# CITY OF MIAMI
# CITY ATTORNEY'S OFFICE
# MEMORANDUM

**TO:** Dr. Victor I. Igwe, Auditor General

**FROM:** Alejandro Vilarello, City Attorney

**DATE:** March 31, 2004

**RE:** **Request for a Legal Opinion regarding §287.055, Fla. Stat. (A-0400167) MIA-0400004**

Pursuant to your memorandum of February 13, 2004, a copy of which is attached, we offer the following in response to your request for a legal opinion on substantially the following issues of local government law:

1. ARE CERTAIN PROCUREMENTS OF FIVE PROFESSIONAL SERVICES, SPECIFIED IN YOUR MEMORANDUM AND LISTED BELOW, BEING DONE IN ACCORDANCE WITH §287.055, FLORIDA STATUTES, THE CONSULTANT'S COMPETITIVE NEGOTIATION ACT ("CCNA")?

2. IF THE ANSWER TO THE FIRST QUESTION IS IN THE AFFIRMATIVE, WHAT ARE THE SPECIFIC SECTIONS OF FLORIDA STATUTES OR LAW SUPPORTING THEIR COMPLIANCE?

3. DOES PIGGYBACKING ON ANOTHER GOVERNMENT'S CONTRACT LEGALLY SUFFICE FOR CCNA PROCUREMENTS, SUCH AS THE FIVE PROFESSIONAL SERVICE PROCUREMENTS YOU IDENTIFIED?

We will answer your questions in the order they are presented above. On the last page of your memorandum, you state the following:

> "The request for [a] legal opinion seeks to determine compliance with CCNA, specifically, the requirement to publicly announce and hold discussions with no less than the three firms in accordance with Sections 287.055(3)(a), (4)(a), Florida Statutes."

As to your first question, pursuant to Section *287.055(2)(a), Fla. Stat.*, CCNA is a state law that encompasses the employment of architectural, professional engineering; landscape, architecture, and registered surveying and mapping services. CCNA applies to local governments. Under CCNA, the "agency" must competitively select and negotiate with the most qualified firm to provide these professional services for a project. "Agency" is defined by

CCNA to mean the state, a state agency, municipality or political subdivision, a school district or a school board, §*287.055(2)(b), F.S.* As discussed below, CCNA expressly allows "continuing contracts," which are defined in *287.055(2)(g), Fla. Stat.*

The first purchase order that you inquire about Purchase Order P#230007, in the amount of $159,520.00, was piggybacked in good faith from Florida Department Of Transportation (FDOT) contract prior to this ruling and in accordance with procedures set forth in §*18-111, City Code.*

The premise of this piggyback, as in several others, was the City's Home Rule Powers under *Article VIII, 2(b), Fla. Const. (1968)* to exercise all governmental, corporate and proprietary powers to enable it to conduct municipal government functions, and exercise any power for municipal purposes, except as otherwise provided by law. The Municipal Home Rule Powers Act has implemented this constitutional concept, §*166.011, et. seq., Fla. Stat.* Courts today analyze municipal legislation as being valid in the absence of an inconsistent state general law, Charter County law, or pre-emption by one of those two types of laws. See, e.g., State v. City of Sunrise, *354 So.2d 1206 (Fla. 1978)*; Lake Worth Utilities v. City of Lake Worth, *468 So.2d 215 (Fla. 1985).*

The Attorney General, in opining about certain aspects of CCNA, has seemingly recognized home rule concepts in this context. In *AGO 93-56* the Attorney General opined that CCNA did not provide criteria for negotiating a continuing contract, and that a municipality may develop its own procedures for evaluating such a contract. Thus, if a city determined it was appropriate to develop certain criteria for determining which firm under a continuing contract would receive certain projects, it could do so by ordinance, resolution, or regulation. *AGO 93-56* (August 23, 1993). Similarly, in *AGO 2001-65*, the Attorney General opined that a school board could adopt a local (home town) preference for awarding contracts under CCNA as long as these local preference rules or regulations did not conflict with state statute or state rules prescribing the competitive bidding procedures. *AGO 2001-65* (September 14, 2001).

The foregoing points out that the City's use of co-operative or piggyback authority under §18-111 of the Purchasing Ordinance of the City Code is arguably an extension of our municipal home rule powers in this context. However, we think, following further research and deliberation, that piggybacking should not be used in securing services under CCNA in the absence of a public emergency. This will be more fully discussed in the answer to your third question that asks, in general, about CCNA and piggyback contracts.

