The question for public sector entities in Florida is, how does an agency or local government procure an IPD contract? There simply is no statute in Florida that mentions IPD. The CCNA procurement process, however, is consistent with the objectives and goals of IPD, and arguably both flexible and broad enough to apply to such a procurement. The success of IPD turns on qualified entities and team members showing a willingness to work together harmoniously and having the skill to carry out their respective roles. While price is relevant, it is not the primary criterion. A CCNA qualifications-based procurement expressly allows for the procurement of design professionals and a construc-

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tion management entity (the latter is recommended for IPD) to be based on a subjective assessment by the agency of a variety of relevant factors, including qualifications, experience, and current workload. The CCNA also allows the agency to include additional qualitative elements that are relevant to the IPD contract and the project, such as prior experience

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on IPD, experience working with the other selected or considered IPD parties, a narrative on their proposed collaborative plan, etc. The presentation and interview requirement of the CCNA also lends itself to a more comprehensive and accurate assessment of these factors, and to put it in common sense terms, whether the party under consideration is someone the government feels like they can work with successfully. The procurements of the various stakeholders can be conducted concurrently, or if more appropriate serialism, where the government picks one party first, say the architect, and then the owner and the architect work collaboratively to select the contractor. Ultimately, the parties then work in good faith to negotiate a fully integrated contract that they all can sign on terms that are “fair, competitive and reasonable,” as the CCNA requires.³⁷

Public-Private Partnerships (P3)

In a typical P3 arrangement, a private entity designs, builds, finances, operates, and maintains (often referred to as “DBFOM”) a project. Under the P3 model, the public entity (which is typically the owner of the project) is responsible for certain capital investments, permitting, processes, and other various obligations. The public entity contracts with a single private partner to perform the DBFOM services for the project. That private partner — typically called a “concessionaire” — brings in all key stakeholders under one umbrella or corporate structure. As most P3s fall under the design-build family, they are subject to the requirements of CCNA and, therefore, must be competitively procured via one of the methods that CCNA sets out for design-build contracts.

The Florida P3 statute, §255.065, and the CCNA statute, §287.055, diverge on two critical components — the required number of proposers and mandatory adherence to a public procurement process. While the CCNA requires that no less than three proposers be included on a shortlist, the P3 statute is silent on a minimum number of proposers that must be selected for further consideration. In

fact, the P3 statute provides that “if only one proposal is received, the responsible public entity may negotiate in good faith”³⁸ with that proposer. As discussed above, the CCNA is silent when it comes to this scenario.

Florida’s most recent amendment of its P3 statute, which went into effect on July 1, 2024, has not only heightened the tension between the CCNA and provisions of the P3 statute, but it has also made certain portions completely incompatible. Under the revised P3 statute, a public entity that receives an unsolicited proposal can essentially bypass the statute’s competitive procurement requirements and proceed with entering into a contract with the proposer, subject to certain considerations. Curtailing the public bidding process allows public entities to bring P3s stemming from unsolicited proposals to completion quickly and cost-effectively.³⁹

However, the last sentence of Florida’s P3 statute, left untouched by the recent amendment, states, “This section does not waive any requirements of [§]287.055.”⁴⁰ This provision has been in place since the inception of the P3 statute and in no uncertain terms communicates the Florida Legislature’s original intent that P3s be subject to the CCNA.

The CCNA does not provide the public entity with any option to bypass a competitive procurement process. Instead, the CCNA, under subsection (9), which sets forth base requirements for the competitive proposal selection process of design-build contracts, requires the solicitation of competitive proposals with the qualification and selection of no fewer than three design-build firms. Nowhere in these procedures can the public bidding process be bypassed. This begs the salient question of how does a public entity that receives an unsolicited proposal for a P3 project subject to the design-build requirements of the CCNA utilize the amended part of the P3 statute and proceed without engaging in a public procurement process while also complying with the CCNA as required by a separate section of the P3 statute?

It is hard to imagine, and cuts against a basic tenet of statutory

construction and contextual canons, that the Florida Legislature would authorize new procedures when it comes to unsolicited proposals for P3 projects, which is disallowed by already existing Florida law. Yet, in the face of the P3 statute's continued express deference to the CCNA and the CCNA's lack of contemporaneous substantive amendments, it is hard to see these provisions as anything but incongruent. This tension between the P3 law amendment and the CCNA appears to be one of legislative oversight, but the reasonable conclusion is that the new P3 law would govern in such a scenario.

