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Design Build Legislative Review

PRESENTED BY:

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About the Speaker – Christopher Horton

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- Chris is a board certified construction lawyer that devotes his entire practice to representing developers, contractors and design professionals in litigation, transactional matters, and as project counsel. Chris has experience advising clients on a wide variety of design-build projects, including mixed-use high rise buildings, road and bridge construction, municipal buildings, water and wastewater projects, hotels, and retail projects.
- Chris received his juris doctorate, *magna cum laude*, from the University of Miami School of Law. Chris attended Jacksonville University where he was the starting quarterback for the Jacksonville University football team.

Summary:

1. Procurement
2. Bid Protests
3. Bonding/Liens
4. Payment
5. Subcontracting
6. Pending Legislation



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Design-Build Contracting Overview

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- Florida Administrative Code 60D-13
 - “Design-Build”
- Consultant’s Competitive Negotiations Act – section 287.055, Florida Statutes – defines key terms:
 - “Design-Build Firm”
 - “Design-Build Contract”

Design-Build Contracting Overview

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- Expressly permitted under section 255.20, Florida Statutes:
 - “Competitively Award”
- Additional statutes govern specific agencies.
 - FDOT – § 337.11
 - School Boards – § 1013.45
- Majority of laws discussed today apply to public projects.

Procurement:

1. Chapter 255, Fla. Stat.
2. Chapter 287, Fla. Stat.
3. Fla. Admin. Code 60D-13
4. Public-Private Partnerships



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Section 255.20, Florida Statutes

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- Section 255.20, Local bids and contracts for public construction work.
 - Applies to construction or improvement of any public building, structure, or other public construction work.
 - Public entity establishes bidding process.
 - Expressly allows design-build contracts

Exceptions to Section 255.20

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- Numerous exceptions to the applicability of Section 255.20:
 - Damage or destruction caused by a sudden unexpected turn of events (such as an act of God, riot, fire, etc.).
 - No responsive bids or proposals.
 - Repair or maintenance.
 - Sole source.

Section 287.055, Florida Statutes

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- Consultants' Competitive Negotiation Act (Section 287.055)
 - Not applicable to state or a state agency.
 - Is applicable to municipalities, political subdivisions, school districts, or school boards.
 - Is applicable to selection of design criteria professional.

Qualifications-Based Selection Process

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- Must be guaranteed maximum price and completion date.
- Must employ or retain licensed design professional.
- Public announcement and advertisement.
- Competitive selection.
 - Evaluation of statements of qualifications and performance data; and
 - Presentations.
- Competitive negotiation.

Competitive Proposal Selection Process

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- Design Criteria Package;
- Qualification and selection of three design-build firms;
- Criteria, procedures and standards for evaluation;
- Solicitation of competitive proposals; and
- Consultation with design professional and evaluation of submittals.

Design-Criteria Professional Selection Process

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- CCNA applies to the selection of a design-professional for preparation of the design-criteria package.
- Package must be prepared and sealed by a design criteria professional.
- Professional may not be selected for the design-build contract.

- Design Criteria Professional selected in accordance with section 287.055.
- Sets forth design criteria package requirements and minimum qualification requirements for design-build firms.
- Public announcement procedures: <http://fcn.state.fl.us/dms/dbc/oppor1.html>
- Competitive Selection.
- Competitive Proposals.
- Competitive Negotiation.

Progressive Design Build

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- Section 255.20 permits various different project delivery methods, including construction management, "*design-build*", continuation and "*any other contract arrangement with a private sector contractor permitted by any applicable municipal or county ordinance, by district resolution, or by state law.*"
- "Design-build contract" is a single contract with a design-build firm for the design and construction of a public construction project.
- "...separately negotiating each phase of a multi-phase project that has been awarded to a construction manager at risk or program manager at risk does not comply with the plain language or intent of section 287.055(9)(c), Florida Statutes." Fla. Att'y Gen. Op. 2007-12 (2007)

Public-Private Partnerships

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- Section 255.065, Florida Statutes authorizes P3s for any public project.
- Solicited and unsolicited proposals.
- Evaluation and award of unsolicited proposals.
- Permits P3s for water, wastewater, and surface water management facilities and related infrastructure.

Additional Agency Specific Statutes

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- Section 337.11, Florida Statutes – FDOT.
- Section 1013.45 – School boards, collegiate system, and Boards of Trustees.

Bid Protests:

Section 120.57, Fla. Stat.



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- Bid Rescission or Reformation:
 - No unilateral right to withdraw bid due to error.
 - Ordinarily, no equitable relief to rescind bid.
 - Case law exceptions – School Board v. Clutter Construction
 - Never a right to reform bid.

- The Administrative Procedure Act applies to most bid protests.
- Time requirements:
 - 72-hours – notice of protest;
 - 10-days – formal written protest.
- Sealed bids, proposals or replies ordinarily exempt from disclosure.