The second purchase order you inquire about Purchase Order P#040033, in the amount of $23,350 for surveying services that was procured in accordance with the quote system for small purchases under the applicable provisions of the City Purchasing Ordinance. *See §18-88 of the City Code.* Similarly, the CCNA threshold for planning activity expenditure such as surveying is $25,000. *See 287.017(1)(b), 287.055(3)(a), Fla. Stat.* We think this purchase was accomplished in accordance with applicable local and state procurement procedures.

You next inquire about three purchases that were acquired under *City Resolution 02-144* adopted on February 4, 2002, to wit:

(i) Purchase Order P#230490 for $75,000 in Landscape architecture at Little Haiti Park;
(ii) Purchase Order P#233711 for $378,407 in Engineering Services for Bicentennial Park;
(iii) Purchase Order P# 232790 for $43,000 in Engineering Services for Bicentennial Park.

*Resolution 02-442* was an award of various professional service contracts under a former section, now repealed, of the City Code that related to "Category B" public works projects. The "Category B" public works projects were defined in former *§18-52 of the City Code* since repealed. The City, in good faith, intended to comply with CCNA in employing this process. By virtue of *MIA 02-220*, issued on August 23, 2002, the City now has these "Category B" projects awarded by the City Commission.

The City enacted a new Purchasing Ordinance, adopted by the City Commission on August 22, 2002, which repealed the former *Section 18-52 of the Code.*[1] The current Purchasing Ordinance, as amended, in §18-87, incorporates by reference the CCNA provisions and provides in pertinent part: "The Chief Procurement Officer shall publicly announce, as required by the Consultant's Competitive Negotiation Act, each occasion when Professional Services are required. The public announcement shall be made in a uniform and consistent manner."[2] It is our understanding that the City now follows these express provisions of CCNA. These provisions were **not** in the City Code when *Res. No. 02-144* was passed. As explained above in this paragraph, the new procurement Ordinance took effect in August 22, 2002. However, Res. No. 02-144 was passed on February 14, 2002, which preceded the new Ordinance.

Lastly, please note that the Purchasing Division advised this office that the contracts awarded by virtue of *Res. No. 02-144* were awarded as "continuing contracts." Continuing contracts are defined by CCNA to mean: "[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 construction costs do not exceed $1 million, for study activity when the fee for such professional service does not exceed $50,000, or for work of a specified nature pursuant to a contract with no time limitation except that the contract must include a termination clause." *287.055(2) (g), Fla. Stat.*

The Attorney General, in interpreting continuing contracts, has distinguished the construction costs category from the study activity category and the work of a specified nature category as outlined in the contract category as being alternatives. That is, a firm may have one of these types of continuing contracts but not several types concurrently. A City can only award one of these kinds of continuing contracts to one firm at one given time. In *AGO 96-52* (July 10,

[1] Ordinance No. 12271, codified as Chapter 18, Article III, City of Miami Code.
[2] 18-87( e), City Code.

1996). The Attorney General further states that nothing in CCNA purported to regulate the terms of a continuing contract, that the continuing contract provisions represent an exception to the general competitive bidding procedures of the Act, and should be read narrowly and sparingly to avoid the appearance of circumventing the statute. *Id.* Cf. City of Lynn Haven v. Bay County Council of Registered Architects, Inc., *528 So. 2d 1244 (Fla. 1ST DCA 1988)* (holding that City's local procedure providing for its general contractor to select an architect for the project was voided as circumventing the requirements of CCNA). In *Lynn Haven* the City adopted a procedure, which effectively allowed the City's contractor to select the architectural firm to be used in the City project. In *AGO 93-56*, the Attorney General opined that if a municipality determined that it was appropriate to develop certain criterion in its selections of firms to perform a continuing contract with the city, it may do so, but should apply such criteria uniformly to all continuing contracts the city enters. The AGO in question further noted that nothing in CCNA purports to regulate the terms of a continuing contract nor does the statute address instances where a city imposes additional criteria on continuing contracts to insure impartiality when a choice must be made among them. *AGO 93-56 (August 23, 1993).*

In light of the foregoing authorities, we conclude that the three procurements you inquired about are continuing contracts awarded under criteria the City established for "Category B" projects in former §*18-52.3 of the City Code*, in *Resolution No. 02-144*, and in the solicitation/contract documents for these providers. Pursuant to our discussion with the Purchasing Division, these three purchase orders appear to be eligible continuing contracts under one of the categories discussed above and set forth in §*287.055(2)(g), Fla. Stat.* and is also supported by the legal opinions interpreting continuing contracts as set forth above.

