

TALLAHASSEE  
1500 Mahan Drive  
Suite 200  
Tallahassee, Florida 32308  
(850) 224-4070 Tel  
(850) 224-4073 Fax



TAMPA  
2502 Rocky Point Drive  
Suite 1060  
Tampa, Florida 33607  
(813) 281-2222 Tel  
(813) 281-0129 Fax

FORT LAUDERDALE  
110 East Broward Boulevard  
Suite 1700  
Fort Lauderdale, Florida 33301  
(954) 315-3852 Tel

## MEMORANDUM

**DATE:** June 12, 2020

**TO:** County RESTORE Coordinators

**FROM:** Lynn Hoshihara and Evan Rosenthal, Gulf Consortium General Counsel

**RE:** Use of Continuing Contracts Procured Under the Consultants Competitive Negotiation Act (CCNA) For Pot 3 Grant Award Work

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### ISSUE

This memorandum is intended to provide guidance to the Subrecipient member counties regarding the interaction between Section 287.055, Florida Statutes (the Consultants Competitive Negotiation Act or CCNA) and the competitive procurement requirements contained in 2 C.F.R. 200.317-326, governing procurement under federal grant awards. Specifically, this memorandum is intended to address questions that have recently arisen regarding the use of firms operating under continuing contracts for the “Professional Services” described in Section 287.055, Florida Statutes (architects, professional engineers, landscape architects, and registered surveyors and mappers), whether this is consistent with the “full and open competition” requirement in 2 C.F.R. 200.319, and under what circumstances it may be appropriate to utilize such continuing contracts for work to be performed under a Pot 3 federal grant award.

### BACKGROUND

CCNA mandates that local governments utilize a qualifications-based procurement process that initially excludes consideration of price for the procurement of the Professional Services described in Section 287.055, F.S. It is only after conclusion of the qualifications-based selection process that a local government may negotiate with firms based on price.

Similarly, while the provisions within 2 C.F.R. 200 governing procurement generally require full and open competition with respect to the cost of an item or service procured under a federal grant award, 2 C.F.R. 200.320(d)(5) recognizes the use of qualifications-based procurement of architectural and engineering services:

The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) Professional Services whereby competitors’ qualifications

are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E Professional Services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

Sections 287.055(2)(g) and (4)(d), F.S., also authorize local governments to enter into continuing contracts for Professional Services covered under CCNA for projects and tasks below certain dollar value thresholds (i.e. projects where the construction cost is less than \$2,000,000, or “study activities” costing less than \$200,000). After they are initially procured through the competitive, qualifications-based selection process, CCNA mandates that firms operating under continuing contracts not be required to competitively bid against each other for specific projects (See Section 287.055(2)(g), F.S.). This is consistent with the general intent of CCNA (and the similar Federal Brooks Act), which is to require that the selection process for these Professional Services be based upon qualifications rather than price.

### **ANALYSIS**

The Gulf Consortium General Manager and General Counsel have conferred with RESTORE Council staff regarding the potential use of continuing contracts procured pursuant to CCNA for work to be performed under a Pot 3 federal grant award. RESTORE Council staff has generally accepted the position of the Gulf Consortium General Manager and General Counsel, which is that the use of such continuing contracts is permissible so long as it complies with 2 C.F.R. 200, state law, and the procurement procedures of the local government.

In order to utilize a Professional Services firm operating under a continuing contract in a manner that complies with 2 C.F.R. 200.317-326, counties should ensure they are engaging in the negotiation of fair and reasonable compensation with such firm with respect to the project or task to be performed. (See 2 C.F.R. 200.320(d)(5)). It is strongly recommended that counties document their compliance with this requirement. Counties also should be aware of and ensure compliance with 2 C.F.R. 200.323(b) (requiring negotiation of profit as a separate element of the price for each contract in which there is no price competition) and 2 C.F.R. 200.318(j)(1) (restricting use of time and materials contracts unless a determination is made that no other contract is suitable and where the contract includes a ceiling price that the contractor exceeds at their own risk).

As described above, Section 287.055(2)(g), F.S., establishes that continuing contracts for Professional Services covered under CCNA are permitted under two circumstances:

1. Where the firm provides Professional Services for projects in which the estimated construction cost does not exceed \$2 million; or
2. For study activities if the fee for Professional Services does not exceed \$200,000.

The term “study activity” is not defined within Section 287.055. However, reading the statute cohesively and in a manner that gives meaning to all of the words used by the Legislature, it appears that the term study activity applies to projects that are unrelated to a discrete construction project or that occur early in the process of formulating a discrete construction project. Examples of study activities would thus include preparation of a comprehensive plan, conceptual master plan, or similar study (such as a regional wastewater management or stormwater basin management plan or similar long range planning document), the preparation of a feasibility study, preparation of an environmental assessment, etc. In evaluating these study activities, the \$200,000 cap on the fee for Professional Services would apply.

The above list is not intended to be comprehensive and other activities—including preliminary design—may qualify as study activities under certain circumstances. However, generally speaking, as a project moves closer to construction, it is less likely that Professional Services associated with such project will be considered study activities. Given that the line can often be blurry, it will often be necessary to evaluate these situations on a case by case basis.

Once a discrete construction project is identified, at that point, all engineering, architectural, and other Professional Services should be evaluated on the basis of whether the estimated construction cost of the project exceeds \$2 million in determining whether the use of a firm operating under a continuing contract would be appropriate. For example, this would include final engineering design and engineering inspection services associated with the construction of infrastructure improvements.

In determining whether the utilization of a firm operating under a continuing contract is appropriate for Professional Services to be performed under a Pot 3 grant award or whether a new CCNA-compliant procurement should be performed, counties should be mindful that the Attorney General has on several occasions expressed the opinion that “the continuing contract provision of section 287.055, Florida Statutes, represent an exception to the general competitive bidding provisions of the [Competitive Consultant Negotiation] Act and should be read narrowly and utilized sparingly in order to avoid an appearance of circumventing the requirements of the statute.” AGO 1996-52; AGO 2007-07; AGO 1993-56. Thus, in the event of any doubt, counties are strongly encouraged to err on the side of caution and conduct a new CCNA procurement for Professional Services.

It is our hope that this Memorandum has provided some basic guidance with respect to the use of continuing contracts for Professional Services to be performed under a Pot 3 grant award. As discussed above, many of these situations will involve fact-specific inquiries that must be evaluated on a case by case basis. General Counsel for the Gulf Consortium is available to discuss these issues upon request.