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Client Alert: Florida Legislature Eases Procurement and Payment Process for Construction Professionals on State and Local Public Projects

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During the 2020 session, the Florida Legislature enacted a number of provisions intended to ease the financial burden on construction industry professionals who perform state and local public works projects. Effective July 1, 2020, the threshold for state and local procurement of “continuing contracts” under the Consultants Competitive Negotiation Act, or “CCNA” is increased from \$2 million to \$4 million for project-related “professional,” “construction management,” or “project management services,” and from \$200,000 to \$500,000 for professional services associated with “study activities.”¹ Separately, effective October 1, 2020, the allowable retainage on public construction projects is changed from 10 percent to a flat rate of five percent for the duration of the project.

The CCNA was first enacted by the Florida Legislature in 1973, and requires that state agencies, counties, municipalities, school districts, and special districts engage in a qualifications-based selection process for procurement of professional services. Under the CCNA, “professional services” include architectural, engineering, landscape architectural, surveying, and mapping services. The CCNA also applies to state and local procurement of construction management and project management services. Governmental entities are required to follow CCNA procurement procedures for “continuing contracts” exceeding a certain dollar threshold. A continuing contract is one in which a professional, construction manager, or project manager performs services on multiple projects, or multiple study activities, under a master contract or agreement. The Florida Legislature initially established thresholds for “continuing contracts” in 1988, and increased these thresholds by statutory amendment in 2002, 2009, and most recently, during the 2020 legislative session.² Governmental entities and construction professionals should benefit from the 2020 increase, in the form of reduced costs associated with procurement preparation and review.

In a separate but equally as beneficial move, the Florida Legislature has amended Florida Statute § 255.078, to reduce the maximum allowable retainage from 10 percent of the costs to five percent throughout the term

of the contract, a move that will most certainly benefit contractors and subcontractors alike. Under current law, project owners are permitted to withhold from payment to contractors up to 10 percent per monthly payment until such time as the project has reached 50 percent completion, at which time the retainage may be reduced from 10 percent to five percent. Correspondingly, after 50 percent completion of the project, contractors may elect to withhold retainage from payments to its subcontractors at a rate higher than five percent.

The Florida Legislature's unanimous move to amend the allowable retainage on public construction projects will most certainly provide welcome relief for contractors and vendors. In particular, by reducing the retainage from 10 percent to five percent for the duration of the project, contractors (and those providing labor, service, and materials under the contractors) will receive more of their funds during the first half of the project, which should help to ease cash flow concerns typical of lengthier construction projects, and especially so, for smaller contractors. Relatedly, the Florida Legislature's decision to reduce the allowable retainage on public construction projects will likely serve to encourage smaller contractors to participate in such projects.

¹ Fla. Stat. § 287.055(2)(g) (2020); Fla. Stat. § 255.103 (2020); Fla. Stat. § 255.104(4) (2020).

² In 2020, the Legislature considered, but ultimately rejected a bill provision which would have allowed for the "continuing contracts" threshold to be adjusted annually via rulemaking by the Department of Management Services, based upon the Engineering News Record's Construction Cost Index. As such, future increases to the "continuing contracts" threshold will require further statutory amendment.