Your final inquiry questions whether piggybacking off another public agency or government's contract is legally sufficient, and seeks specific common law that supports this.

As discussed at the outset of this opinion the legal theory for piggybacking in this instance is the fact that it is not expressly prohibited by CCNA and should be within the City's Home Rule Powers. For example, *166.021(4), Fla. Stat.*, further provides that:

> "The provisions of this section shall be so construed as to secure for municipalities the broad exercise of Home Rule Powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise other than those so expressly prohibited."[3] Cf. City of Miami Beach v. Forte Towers, Inc., *305 So.2d 764 (Fla.1974).* (the court discusses the significance of the Home Rule Powers Act on the city's ability to legislate concerning the subject of rent control laws).

The Attorney General, as noted earlier in this opinion, has determined local governments are free to legislate in certain CCNA related areas. *AGO 2002-03*, supra.; *AGO 96-52*, supra.

[3] Ch. 73-129, Laws of Florida, codified as 166.021

The benefits of piggybacking are that one public agency is able to take advantage of the prices, terms and conditions of a competitively solicited contract from another public agency. The piggybacking off the contract for any good or service from the bid of another public agency or government is allowed by §*18-111* of the City Code entitled "Contracts of other Governmental Entities" if certain findings are made. Please note that this provision provides, in part, that:

> "Notwithstanding all other provisions of this article, in the purchase of necessary goods and/or services the city may, in lieu of other city competitive bidding procedures, accept a competitive bid which has been secured by or on behalf of any federal, state, county or municipal government or from any other governmental entity, state funded institutions and not-for-profit organizations, subject to a determination by the chief procurement officer that the contract was subject to that the contract was entered into pursuant to a competitive process in compliance with city laws....." *See* §18-111, City Code (emphasis supplied).

There is a State Statute that allows certain piggybacks off state contracts (§*287.056, Fla. Stat.*). The statute applies to commodities and certain non-CCNA contractual services available on state term contracts.

The CCNA is a comprehensive statutory scheme for retaining the specified professional services under it. *See*, gen., *AGO 074-206 (July 18, 1974)*. There is no piggyback provisions in CCNA and the general rule in statutory construction is that we cannot insert a word, phrase or concept (e.g. piggyback) that, by all appearances, was not in the mind of the legislature when the statute was enacted. *See*, Devin v City of Hollywood, *35 So2d 1022 (Fla. 4th DCA 1976)*. A city may not, by legislation, prohibit what a state law allows. Acme Specialty Corp. v City of Miami, *292 So2d 379 (Fla. 3rd DCA 1974)*. The reverse is also true. *Id.* The statute is silent on piggybacks.

It is a cardinal rule of statutory construction that the plain meaning of the words used is the primary consideration of statutory construction, in order to give effect to the natural meaning of the words used. *See*, gen., James Talcott, Inc.v. Bank of Miami Beach, *143 So.2d 657 (Fla. 3RD DCA 1962)*; Brooks v. Anastasia Mosquito Control Dist., *148 So.2d 64 (Fla. 1ST DCA 1963)*. Applying this rule of law to §18-111, the governing provision of the City Code, would indicate that piggybacks are allowed for all goods and services of whatever nature that are solicited by a competitive bid, or similar solicitation, that the piggyback exemption to the regular process would apply. It does not exclude CCNA contracts so we cannot read that exclusion.

A bid can be distinguished from a CCNA Act, RFP or RLI, which is the type of instrument used to solicit a CCNA professional service. CCNA solicitations are different than other RFPs or RLIs because they have special statutory criteria. In *CEO 81-28*, the Commission on ethics opined that, in a conflict of interest context, a public official could not take advantage of entering into a CCNA contract with his agency because the sealed competitive bidding

exemption set forth in §*112.313(12) (b), Fla. Stat.* only applies to sealed bids and not to CCNA type solicitations. *See,* Florida Commission on Ethics Opinion *CEO 81-28* (May 14, 1981).

