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**S 1068 GENERAL BILL/CS/1ST ENG by Governmental Operations;
Forman and others**

Consultants' Competitive Negotiation; defines term "design-build contract" & related terms; provides that act does not apply to procurement of design-build contracts by an agency; requires preparation of design criteria package by specified persons; requires each agency to adopt rules or ordinances for award of design-build contracts; specifies minimum procedures for municipalities, political subdivisions, school districts & school boards. Amends 287.055. Effective Date: 06/27/89.

04/06/89 SENATE Filed

04/14/89 SENATE Introduced, referred to Governmental Operations -SJ 149

04/28/89 SENATE Extension of time granted Committee Governmental Operations

05/04/89 SENATE On Committee agenda—Governmental Operations, 05/08/89, 10:00 am, Room-H-(428)—Not considered

05/11/89 SENATE On Committee agenda—Governmental Operations, 05/17/89, 9:00 am, Room-H-(428)

05/12/89 SENATE Extension of time granted Committee Governmental Operations

05/17/89 SENATE Comm. Report: CS by Governmental Operations, placed on Calendar -SJ 404

05/24/89 SENATE CS read first time -SJ 409

05/25/89 SENATE Placed on Special Order Calendar -SJ 450; CS passed as amended; YEAS 39 NAYS 0 -SJ 469; Immediately certified -SJ 469

05/25/89 HOUSE In Messages

06/01/89 HOUSE Received, placed on Calendar; Read second time; Read third time; CS passed; YEAS 108 NAYS 2 -HJ 1065

06/01/89 Ordered enrolled -SJ 691

06/12/89 Signed by Officers and presented to Governor

06/27/89 Approved by Governor; Chapter No. 89-158

NOTES: Above bill history from Division of Legislative Information's *FINAL LEGISLATIVE BILL INFORMATION, 1989 SESSIONS*. Staff Analyses for bills amended beyond final committee action may not be in accordance with the enacted law. Journal page numbers (HJ & SJ) refer to daily Journals and may not be the same as final bound Journals.

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

<u>ANALYST</u>	<u>STAFF DIRECTOR</u>	<u>REFERENCE</u>	<u>ACTION</u>
1. <u>Kane</u> <i>YAK</i>	<u>Stengle</u> <i>JS</i>	1. <u>GO</u>	<u>Fav/CS</u>
2. _____	_____	2. _____	_____
3. _____	_____	3. _____	_____
4. _____	_____	4. _____	_____

SUBJECT:	BILL NO. AND SPONSOR:
Consultants' Competitive Negotiation Act; Design-Build Contracts	CS/SB 1068 by Governmental Operations and Senator Forman

I. SUMMARY:

A. Present Situation:

The "Consultants' Competitive Negotiation Act," s. 287.055, 1988 Supp. (hereinafter referred to as "CCNA"), requires agencies to obtain specified professional services, chiefly relating to building construction, through a competitive selection and negotiation procedure comprised of several stages, rather than through competitive bidding. The services covered are those within the scope of the practice of architecture, professional engineering, landscape architecture, and registered landscape engineering, for projects over \$120,000, and fees for planning services over \$6,000. The first step of the process is the selection of qualified firms based upon qualifications and ability to perform the work for the project. At this stage, price is not permitted to be considered. After firms are ranked in order of their qualifications through the selection procedure, the agency then attempts to negotiate services for the project with firms in order of their qualification ranking. The procedures ensure that professional services for a project are not procured predominantly according to price and, according to the Department of General Services, to provide for a professional relationship, rather than for a contractor relationship, between the firm and the agency.

Although most provisions of ch. 287, F.S., are not applicable to political subdivisions, the CCNA is made specifically applicable to municipalities, political subdivisions, school districts, and school boards, as well as to executive branch agencies. By its requirements, the CCNA in practical terms precludes the use of a construction procedure referred to as "design-build" or "performance-based, a specialized procedure for construction that allows a single entity to be responsible for architecture and engineering services for, and the construction of, a project. Customarily, in the private sector and in government building construction, professional architectural or engineering services are procured separately by the project owner; each firm or professional has specific responsibilities to the owner, as well as responsibilities and liabilities with respect to the completion of the project. It can sometimes result in a savings of time and expense, although there may be drawbacks, as well.

