



MEMORANDUM

TO: Commissioners

FROM: Manuel Almira 

DATE: February 16, 2018

RE: CCNA Evaluation Process (Consultants Competitive Negotiations Act)

It is the understanding of Staff that the intention of the Board was to have multiple approved CCNA Engineering firms from which to assign projects.

The CCNA Evaluation Process that took place in January 2018 and was separated, by State Statute, into three categories:

- 1) Studies not to exceed \$200,000
- 2) Projects not to exceed \$2m
- 3) Work of a Specified Nature

This is explained in detail in the memo, attached, sent by Greg Picken dated 1/31/18 referencing the CCNA Process.

Please be reminded that CH2MHill, our current in-house Engineering Consultant, did not participate in the process as they are currently under contract with the Port as our authorized CCNA Engineering Consultant as follows:

- 1) Studies not to exceed \$50,000
- 2) Projects not to exceed \$1m
- 3) Work of a Specified Nature – as listed in the 2008 RFQ

These category limits represent the State Statute that was in effect when CH2MHill's contract was awarded in 2008.

During the selection process for the CCNA, the Port Qualification Review Committee, comprised of Jose Soler, Carl Baker and Ken Hern, provided the Board with a list of individual qualifying companies for the Board's consideration.

This Committee reviewed and evaluated the firms, but did not short-list or provide selections to the Board. At the January 2018 Board Meeting, Staff was directed to attempt to negotiate an agreement with firms in the following order:

Work of a Specified Nature

The selection to negotiate by the Board members had the following results:

- 1) Kimley-Horn & Associates
- 2) Bermello, Ajamil and Partners
- 3) E.C. Fennell, PA

We are negotiating with Kimley-Horn & Associates, however, subsequent to the selection process, the Board was informed by our Attorney that under current interpretation of the Statue Statutes, by Attorney General of Florida, all projects exceeding \$2m requires a separate RFQ. This is irrespective of any agreements the Port may have with any engineering firms. Again, this would also preempt the Board from awarding Projects of a Specified Nature exceeding \$2m to any firm without a competitive RFQ, regardless of their current agreement with the Port. It is important to note that Kimley-Horn & Associates is eligible for projects under \$2m and is of a Specified Nature in the 2017 RFQ.

Studies not to exceed \$200,000 (Two hundred thousand dollars)

The selection to negotiate by the Board had the following results:

- 1) E.C. Fennell, PA
- 2) Kimley-Horn & Associates
- 3) Bermello, Ajamil and Partners

Projects not to exceed \$2m (Two million dollars)

The selection to negotiate by the Board had the following results:

- 1) E. C. Fennell, PA
- 2) Bermello, Ajamil and Partners
- 3) Kimley-Horn & Associates

Hence, Staff is negotiating with both E.C. Fennell for the Studies Not to Exceed \$200,000 and Projects Not to Exceed \$2m, and Kimley-Horn & Associates for Work of a Specified Nature and under \$2m.

Additionally, please be reminded that under any circumstance the Board has the right to request an RFQ for any and all projects.

Attached for your information is a copy of the Commissioner's ranking by the three categories:

- 1) Studies not to exceed \$200,000 (Two hundred thousand dollars)
- 2) Projects not to exceed \$2m (Two million dollars)
- 3) Work of a Specified Nature

Assuming the Port is successful in reaching an agreement with E.C. Fennell, PA on the two categories where they qualified first, there still will remain an issue of the disparity in amounts/limitations that will be part of their agreements under current State Statutes and the amounts/limitations in our existing agreements with CH2MHill that were established under past State Statute limitations. I have attached a matrix to highlight this issue.

Notwithstanding, the foregoing counsel feels comfortable that the Board can award work orders to Kimley-Horn where, 1) the cost of construction does not exceed \$2m and, 2) the project was listed in the 2017 RFQ for Work of a Specified Nature.

Attachments - 3

Memorandum

TO: Commissioners, Port of Palm Beach District;
Manuel Almira, Executive Director

FROM: Gary, Dytrych & Ryan, P.A., Gary, Dytrych & Ryan, P.A.

DATED: January 31, 2018

RE: CCNA, AGO 2013-28

The Port having ranked contractors for three separate types of Continuing Contracts, it is appropriate to consider what work can or may be awarded under each of these Continuing Contracts, and how other work, requiring engineering services will be awarded going forward.

Based on an Attorney General's Opinion AGO 2013-28 (attached), other public entities¹ have and are modifying the way in which engineering work is awarded, even when Continuing Contracts are in place.

Section 1 CURRENT PORT PRACTICE

Historically, the Port has either "gone out" for engineers for an individual project (as in the case of Slip 3/Berth 17), or used issued a Work Order to the engineer who has the type of Continuing Contract referred to as a "Work of a Specified Nature".

