THE CONSTRUCTION LAW BRIEFING PAPER

FABYANSKE, WESTRA, HART & THOMSON, P.A.
800 LaSalle Avenue, Suite 1900, Minneapolis, MN 55402 612-338-0115

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NEW MINNESOTA STATUTES ALLOW DESIGN-BUILD, CM AT RISK AND PURCHASE ORDER CONTRACTING FOR PUBLIC PROJECTS

by Dean B. Thomson*

INTRODUCTION

It is a brave new world in public procurement. For decades, public projects have been awarded on the basis of the lowest responsible bid, but that is now changing. Various industry groups and public owners have long lobbied for laws that would allow public agencies to procure construction and design services in the same manner used by many private companies. This year a coalition of industry groups and public agencies including MnAGC, MnAIA, DBIA, the Department of Administration ("DOA"), Minnesota State Colleges and Universities ("MnSCU") and the University of Minnesota ("U of M") changed the rules of public procurement in Minnesota. They successfully lobbied for legislation allowing the DOA, UofM and MnSCU to use design-build, construction management at risk ("CM at Risk") and a new creation called Purchase Order Contracting as delivery systems for public projects. The basis for award under these new systems is not low bid, but "best value." The rules of public procurement are changing and this month's Briefing Paper will provide you a road map through the new statutory landscape.

THE TRADITIONAL METHOD

Before the recent amendments, the DOA and MnSCU were required to award contracts to the lowest responsible bidder. Although these agencies had some discretion in how they defined and determined whether a contractor was "responsible," the typical result was that contracts were awarded to the contractor submitting the lowest bid, as long as the bidder could provide statutorily required performance and payment bonds. The U of M claimed exemption from public bidding laws but nevertheless often voluntarily chose to follow them. All these institutions could choose to hire construction managers without competitive bidding as long as the construction managers were "agents" and not "at risk" for the project's price, quality, or schedule. If the construction managers were "at risk" for these items, they were essentially general

* Mr. Thomson is a shareholder in the firm and a Fellow in the American College of Construction Lawyers. He concentrates his practice in construction, insurance, procurement, and civil litigation and can be reached at (612) 359-7624 or dthomson@fwhtlaw.com.

contractors who did not self-perform any work. Therefore, CM at Risk contracts had to be competitively bid.

Preventing abuses in the award of public projects was one of the main purposes of the traditional low bid method of procurement. As the Minnesota Supreme Court said over 50 years ago, the purpose of public bidding was to divest public officials of discretion to avoid even the appearance of "fraud, favoritism, and undue influence." *Griswold v. Ramsey County*, 65 N.W.2d 647, 652 (Minn. 1954).

The three new methods of procurement recently enacted by the legislature infuse discretion back into the process. The legislature determined that new delivery systems such as design-build provided better value in certain circumstances than the traditional method of fully designing construction documents and then bidding them. Since the design is not fully developed and cannot yet be fully priced when the design-builder is selected, factors other than price have to be used to select the successful proposer. As a result, "best value" to the public is no longer assumed to be the low bid.

The challenge in drafting the new legislation was to satisfy the agencies' demand for design-build and CM at Risk procurement while protecting against some of the potential problems inherent in expanding discretion in the award of public contracts.

A. DESIGN BUILD

There are two types of design-build procurement allowed by the new statute. The first is Qualifications Based Selection ("QBS") and the second is Design and Price Based Selection ("DPBS"). Before the public agency can use either, the head of the agency has to make a written determination, including specific findings, that the desired design-build method serves the public interest. This requirement is designed to ensure that the new procurement methods are not used on projects for which they may not be best suited. To further ensure that the new methods do not immediately displace the old, they can be used for only 5% of the number of an agency's projects in 2006 and 2007 and for 10% of its projects each year thereafter.

1. Qualifications Based Selection

As its name implies, the QBS method focuses on qualifications. At a minimum, the criteria to be evaluated shall include the proposer's experience as a constructor, designer or design-builder, its key personnel, its technical competence, its past performance on similar projects, its safety record, and its availability to and familiarity with the project locale. The last criterion was demanded by outstate contractors and designers who wanted some evaluation credit for their proximity to a local project. So that quality concerns do not overwhelm or render irrelevant the issue of cost, the solicitation may also ask the proposer to state the proposed overhead and fee that the design-builder proposes to charge for its construction services.

The proposals are then judged and a short list of at least three but no more than five is created. After formal interviews of the short list are conducted, the agency will award the design-build contract to the successful proposer. The successful proposer must then competitively bid (but not publicly bid) all trade contract work for the project from a list of qualified firms (subject to availability of such firms for the specific work). A notable exception to competitive bidding of trade work concerns mechanical and electrical ("M&E") subcontractors. If a proposer decides to include an M&E

subcontractor on its design-build team, that M&E subcontractor does not have to submit a competitive bid for any work it chooses to self-perform as long as it signs a time and materials GMP contract for its portion of the work.