Conclusion

The CCNA is a statute rife with nuances and complexities across various topics affecting public construction procurement procedures. Although this article is a primer on the CCNA's processes, this article only covers its implementation and its challenges at a high level. It is clear from the examination of its processes and pitfalls that the CCNA has not been amended to keep up with the evolving nature of Florida's construction and infrastructure industries. As public owners and contractors endeavor to utilize new and cutting-edge contracting and pricing methods, they should bear in mind the constraints that remain in place under the CCNA and strive to implement best practices as they seek to comply with the CCNA's outdated, but still mandatory, framework. □

¹ Gov. Ron DeSantis, *Governor Ron DeSantis Announces the Focus on Florida's Future Budget Recommendations for Fiscal Year 2024-2025*, Executive Office of the Governor (Dec. 5, 2023), available at <https://www.fdot.gov/info/co/news/2025/07012025>.

² "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." FLA. STAT. §287.055(2)(a).

³ Port Miami Tunnel Project Overview, <http://www.portofmiamitunnel.com/project-overview/project-overview-1/>; see also Alfonso Chardy, *Traffic Sailing Through Long-Awaited PortMiami Tunnel*, MIAMI HERALD, Aug. 3, 2014, available at <https://www.miamiherald.com/news/local/community/miami-dade/article1978272.html>.

⁴ Ch. 2009-227, LAWS OF FLA.; Ch. 2020-127, LAWS OF FLA.; Ch. 2023-304, LAWS OF FLA.; Ch. 2024-204, LAWS OF FLA.

⁵ "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 [§]380.06 or [§§]163.3220-163.3243." FLA. STAT. §287.055(2)(b).

⁶ Except in cases of valid public emergencies certified by the agency head. FLA. STAT. §287.055(3)(a)(1). This article does not address such public emergency exceptions.

⁷ FLA. STAT. §287.055(3)(a)(1). See also FLA. STAT. §287.017.

⁸ FLA. STAT. §287.055(3)(a)(1).

⁹ FLA. STAT. §287.055(4)(a).

¹⁰ FLA. STAT. §287.055(4)(b).

¹¹ FLA. STAT. §287.055(5)(a).

¹² FLA. STAT. §287.055(5)(b)-(c).

¹³ FLA. STAT. §287.055(3)(a).

¹⁴ FLA. STAT. §287.055(4)(a)-(b).

¹⁵ FLA. STAT. §287.055(4)(a) (emphasis added).

¹⁶ OPEN GOVERNMENT SUNSET REVIEW ACT, Ch. 2011-140.

¹⁷ "Competitive solicitation" means the process of requesting and receiving sealed bids, proposals, or replies in accordance with the terms of a competitive process, regardless of the method of procurement." FLA. STAT. §286.0113(2)(a)(1).

¹⁸ FLA. STAT. §287.055(2)(g).

¹⁹ FLA. STAT. §287.055(2)(g)(2).

²⁰ OP. ATT'Y. GEN. FLA. 2013-28 (2013).

²¹ *Id.*

²² *Beverly v. Div. of Dept. of Bus. Reg.*, 282 So. 2d 657, 660 (Fla. 1st DCA 1973).

²³ FLA. STAT. §255.20.

²⁴ FLA. STAT. §255.20(1).

²⁵ FLA. STAT. §§255.065 and 255.103.

²⁶ FLA. STAT. §287.055(2)(h).

²⁷ FLA. STAT. §287.055(9)(a).

²⁸ FLA. STAT. §287.055(9)(c)(2).

²⁹ FLA. STAT. §287.055(9)(c)(3).

³⁰ *Id.*

³¹ AIA Contract Documents, Construction Management (CMA and CMc), <https://help.aiacontracts.com/hc/en-us/sections/1500001370482-Construction-Management-CMA-CMc>.

³² FLA. STAT. §255.20.

³³ FLA. STAT. §255.103.

³⁴ OP. ATT'Y. GEN. FLA. 2017-02 (2017).

³⁵ *Id.*

³⁶ *Id.*

³⁷ FLA. STAT. §287.055(5)(a).

³⁸ FLA. STAT. §255.065(5)(c).

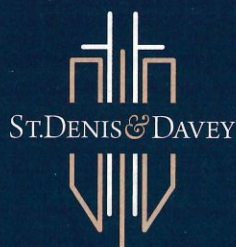
³⁹ Ch. 2024-96, LAWS OF FLA.

⁴⁰ FLA. STAT. §255.065(14)(f).

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