Section 2 AGO OPINION 2013-28

Under the guidance of AGO 2013-28, ALL engineering projects where the construction cost of the project exceeds \$2,000,000, MUST go out under a separate CCNA RFQ, even when there is a Continuing Contract in place for Work of a Specified Nature.— yes, EVERY contract. A detailed discussion of AGO 2013-28 at Section 4, below.

Section 3 HOW THIS EFFECTS THE PORT

If the Port follows AGO 2013-28, the Port would need to add two-to-three months to the timeline for any new projects with a construction cost that exceeds \$2,000,000.

The Port currently has three Continuing Contracts with CH2MHILL, awarded in 2008, for engineering services for (1) projects where the construction cost is not over \$1,000,000², (2) studies, where the study cost is not over \$50,000³, and (3) Work of a Specified Nature. These contracts are written as non-exclusive and will continue unless terminated by either party.

¹ For example, Port Canaveral and Palm Beach County.

² Per the CCNA limit in effect in 2008.

³ Per the CCNA limit in effect in 2008

Assuming that the Port is able to negotiate Continuing Contracts with E.C. Fennel, the number 1 ranked engineering firm, for projects where the construction cost does not exceed \$2,000,000 and for studies that do not exceed \$200,000, and with Kimley-Horn for Work of a Specified Nature, the Port will have three CCNA Contractors, each with different contracts with different limits. Further, the description of the Work of a Specified Nature under the CH2MHILL contract than it is under the Kimley-Horn contract, because the scope of projects in focus in 2008 (when the CH2MHILL contract was executed) is different from the projects which were in focus in the 2017 CCNA RFQ.

Here are examples of how work orders could be awarded going forward:

Construction Projects:

1. If the construction cost of the project does not exceed \$2,000,000, the Port could issue the Work Order to E.C. Fennel; or
2. If the construction cost of the project does not exceed \$1,000,000⁴, the Port could issue a Work Order to CH2MHILL, or E.C. Fennel; or
3. The Port could elect to go out under a separate CCNA RFQ for the project, even though the Port has Continuing Contracts with E.C. Fennel and Ch2MHILL⁵.
4. BUT, the Port could not utilize the Continuing Contract for Work of a Specified Nature for the project regardless of construction cost.
5. If the construction cost of the project exceeds \$2,000,000, the Port must (per AGO 2013-28) go out for engineering services under a new project-specific CCNA RFQ for that single project.

Studies

1. Where the study cost does not exceed \$200,000, the Port could issue a Work Order to E.C. Fennel; or
2. Where the study cost does not exceed \$50,000, the Port could issue a Work Order to CH2MHILL or to E.C. Fennel; or
3. The Port could elect to go out under a separate CCNA RFQ for the study, even though the Port has Continuing Contracts with E.C. Fennel and Ch2MHILL.
4. BUT, the Port could not utilize the Continuing Contract for Work of a Specified Nature for the project regardless of construction cost.
5. If the study cost exceeds \$200,000, the Port must go out under new study-specific CCNA RFQ for that single study.

Work of a Specified Nature

Obviously, this begs the question, "What kinds of Work Orders can be issued under the Continuing Contract for Work of a Specified Nature". There is no case law as to what constitutes "Work of a Specified Nature" and no AG opinion offers any guidance or suggestions, but it is clear that the

4 The limit in effect when the CH2MHILL Continuing Contract for Studies was executed.

5 Our continuing contracts are drafted so that they are "non-exclusive".

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. Firms providing professional services under continuing contracts shall not be required to bid against one another.”

To accept the AG’s opinion, you must, essentially, read the above underlined language completely out of the statute⁶. That it inconsistent with what I would consider ordinary principles of statutory interpretation, and seems more like an attempt to fix, under the guise of interpretation, a legislative error. Ordinarily, I would expect the exercise “interpretation” of a statute to be undertaken in such a manner as to give it all meaning.

b) The AG’s opinion acknowledges that the statute is “ambiguous”

The attorney general’s opinion references the fact that the drafters of the House Staff Analysis believed that the statute was ambiguous, but the legislature passed it in the face of that Analysis. As the legislature had the House Staff Analysis before it at the time that the legislature voted, it could be argued with equal force that the legislature did not believe that the statute was ambiguous, and in fact intended a result different from what the attorney general determined – a result that was consistent with then current practice of many public entities – to handle most engineering work under a continuing contract for “work of a specified nature”.

c) No Case Law

The attorney general’s opinion cites no cases in support of AGO 2013-28, and there are no cases either way on the issue.

d) Legislative Intent

The AG’s opinion relies on the AG’s opinion of legislative intent. While that is a common method of interpreting a statute, here, in order to do this, you must completely ignore a lengthy and specific clause about Work of a Specified Nature.