A bid is defined as a selection driven by objective criteria, where price is a key or primary factor. Section 18-85(a) of the City Code dealing with Competitive Sealed Bidding provides, in part, that it is to be employed where there are detailed plans and specifications, and it is to be used when the award will be made to the lowest responsive and responsible bidder on the basis of price. Cf. Intercontinental Properties, Inc. v. Florida Dept. of H.R.S., *606 So.2d 380 (Fla. 3rD DCA 1992)* (strong public policy against disqualifying low bidder).

Conversely, a CCNA solicitation is one driven by express and different statutory factors which apply to the acquisition of professional architectural, engineering, landscape architectural, or surveying and mapping services See, *287.055, Fla. Stat.* The factors for selection include adequacy of personnel; whether a firm is a certified MBE; past performance; willingness to meet time and budget requirements; location; recent, current and projected workloads; volume of previous work awarded so as to equitably distribute work to qualified firms. See, *287.055(4)(b), Fla. Stat.*

A CCNA procurement, RFQ/RLI has a different selection criteria than price. Section 287.055(4)(b), *Fla. Stat.* CCNA disallows a discussion of price until contract negotiations with selected firms are to occur. The Act, in part, provides:

> "The agency may request, accept, and consider proposals for the compensation to be paid under the contract only during competitive negotiations under subsection (5)." *Id.*

This ruling applies on a prospective basis following this extensive research and quiet deliberation. Be advised that no direct Florida case law or Advisory Attorney General Opinions, dealing with CCNA and piggybacks, was found. There is no primary state law authority on point and CCNA is a state law. Please be advised that neither of the two largest local public agencies-Broward or Miami-Dade County is using piggybacking awards in a CCNA context. Thus, no local practice, course of business or custom by any other local public agency to use piggybacking in this CCNA context could be found. Piggybacking may be used to procure goods and services but CCNA makes no provision for this process.

Since procurement laws are remedial in nature, they may be broadly construed as giving effect to their character, deviations therefrom are narrowly construed to avoid the possibility of these laws being circumvented. *See,* Duboise Const. Co. v. City of South Miami, *108 Fla. 362, 146 So. 833 (1933).*

In conclusion, unless and until legislatively or judicially determined otherwise, our opinion is that the piggyback process under *§18-111,* of the City Code should not be used for CCNA professional services unless a valid public emergency has been declared to exist, which removes the City from the provisions of CCNA. This opinion is strictly limited to professional services subject to CCNA.

Please call this office if you have any questions, comments or concerns about this decision.

Prepared by:

Rafael Suarez-Rivas

Rafael Suarez-Rivas, Assistant City Attorney

Reviewed by:

Rafael O. Diaz, Assistant City Attorney

c: Joe Arriola, City Manager
Alicia Cuervo Schreiber, Chief of Neighborhood Services
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**CITY OF MIAMI, FLORIDA**

**INTER-OFFICE MEMORANDUM**

TO: Alejandro Vilarello
City Attorney

DATE: February 13, 2004

SUBJECT: Request for Legal Opinion on Florida Statute 287.055

FROM: Victor Igwe
Auditor General

REFERENCES: Bond Issuance

ENCLOSURES:

The Homeland Security, Neighborhood Improvements, Capital Projects and Infrastructure Improvements Bond Issuance (Bond Issuance) of $255 million, limited to ad valorem tax bond, was approved by the voters of the City of Miami on November 13, 2001. The applicable Sections of the Florida Statutes, City Charter, Ordinance No. 12137, and Resolution No. 02-797, impose requirements and restrictions on the use of proceeds and expenditure of funds from the Bond monies. As of December 31, 2003, approximately $155 million of the total $255 million approved has been issued, and $7,858,426 has been expended.

This memorandum serves as a request for a legal opinion regarding professional services procured by the City under Section 287.055, Florida Statutes (Consultants' Competitive Negotiation Act - CCNA). During our review of expenditures funded with the Bond monies, specifically, CIP Project 331412 (Little Haiti Park) and CIP Project 331418 (Bicentennial Park), several procurements of professional services came to our attention that appear not to be in compliance with Section 287.055, Florida Statutes, as follows:

Section 287.055, (3)(a), Florida Statutes, reads:

> "Each agency shall publicly announce, in a uniform and consistent manner, each occasion when professional services must be purchased for a

> project the basic construction cost of which is estimated by the agency to exceed the threshold amount provided in s. 287.017 for CATEGORY FIVE or for a planning or study activity when the fee for professional services exceeds the threshold amount provided in s. 287.017 for CATEGORY TWO, except in cases of valid public emergencies certified by the agency head. The public notice must include a general description of the project and must indicate how interested consultants may apply for consideration."