Bonds and Liens:

- 1. Bid Bonds**
- 2. Mandatory Payment and Performance Bonds**
- 3. Private Projects**



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- Section 255.051
 - Applies to bids with state, county, municipality, or department or agency of the state.
 - May require good faith deposit with bid.
 - May be in the form of a bond.
- FDOT
 - Requires a 5% bid bond for bids over \$150,000.
- County Water and Sewer System Improvements
 - Requires a bid bond in the amount of 2.5 percent of the amount of the bid.

Payment and Performance Bonds

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- Section 255.05
 - Requires payment and performance bond for public projects in excess of \$100,000.
 - Amount of bond equal to contract price.
 - Cost of design may be excluded.
- Section 337.11
 - FDOT requires the bond to cover up to 25 percent of the original contract amount.

Payment and Performance Bonds

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- The bond must state on its front page:
 - The name, principal business address, and phone number of the contractor (design-builder), the surety, the owner, and, if different from the owner, the contracting public entity.
 - The contract number assigned by the contracting public entity.
 - The bond number assigned by the surety.
 - A description of the project, such as a legal description or the street address of the property and a general description of the improvement.

Payment and Performance Bonds

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- Perfecting a claim under a 255.05 payment bond:
 - Notice to Contractor (design-builder);
 - Notice of Nonpayment;
 - Time limitations.

- Private Payment Bonds
 - Section 713.23 – Payment Bonds
 - Section 713.245 – Conditional Payment Bonds
 - THIS BOND ONLY COVERS CLAIMS OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS, AND LABORERS TO THE EXTENT THE CONTRACTOR HAS BEEN PAID FOR THE LABOR, SERVICES, OR MATERIALS PROVIDED BY SUCH PERSONS. THIS BOND DOES NOT PRECLUDE YOU FROM SERVING A NOTICE TO OWNER OR FILING A CLAIM OF LIEN ON THIS PROJECT.
 - Section 713.24 – Transfer Lien Bond

- Lien Law:
 - Chapter 713, Florida Statutes
 - Provides design-builders with lien rights.
 - Professional services are lienable, regardless of whether such real property is actually improved.

Payment Terms



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- Section 218.70 to 218.80 – Local Prompt Payment Laws
 - Payment within 10-days.
- Section 255.0705 to 255.078 – Florida's Prompt Payment Laws
 - Payment within 7-days.
- Section 715.12 - Construction Contract Prompt Payment Law
 - Payment within 14-days.

- Florida recognizes:
 - Pay if paid clauses;
 - No damages for delay clauses; and
 - Liquidated damages clauses.
- Retainage
 - Statutory amount permitted is now 5% for public projects.
 - For private projects, still a right to withhold 10%.

Subcontracting & MBE/DBE/WBE



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- Section 255.0515
 - Public entities may require bidders to list the subcontractors.
 - A bidder on state contracts may not remove or replace subcontractors once the list has been made public, except after demonstrating good cause to do so.

- Section 255.04
 - All state and local officials are required, in erecting or constructing any public administrative or institutional building, to give preference to Florida residents in the purchase of materials and in the letting of contracts for construction.

- Section 255.101-255.102
 - Design-builders for public works are to engage in a “good faith effort” to comply with minority participation goals for competitively awarded building and construction contracts.
 - Rules for determining such a “good faith effort” are established by the Office of Supplier Diversity, as well as individual agencies and governmental entities.

Pending Legislation



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- Approved by the Governor on June 29, 2021, effective July 1, 2021.
- Amends sections 255.0991 and 255.0992.
- Ensures that contractors licensed to do work in the state can compete on work statewide and that they cannot be subject to overly specific or restrictive pre-bid mandates relating to hiring, wage and benefit, training, and geographic location.

- Proposed overhaul of Chapter 558
- The proposed language would have: required owners to sign off on the claim of defect under oath, to attest to their personal knowledge of the existence of the defect, to exhaust any applicable warranty options, would amend the definition of material violation, and would require subsequent proof that any financial awards secured were utilized to repair the alleged defect.

Federal Legislation

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- Bipartisan Infrastructure Bill
 - Transportation - \$312 Billion
 - Roads, Bridges, Major Projects - \$109 Billion
 - Airports - \$25 Billion
 - Ports & Waterways - \$16 Billion
 - Water Infrastructure - \$55 Billion
 - Public Transit and Passenger/Freight Rail - \$115 Billion
 - EV Infrastructure - \$15 Billion

- PRO Act
 - Two most contentious parts of the PRO Act are:
 - ABC test that would be applied to independent contractors.
 - Abolishment of right-to-work laws in various states such as Florida.

Future of Design-Build in Florida

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- What do you want to see?



Questions?

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