“Legislative Intent” is a valid argument, but in this case it that argument goes against the actual language of the statute. For example, it could well have been the legislative intent to permit a class of Continuing Contracts that would permit the agency to issue contracts for smaller, under \$2,000,000 Projects, where there was no specific project in mind at the time of the issuance of the RFQ for the Continuing Contract, but still be able to have a Continuing Contract, for Projects

⁶ However, perhaps the answer may be in the definition of a “Project” in Section 287.055(2)(f).

“(f) “Project” means that fixed capital outlay study or planning activity described in the public notice of the state or a state agency under paragraph (3)(a). A project may include:

1. A grouping of minor construction, rehabilitation, or renovation activities.
2. A grouping of substantially similar construction, rehabilitation, or renovation activities.”

Item (f)(2), “a grouping of substantially similar construction, rehabilitation or renovation activities”, is precisely the kind of work described in the Port’s RFQ for Work of a Specified Nature. (See Endnotes).

AG is taking the position that, whatever work that might be done under such a Continuing Contract, it cannot be engineering for a project where the **Construction Cost exceeds \$2,000,000**, or for a **study that exceeds \$200,000**.

It should be noted that the Port's CCNA RFQ for Continuing Contract for Work of a Specified Nature **is fairly specific**, and could be defended as a CCNA-RFQ for the projects described therein (these are listed in the endnote to this memo, and see, for example "**MOB Laydown Area Design and Inspection Services and Bulkhead replacement planning and design**"), however, the Port may not want to be put in the position of "defending" a case where the opposition has an AGI supporting its position.

While there is no specific statutory **remedy for violating the CCNA**, a claim of violation could be used to halt a project. **Such a claim could come from many fronts.**

Section 4 DETAILED DISCUSSION OF AGO 2013-28

The CCNA requires that agencies go out for certain types of services, including engineering services, for all projects. However, it permits an agency to have "Continuing Contracts" in certain instances in order to avoid being in a constant state of RFQ-CCNA process. This takes up staff time, results in lobbying of Port Commissioners, and causes engineering firms to respond and prepare presentations. The language of the Statute (and I paraphrase, but the complete language appears in Section 4.1a) below) **permits Continuing Contracts in three circumstances: for (1) projects where the Construction Cost does not exceed \$2,000,000, (2) studies where the Study Cost is does not exceed \$200,000, 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. The Port's RFQ for this third type of Continuing Contract includes items 1-22 set forth in the Endnote at the end of this memo.

AGO 2013-28 states, in summary, that there is an ambiguity in the statute, and then proceeds to interpret it, rejecting the manner in which public entities have been interpreting "Work of a Specified Nature". In doing so, I believe that some leaps are made.

4.1 AGO Opinion 2013-28

The Attorney General Opinion takes the position that the third type of Continuing Contract – "Work of a Specified Nature" – is actually the result of mistake by the legislature, and that the agency must go out for engineers for every construction contract expected to be over \$2,000,000. Attorney General Opinions do not have the force of law, but are often well-reasoned and helpful in coming to a conclusion. >

There are several points about this particular AGO that have caused readers to take issue with it:

- a) **The AG's opinion gives no meaning to, and thereby renders meaningless, the underlined phrase:**

The language of the statute relative to Continuing Contracts provides:

"A "continuing contract" is a contract for professional services entered into in accordance with all the procedures of this act between an agency and a firm 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 \$2 million, for study activity if the fee for professional services for each individual study under the contract does not exceed \$200,000, or for work of a

where the Construction Cost exceeds \$2,000,000, where the Projects were sufficiently in focus to be able to "specify" them in the RFQ for Continuing Contracts for Work of a Specified Nature.

Further, if the legislature sought to simply put a monetary limit on Continuing Contracts, it could simply have said "The CCNA must be used every time the Project involves a construction contract where the cost exceeds \$2,000,000". But it did not do so.

The AG's opinion makes no effort to state or explain the purpose of having a Continuing Contract for Work of a Specified Nature. A rule of statutory interpretation is to attempt to give the entire statute meaning. By ignoring this entire class of Continuing Contract, the AGO chooses to ignore this rule.

If this statute is as bad as the AG suggests, the remedy would seem to need to come from the legislature, not shoehorning the remedy into an Attorney General's Opinion.

e) The Port's RFQ

The Port's form of Continuing Contract actually lists the work which is to be covered by the Continuing Contract, for example "Item 16 - MOB Laydown Area design and inspection services", "Item 17 - Bulkhead replacement planning and design", etc. and in that sense is specific and is in the nature of a stand-alone CCNA RFQ, whether or not it is would be a Continuing Contract. The items set forth in the RFQ for Work of a Specified Nature is set forth in an Endnote to this Memoⁱ.