Section 287.055, (4)(a), Florida Statutes, reads:

> "For each proposed project, the agency shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with, and may require public presentations by, no fewer than three firms regarding their qualifications, approach to the project, and ability to furnish the required services."

- Purchase order number P230007, dated October 3, 2002, for CIP Project 331412 (Little Haiti Park), in the amount of $159,200, for "engineering services" provided by Post, Buckley, Schuh & Jernigan, was procured via piggybacking on FDOT contract number 25072714201. There was no public announcement by the City as required in Section 287.055, (3)(a), Florida Statutes, as noted above, nor was there any process of discussions with no fewer than three firms, as required in Section 287.055, (4)(a), Florida Statutes, as stated above. Therefore, this appears not to be in compliance with CCNA.
- Purchase order number P040033, dated October 6, 2003, in the amount of $23,350, for "surveying" provided by Leiter, Perez & Associates, was procured pursuant to a quote for services in accordance with the City's Procurement Code for services under $25,000. However, these services were for CIP Project number 331412 (Little Haiti Park), which has a total estimated project cost of $25 million and is subject to CCNA. Therefore, it appears that this procurement was not publicly noticed and there were no discussions held with no fewer than three firms in accordance with Section 287.055(3)(a)(4)(a), Florida Statutes, despite the contract amount of less than $25,000.
- The following three projects were procured through Resolution number 02-144, dated February 14, 2002, which authorized the Manager to negotiate with the various firms listed by specialty for "Category B" public works projects:

| CIP Project | PO # | PO Date | Contractor/Vendor | Service Provided | Amount | Department |
|---|---|---|---|---|---|---|
| CIP 331412 Little Haiti Park | P230490 | 10/29/02 | Curtis and Rogers | Landscape Architecture | $ 75,000 | Planning & Zoning |
| CIP 331418 Bicentennial Park | P233711 | 05/20/03 | Edwards & Kelcey | Engineer Services | $378,407 | Public Works/CIP |
| CIP 331418 Bicentennial Park | P232790 | 03/19/03 | Edwards & Kelcey | Engineer Services | $ 43,000 | Public Works/CIP |

Pursuant to your Legal Opinion number MIA-02-0020, dated August 23, 2002, which reads:

> "Resolution No. 02-144, however, does not identify by name or reference any specific project. In regard to the selection of architects/engineers, the City of Miami Code adopts by reference the applicable state law: the Consultants' Competitive Negotiation Act, ("CCNA), Section 287.055, Fla. Stat., in the selection of architects/engineers. CNNA refers to a project as a defined term, and requires a public announcement and qualification procedures for each project."

Therefore, it appears that the above three items were not procured in accordance with CCNA because they were not publicly noticed and discussed in terms of the specific project.

Inasmuch as the material portion of the expenditures associated with the Bond Issuance have not been incurred, it is important to ensure that bond proceeds are disbursed in compliance with all requirements and/or restrictions. Therefore, I formally request that you provide a legal opinion as it relates to the use of bond proceeds for various procurements of goods/services. Please provide legal opinion on the following types of purchases relative to CCNA:

- Are the above five procurements in accordance with CCNA?
- If you are of the opinion that any of the above were, in fact, in compliance with CCNA, what is the specific Section of the Florida Statutes supporting its compliance?

- Does piggybacking on another government's contract legally suffice for CCNA procurements such as is the first item above? If yes, what is the specific statutory or common law that supports this?

This request for legal opinion seeks to determine compliance with CCNA, specifically, the requirement to publicly announce and hold discussions with no fewer than three firms in accordance with Section 287.055, (3)(a)(4)(a), Florida Statutes. This request does not seek clarification about which items need to be brought forward to the Commission, which is a separate issue. If you should have any comments or questions, please call me at ext. 2044. Please assign and advise.

C: Linda Haskins, Deputy Chief Administrator/Chief Financial Officer
Alicia Cuervo Schreiber, Chief of Operations
Glenn Marcos, Purchasing Director
Stephanie Grindell, Public Works Director
Keith Carswell, Economic Development Director
Ana Gelabert – Sanchez, Planning and Zoning Director
Jorge Cano, CIP Director
Pilar Saenz, CIP Administrator
Jon Goodman, Deputy Auditor General