Section 255.29, F.S., requires the Department of General Services to establish procedures for entering performance-based contracts, and specifies minimum procedures that must be included. Section 287.055(10), F.S., provides that the CCNA is not applicable to the procurement of performance based upon contracts, i.e., performance-based contracts.

Because s. 287.055, F.S., 1988 Supp., is generally applicable to political subdivisions as well as to state agencies, it appears that political subdivisions, as well as state agencies, are permitted to use performance-based contracts, which are exempted from the CCNA.

A recent Attorney General's Opinion, AGO 88-54, states that political subdivisions are not exempted from the CCNA for performance-based contracts, because of the manner in which the language of s. 287.055(10), F.S., was enacted. The opinion states that the intent of the Legislature in enacting ch. 84-321, L.O.F., was clearly to exempt only state agencies from the CCNA. This opinion is based on the finding that section 10 of ch. 84-321, L.O.F., added a subsection (4) to s. 255.29, F.S., directing the Department of General Services to provide procedures for entering into performance-based contracts when determined to be in the best interest of the state and, in the last sentence of the subsection, stated that s. 287.055, F.S., would not be applicable to the procurement of performance based on contracts. That last sentence of subsection (4) that created the exemption was transferred by the Division of Statutory Revision, which placed it in subsection (10) of s. 287.055, F.S. The Attorney General's opinion, based upon case law of the state, determines, *inter alia*, that the original intent of the Legislature is controlling, and that the placement of a law in the codification of the statutes is not determinative of legislative intent.

A number of political subdivisions, nevertheless, currently use the design-build procedure. Based upon a survey by the Advisory Council for Intergovernmental Relations of 31 counties and 37 municipalities, a number of cities and counties believe that "design-build" offers potential cost savings in construction. Because of the recent Attorney General's Opinion, political subdivisions may no longer be able to use design-build procedures that do not include the procedures specified in the CCNA. One county has already reported a protest of an award of a construction contract using the design-bid procedures because the CCNA procedures were not followed.

The Department of General Services, although permitted to use design-build for several years, has begun to use the procedure only in the past year, and on a limited basis. The department will use design-build for less complex facilities, such as parking garages and farmers' markets. The procedures of ch. 13D-23, F.A.C., must be followed. For each project, the department requires that a separate architect or professional engineer prepare a design criteria package that will define design constraints and the time and budgetary constraints to be achieved, and may specify technical requirements for the elements of the project as well. The design-build services for the project are obtained either through competitive negotiation, or a procedure which is in the nature of requests for proposals. Prequalification of prospective firms is required.

The Department of Transportation is authorized by s. 337.11(5), F.S., 1988 Supp., to use design-build procedures for the construction of roads, building, and other facilities. The department is required to adopt procedures by rule, for which minimum procedures are provided by law. The applicable rules are contained in ch. 14-91, F.A.C.

Chapter 471, F.S., provides for the regulation of engineering services and licensure of professionals. Section 471.023, F.S., provides for the certification of partnerships and corporations offering engineering services. Chapter 481, F.S., provides for the regulation of architectural and landscape architectural services. Section 481.219, F.S., 1988 Supp., provides for certification of partnerships and corporations

offering architectural services through licensees; s. 481.319, F.S., 1988 Supp., makes similar provisions for landscape architectural services. Chapter 489, F.S., provides for the regulation of the construction industry. Section 489.119, F.S., 1988 Supp., provides for contracting services by business organizations through a certified or registered qualifying agent.

B. Effect of Proposed Changes:

A "design-build firm" would be defined to mean a partnership, corporation, or other entity which is certified under Florida law to practice engineering, architecture, or landscape architecture, or which is certified to engage in contracting through a certified or registered general contractor or building contractor.

A "design-build contract" would be defined as a single contract with a design-build firm, for the design and construction of a public construction project. A "design criteria package" would be defined as a set of drawings or specifications regarding technical aspects of the project for a project that would permit the design-build firm to submit a bid or proposal in response to an agency's request for same, or to permit an agency to enter into a design-build contract. The package would specify performance-based criteria for the public construction project.

