

PRIMER ON THE CCNA'S PROCESSES AND PITFALLS: INCLUDING ADVANCED TOPICS ON DESIGN-BUILD, CONSTRUCTION MANAGEMENT AT RISK, AND P3s

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Today's Presenters



Lacey Corona
Tallahassee/Orlando



Megan Schroder
Tampa/Orlando

Contact Information:

Lacey.Corona@nelsonmullins.com

Megan.Schroder@nelsonmullins.com

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*Primer on the CCNA's Processes and Pitfalls:
Including Advanced Topics on Design-Build,
Construction Management, Integrated Project
Delivery, and Public-Private Partnerships*

Pitfalls

- **A 1973 statute in a modern boom** - barely amended in 50 years, now straining against Florida's mega-projects
- **Little guidance to rely on** - almost no case law, only a handful of AG opinions
- **"Publicly announce" vs. "advertise"** - no required timeframe or method for notice
- **The fewer-than-three-firms gap** - mandatory shortlist of three, but silent when fewer respond or qualify
- **Sunshine Law conflict** - statute says "public" presentations; exemptions require closed, recorded sessions
- **Continuing contracts "or" ambiguity** - AG reading collapses three independent categories into one
- **CMAR price caution (2017 AGO)** - bars price consideration in negotiated CM procurements, in tension with § 255.20
- **Federal funding friction** - qualifications-only selection clashes with federal rules requiring price
- **The P3 conflict** - 2024 amendment allows unsolicited proposals, yet the P3 law still defers entirely to the CCNA

CCNA PRIMER: Process, Pitfalls, and Best Practices

Overview of the Consultants' Competitive Negotiation Act (CCNA)

- Section 287.055, Florida Statutes
- Governs procurement of professional services by public entities
 - State and local agencies, counties, municipalities, school districts, school boards, special districts, and political subdivisions
- "Professional services" means architecture, professional engineering, landscape architecture, or registered surveying and mapping services
- Applies to public projects with estimated construction costs exceeding \$325,000 or for when professional service fees exceed \$35,000
- Subsection (9) addresses public procurement of design-build services

Overview of the Consultants' Competitive Negotiation Act (CCNA)

- Focuses on the qualifications and expertise of the professional over cost
- First enacted in the 1973
- Revelatory in the 1970s, as public procurements historically focused on price
- 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

Key Aspects of the CCNA Process

- Public notice required
 - general description of the project
 - how interested firms can apply for consideration
- Firms submit their qualifications (generally called a "Statement of Qualifications" or "SOQ")
- Agency evaluates SOQs based on advertised evaluation criteria
- Agency selects ("shortlists") no fewer than three of the most-qualified firms
- Shortlisted firms give presentation and/or answer agency questions
- Agency conducts further discussions regarding qualifications, approach to the project, and ability to furnish the required services with shortlisted firms

Key Aspects of the CCNA Process

- After shortlisting and presentations, the agency ranks no fewer than 3 firms it considers to be the most highly qualified to perform the services
- When ranking, the agency must consider:
 - ability of professional personnel;
 - past performance;
 - willingness to meet time and budget requirements; and,
 - recent, current, and projected workloads of the firms
- The agency will then negotiate a contract with its top-ranked firm for a fair, reasonable, and competitive price.
- If the agency and its top-ranked firm cannot agree on compensation, the agency may terminate negotiations with that firm and negotiate with its second-ranked firm, and so on until an agreement is reached or the agency elects to terminate the procurement

Potential Pitfalls & Best Practices in the CCNA Process

Public Announcements v. 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."
 - Does not use "advertise" like Chapter 255, and does not specify a timeframe or vehicle for the public announcement
- While a public posting may suffice under subsection 3(a) for CCNA services, best practice is to follow section 255.0525, Florida Statutes, with its advertising timeframes and stated publication requirements for construction projects.
 - Achieves the goal of outreach and transparency
- Consider whether specialized services may benefit from additional advertising in sector-specific publications

Potential Pitfalls & Best Practices in the CCNA Process

Shortlisting Less than 3 Qualified Firms

- Subsections 4(a) and (b), use the mandatory "shall" in requiring the shortlisting and ranking of no fewer than 3 qualified firms
 - **But what if less than 3 qualified firms respond?** → CCNA does not specify what to do if less than 3 firms propose or less than 3 are qualified to perform the services and case law guidance is lacking
- Consider proceeding with only 2 shortlisted firms
 - Confirm that public announcement afforded proper outreach and the advertised services and qualifications were not too narrowly drafted to limit reasonable competition.
 - Is restarting the procurement is possible given time, cost, and potential futility
- Agency should document all efforts made to spur competition and why it is reasonable to proceed with less than 3 qualified firms instead of restarting the procurement.

Potential Pitfalls & Best Practices in the CCNA Process

Presentations and Florida's Sunshine Law Exemptions

- Subsection 4(a) specifically provides for "public presentations" by the shortlisted firms.
 - But Florida's Sunshine Law exemptions (§ 286.0113(2)(a)(1), Fla. Stat.) require such presentations, questions/answer sessions, and negotiations performed under a competitive solicitation, be conducted in a closed, but recorded, session.
 - Intent is to preserve, during the procurement process, confidentiality of the presentations so that one proposer cannot observe the presentation of its competition and thus gain an advantage.
- Best practice is to harmonize the statutes by conducting the presentations during closed sessions, which are recorded and later made available pursuant to § 286.0113.

