Hybrid Process to select Construction Manager

Number: AGO 2017-02

Date: March 23, 2017

Subject:
Hybrid Process to select Construction Manager

March 9, 2017

Mr. John C. Randolph
Attorney for the Town of Palm Beach
Flagler Center Tower, Suite 1100
505 South Flagler Drive
West Palm Beach, Florida 33401

RE: CONSULTANTS' COMPETITIVE NEGOTIATION ACT – CCNA – CONTRACTS – CONSTRUCTION MANAGER AT RISK SERVICES – whether s. 255.103, Fla. Stat. (2016), s. 255.20, Fla. Stat. (2016), and s. 287.055, Fla. Stat. (2016), allow a local government to use a hybrid process for competitive selection of firms with whom to negotiate a construction manager at risk contract for a public construction project.

Dear Mr. Randolph:

On behalf of the Town Council, you have asked the following question:

Whether the Town of Palm Beach, in procuring the negotiated services of a construction manager at risk ("CMAR") in connection with a planned underground utilities construction project, may use an alternative to the procedures set forth in section 287.055, Florida Statutes (the "Consultants' Competitive Negotiation Act,"[1]), in which the Town would consider price, as well as qualifications, in ranking and selecting those firms with whom the Town would competitively negotiate?[2]

In sum:

Both individually and collectively, sections 255.103, 255.20, and 287.055, Florida Statutes[3] (pertaining to local government procurement of construction management services), do not authorize the use of a hybrid competitive selection process whereby the Town would evaluate both qualifications and price prior to selecting the firms with whom to negotiate a CMAR contract. As a result, the Town may not employ the proposed alternative, but must comply with the requirements of section 287.055, Florida Statutes, in its competitive procurement of a negotiated CMAR services contract in connection with its planned underground utilities construction project.

As described in section 255.103, Florida Statutes("Construction management or program management entities"), a construction manager is "responsible for construction project scheduling and coordination in both preconstruction and construction phases and generally

responsible for the successful, timely, and economical completion of the construction project."[4] The construction manager may also be at risk, as contemplated by the additional provision that "the construction management entity, *after having been selected and after competitive negotiations*, may be required to offer a guaranteed maximum price and a guaranteed completion date…in which case, the construction management entity must secure an appropriate surety bond pursuant to s. 255.05 and must hold construction subcontracts."[5] Although your letter does not detail the scope of construction management services the Town would seek, you indicate that the CMAR would not provide "professional engineering or architectural services," but "only…construction services[.]"[6]

As you have noted, under section 255.103, a "governmental entity"[7] "may select a construction management entity" "pursuant to the process provided by s. 287.055[,] [Florida Statutes]."[8] Section 255.103 also allows use of the procedures provided by section 255.20, Florida Statutes: "This section does not prohibit a local government from procuring construction management services…pursuant to the requirements of s. 255.20."[9] In section 255.103, no available processes other than those provided by sections 287.055 and 255.20, Florida Statutes, are described.

Section 255.20, Florida Statutes, pertains, in pertinent part, to "contracts for public construction works."[10] Although it also "expressly allows contracts for construction management services,"[11] it mandates, in subsection (1)(d)3., that, when such contracts are "subject to competitive negotiations," they "*must* be awarded in accordance with s. 287.055."[12]

The significance of these constraints lies in the timing authorized by statute for a procuring entity's consideration of price. Under all three statutes, when a governmental entity seeks to procure a contract for CMAR services subject to negotiation, price may *not* be considered in the competitive selection--but only in the competitive negotiation--phase.

Section 255.103(2), Florida Statutes (2016), allows a local government to require the construction management entity to "offer a guaranteed maximum price [or a lump-sum price] and a guaranteed completion date[,]" but only "after having been selected and after competitive negotiations[.]" Section 287.055, Florida Statutes, allows a local government to "request, accept, and consider proposals for the compensation to be paid under the contract," but, similarly, "only during competitive negotiations under subsection (5)."[13]

Section 287.055, subsection (5), provides that a local government "shall *negotiate* a contract with the most qualified firm for professional services at compensation which the [local government] determines is fair, competitive, and reasonable. In making such determination, the [local government] shall conduct a detailed analysis of the cost of the professional services required in addition to considering their scope and complexity."[14] Section 255.20, Florida Statutes, reiterates these same requirements by mandating that construction management services contracts "subject to competitive negotiations" "must be awarded in accordance with s. 287.055."[15]

Within this framework, you have asked whether the Town is prohibited by statute from using a competitive process in which price as well as qualifications would be evaluated *before* selecting the firms with whom a potential CMAR services contract would be negotiated.[16] Observing that

section 255.103(2), Florida Statutes, employs the word “may” [use the section 287.055 process] rather than the word “shall,” you suggest that this permissive language appears to allow use of the competitive selection alternative proposed.