A "design criteria professional" would be defined as a firm certified to practice architecture or landscape architecture, or a firm certified as a registered engineer, that is employed by or under contract to an agency to provide professional architecture, landscape architecture, or engineering services in connection with the preparation of the design criteria package.

The provisions of the Consultants' Competitive Negotiation Act would not apply to the procurement of design-build contracts, except as specifically provided. Agencies would be required to award design-build contracts in accordance with the procurement laws, rules, and ordinances applicable to the agency.

A design criteria package would be prepared and sealed by a design criteria professional either employed by, or retained by, the agency. If a professional is retained, he would have to be selected in accordance with the competitive selection and competitive negotiation procedures of the CCNA, and would not be eligible to render services under a contract for which he prepared the design criteria package.

Each agency would be required to adopt rules or ordinances for the award of design-build contracts. For municipalities, political subdivisions, school districts, and school boards, minimum procedures would be specified. The procedures of these local government entities would be required to include provisions for: preparation of a design criteria package; the qualification and selection of at least three of the most qualified design-build firms based on qualifications, availability, and past work of the firms; criteria, procedures, and standards for the evaluation of design-build contract proposals or bids based on price, technical, and design aspects of the public construction; the solicitation of competitive proposals pursuant to a design criteria package from the qualified design-build firms, and the evaluation of the responses or bids submitted by the firms based on the evaluation criteria and procedures established prior to the solicitation of competitive proposals; the consultation with the design criteria professional in the evaluation of bids or responses, the supervision or the approval by the agency of the detailed working drawings of the project, and the evaluation of the project construction with the design criteria package; and

for the agency head, in the case of public emergencies, to declare an emergency and to authorize negotiations with the best-qualified design-build firm available at the time.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

Opportunities with political subdivisions for firms that offer design-build services would be preserved.

B. Government:

Local governments would be protected from challenge in the use of the design-build construction procedure.

III. COMMENTS:

The Department of General Services reports that while many other federal, state, and local governments have employed design-build procedures, some unsatisfactory results and a waste of public funds for construction have occurred because of a lack of professional expertise in quality-control procedures.

The opinions of the Attorney General are persuasive authority in the courts of this state, but are not binding on the requestor or the courts. The conclusion of AGO 88-54 that the exemption from the CCNA is not applicable to political subdivisions does not consider that the Legislature in odd-numbered years regularly adopts the codification of laws from the preceding 2 years as the official statutes of the state, and repeals the general law enacted prior to that codification.

With regard to minimum procedures to be followed, no standards are provided by which an agency head of a local government entity would determine the existence of a "public emergency." Usually, procedures are waived in the financial interests of the state or an entity, or when necessary to protect other specified interests.

IV. AMENDMENTS:

None.

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
COMMITTEE SUBSTITUTE FOR
Senate Bill 1068

For purposes of the Consultants' Competitive Negotiation Act, adds definitions of the terms "design-build firm," "design-build contract," "design criteria package," and "design criteria professional."

In providing an exemption from the requirements of the Consultants' Competitive Negotiation Act, substitutes the use of the term "design-build" for the term "performance-based contract" to provide that the Consultants' Competitive Negotiation Act is not applicable to the procurement of such contracts, except in contracting with a design criteria professional.

Requires that a design criteria package is to be prepared by a design criteria professional who is either employed or retained by the agency. When the design criteria professional is retained by the agency, such professional must be contracted with according to the competitive selection and negotiation procedures of the Consultants' Competitive Negotiation Act.

Specifies that the design criteria professional is not eligible to render services under the design-build contract for which he prepares the design criteria package.

Adds a requirement that all agencies, rather than specified local government agencies, must adopt procedures for the award of design-build contracts.

For municipalities, political subdivisions, school districts, and school boards, adds provisions for minimum procedures, including the preparation of a design criteria package, the selection of qualified firms, and review and selection procedures.

Committee on Governmental Operations


Staff Director

(FILE THREE COPIES WITH THE SECRETARY OF THE SENATE)