Section 5 PORT OPTIONS

All of that said, awarding a Continuing Contract for "Work of a Specified Nature", as the Port has just done, in and of itself does not constitute any kind of violation. An issue would only arise if the Port issues a work order under it for engineering services if the construction cost of the Project for which the engineering services are sought is anticipated to exceed \$2,000,000 (or a study over \$200,000). At that time the Port can determine at that time whether to go out under a CCNA RFQ for the specific project. However, the trend and policies of other governmental agencies should be well-noted. The number of times that the Port undertakes projects where the construction cost exceeds \$2,000,000 is very limited, and should not, as a practical matter, represent a significant burden.

- ⁱ 1. Port master plan development, amendment, and implementation;
2. Conceptual and long range - planning;
3. Implementation of current and future projects in the current Capital Improvement Program;
4. Railroad expansion/improvements;
5. Site layout, parking, traffic circulation, signage, site lighting, storm water, infrastructure and utility design;
6. Paving projects;
7. Landscape design;
8. Multimodal/inter-modal transportation planning;
9. Security planning and design projects;
10. Fencing design;
11. Feasibility analysis;
12. Cost benefit analysis;
13. Regulatory permit applications and processing with the agencies;

CCNA Selection For Engineering Services - Work Of A Specified Nature

Commissioner Signature

	Bermello, Ajamil & Partners	E.C. Fennel Engineering Consultants	HDR Engineering	Kimley-Horn
Commissioner				
Ciklin	3	4	2	1
Enright	2	1	4	3
Richards	3	2	4	1
McArthur	2	4	3	1
Waldron	1	2	4	3
Score (Low Score Is Selecte)	11	13	17	9

Give a #1 To The Best Company
Give a #2 to the Second Best Company

Give a #3 To The Third Best Company
Give a #4 To The Fourth Best Company

CCNA Selection For Engineering Services

Study Activity: When the fee for such professional service does not exceed Two Hundred Thousand Dollars

Commissioner Signature

	Bermello, Ajamil & Partners		E.C. Fennel Engineering Consultants		HDR Engineering		Kimley-Horn	
Commissioner	SECOND SCORE					SECOND SCORE		
Ciklin	2	3	4		2	1	1	
Enright	1	2	1		3	2	4	
Richards	2	3	1		4	1	2	
McArthur	2	2	4		3	1	1	
Waldron	1	2	1		3	2	4	
Score	8	12	11		15	7	12	

(Low Score Is Selecte)

**CCNA Selection For Engineering Services -
Professional Services for Projects Under Two Million Dollars**

Commissioner Signature

		Bermello, Ajamil & Partners		E.C. Fennel Engineering Consultants		HDR Engineering		Kimley-Horn
Commissioner	SECOND SCORE		SECOND SCORE					
Ciklin	2	3	1	4	2	1		
Enright	2	2	1	1	4	3		
Richards	2	2	1	1	4	3		
McArthur	1	2	2	4	3	1		
Waldron	1	2	2	1	3	4		
Score	8	11	7	11	16	12		

(Low Score Is Selected)

**Give a #1 To The Best Company
Give a #2 to the Second Best Company**

**Give a #3 To The Third Best Company
Give a #4 To The Fourth Best Company**

PORT OF PALM BEACH DISTRICT

CCNA ENGINEERING FIRMS
STATUS UPON CONTRACT EXECUTIONS

	BOARDS ABILITY TO ASSIGN FIRM		
	<u>EC FENNEL</u>	<u>CH2MHILL*</u>	<u>KIMLEY-HORN *</u>
<i>STUDIES</i>			
STUDIES UP TO \$50,000	YES	YES	
STUDIES BETWEEN \$50,001 AND \$200,000	YES		
STUDIES OVER \$200,000 MUST BE THROUGH RFQ PER AGO POSITION			
<i>PROJECTS OF A SPECIFIED NATURE PER RFQ UNDER \$2,000,000</i>			
PROJECTS SPECIFIED ON 2008 RFQ	YES	YES	
PROJECTS SPECIFIED ON 2017 RFQ	YES		YES
PROJECTS SPECIFIED ON BOTH RFQ'S	YES	YES	
SPECIFIED PROJECTS OVER \$2,000,000 MUST BE THROUGH RFQ PER AGO POSITION			
<i>UNSPECIFIED PROJECTS</i>			
PROJECTS UNDER \$1,000,000	YES	YES	
PROJECTS \$1,000,001 TO \$2,000,000	YES		
PROJECTS OVER \$2,000,000 MUST BE THROUGH RFQ PER AGO POSITION			

* The study and Construction Cost limits were different in 2008 than in 2017. Also the Projects listed in the 2008 RFQ are slightly different than the 2017 RFQ, due to the passage of time.