While section 255.103(2), Florida Statutes, does reflect that a governmental entity “may” select a construction manager pursuant to the process provided by section 287.055, Florida Statutes, the remaining provisions of section 255.103 do not otherwise authorize the hybrid selection process you have described. Instead, the statute only provides: “This section does not prohibit a local government from procuring construction management services…*pursuant to the requirements of s. 255.20.*”

The requirements of section 255.20(1)(d), Florida Statutes, in turn, bring the analysis back full circle to the Consultants' Competitive Negotiation Act. Based on the alternative selection method described in your letter, the proposed process would culminate in the Town’s negotiation “with the highest ranked firm first and, if necessary, [the Town would] proceed to the next highest ranking.” This directly implicates the mandate in section 255.20(1)(d)3. that a contract “subject to competitive negotiations…must be awarded in accordance with s. 287.055[,] [Florida Statutes].”[17]

Based on the foregoing, I am of the opinion that, both individually and collectively, sections 255.103, 255.20, and 287.055, Florida Statutes, 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.[18] Because the contract for CMAR services described in your letter would be subject to competitive negotiations, the Town must utilize the selection process provided for by section 287.055, Florida Statutes.

Sincerely,

Pam Bondi
Attorney General

PB/ttlm

---

[1] § 287.055(1), Fla. Stat. (2016).

[2] This opinion is expressly limited to addressing the question posed in your opinion request. While you have provided this office with a copy of a request for proposals for a CMAR which was apparently used by another local government, nothing in this opinion should be understood to address or comment on the competitive selection process used by another entity.
[3] These three statutes, which cross-reference each other, must be read together to properly address the question posed. *See generally Fla. Dep't of Highway Safety & Motor Vehicles v. Hernandez*, 74 So. 3d 1070, 1075 (Fla. 2011), *as revised on denial of reh'g* (Nov. 10, 2011) (reflecting that “statutes relating to the same subject matter must be read together, or *in pari materia*”) (citing *Fla. Dep't of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005) (“The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the

Legislature's intent.")).

[4] § 255.103 (2), Fla. Stat. 2016).

[5] *Id.* (italicized emphasis added).

[6] It is therefore assumed, for purposes of this analysis, that, as posited, "only construction services are sought." Because a detailed description of the scope of services has not been provided, it is not otherwise possible to determine whether the proposed CMAR contract might comprise professional architectural or engineering services, or not. The potential professional architectural or engineering aspects of a construction manager's role are discussed in Brian A. Wolf, *Rights and Liabilities of Construction Managers*:

"In many states, a CM must obtain a license as a design professional or contractor, depending on the services rendered. *See Full Circle Diary, LLC v. McKinney*, 467 F. Supp. 2d 1343 (M.D. Fla. 2006). In Florida, an architectural license may be required, because many CM services are encompassed by the definition of "architecture" in F.S. 481.203(6), which includes planning, job-site inspection, and administration of construction contracts. Likewise, design preparation and supervision of construction may fall within the definition of "professional engineering" under F.S. 471.005(7). *Verich v. Florida State Board of Architecture*, 239 So. 2d 29 (Fla. 4th DCA 1970) (construing former F.S. 471.02(5))."

CONSL FL-CLE 4-1 (2013); cf. also City of Lynn Haven v. Bay Cty. Council of Registered Architects, Inc., 528 So. 2d 1244, 1245 (Fla. 1st DCA 1988) (enjoining the City, in connection with construction of a public building project, from circumventing the requirements of § 287.055, Fla. Stat., by allowing the low bidder to select and hire an architect to prepare, sign, and seal the architectural drawings and direct the projects); § 255.103(2), Fla. Stat. (2016) (reflecting that, after a construction management entity has been selected "pursuant to the process provided by s. 287.055," such entity "may retain necessary design professionals selected under the process provided in s. 287.055").