ADVANCED TOPICS: Design-Build and Construction Manager at Risk

DESIGN-BUILD DEFINED BY THE CCNA

- 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 section 489.119, Florida Statutes, to engage in **contracting** or certified under sections 471.023, 481.219, or 481.319, Florida Statutes, to practice **engineering, architecture, or landscape architecture**.

DESIGN-BUILD PROCUREMENTS

- The CCNA provides two options to procure a design-build project.
 - 1) Qualifications-Based approach (ranking on qualifications and negotiated pricing)
 - 2) Request for Proposals
- Note on Federal-Aid Projects (grants/loans) – Most agencies consider design-build an alternative project delivery
 - Need to seek review and concurrence of federal agency

DESIGN-BUILD RFP

- Requires development of a design criteria package (DCP) by a design criteria professional (retained or employed)
- DCP is defined in the CCNA:
 - Concise, performance-oriented drawings or specifications
 - Purpose is to furnish sufficient information for proposers to prepare a bid/proposal.
 - Must specify **performance-based criteria**, including the legal description of the site, survey information, interior space requirements, material quality standards, schematic layouts and conceptual design criteria, cost or budget estimates, design and construction schedules, site development requirements, provisions for utilities, stormwater retention and disposal, and parking requirements *applicable to the project*.

DESIGN-BUILD RFP

- Multi-step, starting with a public 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."
- The shortlisted proposers are 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.

Construction Management at Risk

- 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.
- At Risk or At Agency
- Owner has separate contract with the Designer.

Construction Management at Risk

- Section 255.103, Florida Statutes, expressly allows a CM to be selected on qualifications with a negotiated contract.
 - This method is used when the experience and proposed team are more critical to the success of the project than achieving a competitive fee for the service. Most of the subcontract work, which comprises the majority of the project's cost, can still be competitively bid. This method balances the professional services by negotiation and the construction services by bidding.
- Section 255.103 also expressly allows a CM to be procured pursuant to the requirements of section 255.20, Florida Statutes, which includes RFP with price as a factor.

Construction Management at Risk

CAUTION: AGO has stated that a hybrid selection process is not allowed

- On March 8, 2017, the Florida Attorney General issued an opinion declaring that local governments must comply with the CCNA when procuring CM contracts that contemplate a negotiation of the contract.
- The AG opined that price cannot be considered during the procurement selection process in such a circumstance.
- This seems to be a potential departure from Section 255.20, Florida Statutes, which allows the flexibility to follow local policies and consider price when selecting firms with whom to negotiate a construction management contract. It is a best practice to follow the AGO closely.

ADVANCED TOPICS: Integrated Project Delivery and Public-Private Partnerships

Advanced Topic: Integrated Project Delivery (IPD)

What is IPD?

- A collaborative project delivery method that integrates people, systems, business structures, and practices.
- Aims to optimize project results, increase value to the owner, reduce waste, and maximize efficiency.
- Involves early involvement of key participants, shared risk/reward, and multi-party agreements.

How CCNA Applies to IPD

CCNA & IPD

- Florida's CCNA statute generally requires a qualifications-based selection process for professional services.
- IPD contracts often involve non-traditional structures not explicitly contemplated by CCNA.

Key Considerations for Procurement

- Whether professional services are procured independently or as part of a broader integrated agreement.
- Compliance with qualifications-based selection remains essential.
- Need for a highly coordinated procurement

Public-Private Partnerships (P3s)

P3 Overview

- P3s involve collaboration between public agencies and private sector entities to deliver infrastructure or services.
- 255.065, F.S. governs P3s, allowing flexibility in procurement, financing, and operations.
- Tension can arise between the flexible nature of P3s and the rigid CCNA requirements for professional services.

Challenges in P3 Procurement

Divergence Between CCNA and P3 Statutes

- CCNA emphasizes qualifications-based selection; P3 statutes permit broader consideration of cost and innovation.
- Coordination between legal teams is critical to ensure procurement complies with both statutory schemes.
- Challenges include:
 - Sequencing procurement steps
 - Ensuring proper evaluation criteria
 - Managing unsolicited proposal risks

P3 Procurement and Unsolicited Proposals

Recent Amendments and Tension with CCNA

- Recent changes to Florida's P3 statutes encourage submission of unsolicited proposals
 - Allows for direct negotiation after evaluation of the proposal within the framework of the public interest factors.
- Agencies should still ensure that professional services for the P3 design-consultant follow CCNA's qualifications-based process for .

Proposed Legislation to Address Pitfalls

Issue	Proposed Fix
Unsolicited P3 proposals conflict with CCNA competition rule	No competitive procurement required for unsolicited P3s
Silent on fewer than 3 firms	Allows shortlist/rank with fewer than 3
Continuing-contract "or" ambiguity	Confirms 3rd category stands alone
Unclear how to solicit a P3	One-step developer selection allowed
Phased (Progressive) design-build not addressed	Expressly authorized
Sunshine Law conflict	Closed, recorded sessions codified *
P3 bonding unclear	GC posts the bonds
P3 records exemption lapsed 2021	Reinstated for unsolicited P3s *

QUESTIONS?

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