[7] *See* § 255.103 (1), Fla. Stat. (2016) ("As used in this section, the term "governmental entity" means a…political subdivision of the state.").

[8] § 255.103 (2), Fla. Stat. (2016).

[9] § 255.103 (5), Fla. Stat. (2016); *see also* CHARTER OF THE TOWN OF PALM BEACH, FLORIDA, Art. 6, § 2-566 ("Procedure for contracts, purchases, exceeding twenty-five thousand dollars.")("All exceptions from public bid requirements referenced herein are intended to be in compliance with state statutes, specifically, but not limited to, F.S. § 255.20 and to the extent any provision herein is in contravention of said statute, said exception shall not apply") (italicized emphasis added). However, the Charter of the Town of Palm Beach, Florida does not set forth the proposed procurement process described here.

[10] § 255.20(1), Fla. Stat., provides that a "political subdivision of the state seeking to construct…other public construction works must competitively award to an appropriately licensed contractor each project that is estimated…to cost more than $300,000." *Id.* Because the Town

currently estimates that the cost of the utility undergrounding project will be $90 million (*see* http://townofpalmbeach.com/index.aspx?nid=376, last visited February 10, 2017), it is assumed, for purposes of this analysis, that the CMAR contract cost would exceed $300,000.

[11] § 255.20(1), Fla. Stat. (2016).

[12] § 255.20(1)(d)3. (italicized emphasis supplied).

[13] § 287.055 (4)(b), Fla. Stat. (2016). This restriction was added after the decision in *City of Jacksonville v. Reynolds, Smith & Hills, Architects, Engineers & Planners, Inc.*, 424 So. 2d 63, 64 (Fla. 1st DCA 1982). In that case, the court considered a city ordinance which had been invalidated as inconsistent with the Consultants' Competitive Negotiation Act ("Act"). The ordinance established a process whereby respondents had to submit a quotation of fees which was "taken into consideration in determining the three most qualified firms before entering into competitive negotiations." At that time, the Act did not expressly restrict the request, receipt, and consideration of "proposals for the compensation to be paid under the contract" to the post-selection competitive negotiation phase, as it does now. Because the prior version of the Act made "no mention of fee quotation," the court concluded that, "[w]ithout an express prohibition,…such use of fee quotations [did not damage] the process established by the Act." 424 So. 2d at 64. The present version of the Act, in contrast, expressly prohibits consideration of price during the competitive selection phase.

[14] § 287.055 (5) (a), Fla. Stat.(2016)(italicized emphasis added); cf. Fla. Att'y Gen. Op. 2010-20 (2010) ("Nothing in section 287.055, Florida Statutes, authorizes an agency to include compensation rates as a factor in the initial consideration and selection of a firm to provide professional services.").

[15] § 255.20(1)(d)3., Fla. Stat. (2016).

[16] As described in your letter, respondents would submit a qualifications proposal and, in a separate sealed envelope, would also submit a cost proposal for preconstruction services, construction services (CMAR fees), percentage of profit, cost of insurance and bond premium, general conditions, and recommended contingency. The selection committee would first rate the respondents based on their qualifications. After completing that assessment, the Purchasing Division would publicly open the separately-sealed CMAR Fee Proposals, and--prior to firm selection--would award points for each respondent's proposal based on a formula. These points would then be added to the evaluation committee member's scores for each respondent, and the resulting "final scores" would be tabulated and converted to rankings. The order of subsequent contract negotiation with respondents would depend upon the resulting relative rankings: "[t]he Town will then negotiate with the highest ranked firm first and, if necessary, proceed to the next highest ranking."

[17] *See generally Alsop v. Pierce*, 19 So. 2d 799, 805 (Fla. 1944) ("When the controlling law directs how a thing shall be done that is, in effect, a prohibition against its being done in any other way.").

[18] *Cf.* Op. Att'y Gen. Fla. 11-21 (2011) (concluding that the Southwest Florida Water

Management District was required to procure construction and construction management services contracts pursuant to the terms of § 255.20, Fla. Stat., and had “no authority to develop a ‘hybrid’ model for awarding construction projects in the absence of statutory authority”).