2. Design-Price Based Selection

The DPBS method not only looks at qualifications, but also evaluates a preliminary design and its price as part of the award process. The first stage of the process is an evaluation of responses to a Request for Qualifications ("RFQ"). The contents of the RFQ are quite similar to those evaluated in the QBS process. The agency head then creates a short list of proposers of at least three and sends them a Request for Proposal ("RFP") which solicits preliminary plans and specifications, a CPM schedule, and a GMP for the project. A stipend will be awarded to those preparing RFP's of not less than 0.3% of the agency's estimate of the cost of the project. The agency will then conduct interviews and select the successful proposer.

B. CM AT RISK

The CM at Risk selection process also consists of two stages. The first involves an RFQ, the contents of which is very similar to the RFQ for the design-build process. The RFQ may also request the overhead and fee that the CM at Risk proposes to charge.

The agency head will appoint a selection committee composed of at least three persons, one of whom must have construction industry expertise. The selection committee will then create a short list of at least three potential CM's at Risk and then request fee and expense proposals from each finalist. After conducting interviews, the committee will select the successful CM at Risk who must then competitively (but not publicly) bid all trade work. The CM at Risk and the agency head will determine the composition of the list of trade contractors asked to competitively bid the project. With the approval of the agency head, the CM may also submit a bid for the trade contract work.

C. JOB ORDER CONTRACTING

Job Order Contracting ("JOC") was designed to create an expedited method of awarding smaller sized projects. MnSCU was especially frustrated with the delays involved in traditional public bidding. Therefore, MnSCU successfully lobbied for a process by which any contractor who agreed to sign a standard, master agency contract would be pre-qualified to perform the agency's work. Once the list of qualified contractors is created, the agency can request bids from any (but not necessarily all) contractors on the list without advertisement or public bidding. For construction contracts up to $50,000, the agency must request at least two bids; for contracts up to $100,000, the agency must request at least three bids; and for contracts up to $250,000, the agency must request at least four bids. The agency head is responsible for developing a system to ensure a reasonable opportunity for all qualified contractors to bid on construction services on a "periodic" basis.

D. RISKS AND SOLUTIONS

These new processes involve a great deal of agency discretion, and it is useful to know some of the risks and protections the new procedures contain.

- In an effort to insulate agencies from political pressure, undue influence, and accusations of favoritism, the State Designer Selection Board is the entity charged with evaluating and

selecting the successful proposer. Ironically, the Board selects the top candidate for the DOA but only the top *two* candidates for the U of M and MnSCU, even though the later two entities are more prone to influence through donations to the college. After receiving the top two choices from the Board, the U of M and MnSCU are given the discretion to evaluate and select the successful proposer.

- To bring more objectivity and transparency to the selection process, the agency has to list the selection criteria and subcriteria for each stage of the process *and* the relative evaluation weight each criterion or subcriterion will be given. As a result, each proposer should be better able to match what they propose to supply what the agency demands. Furthermore, the award must be made to the proposer whose proposal scores the highest according to the weighted criteria. This protection should reduce concerns about excessive discretion and after-the-fact justifications for awards.

- The requirement of competitive bidding of subtrades is an attempt to foster competition, but competitive bidding is not the same as public bidding. Only those subcontractors invited to submit bids will participate in the competitive bidding. Under traditional public bidding any subcontractor could submit a bid. There will likely be complaints from those subcontractors who feel they are qualified to bid but are not invited to participate in the competitive bid process.

- The post bid interview process is designed to further communications between the proposer and agency, but they can also foster complaints. If the interviewers are not the same or ask dissimilar questions, proposers could feel that the interview process is unevenly conducted and provides some proposers with competitive advantages over others. Fortunately, the statute at least prevents the agency from sharing price and other confidential information among the proposers.

- In an attempt to further protect the integrity of the process, the agency cannot consider a proposer's past claims history in the RFQ and RFP process. Thus, design-builders and CMs at Risk should feel free to assert legitimate claims without fear of future reprisal or "black-listing."

- To encourage competition in the process, any RFQ or RFP criteria cannot impose unnecessary conditions beyond reasonable requirements to ensure maximum participation of qualified design-builders. In addition, the union or non-union status of a proposer cannot be a selection criteria.

- It will be difficult to explain to qualified bidders why they are unable to bid on Job Order Contracting projects simply because it is not their turn to do so. Similarly, it will be difficult to explain to the public why it is advantageous to limit competition to 2, 3 or 4 bidders depending on the size of the project if other bidders desire to submit bids on the project. Small, emerging contractors often depend on small contracts to get established and this system may make it unduly

difficult for them to get an adequate volume of work.

Hopefully, many of these issues will be resolved based on how the methods are actually administered by the agencies in question. Nevertheless, if you have any objection to a proposed solicitation procedure under these new procurement methods, it is important to ask for clarification or object in writing *before* participating in the process or you may be found to have waived your complaint. As an example, if you feel the criteria are inappropriate, too restrictive or not properly weighted, you should register an objection to the agency before your proposal is evaluated.

E. LEGAL ISSUES

Any new delivery system poses new legal issues and these new procurement methods are no exception. We have counseled many of our clients on how to avoid the risks of entering the design-build and CM at Risk market.

If you submit a design-build proposal, take steps to ensure your company is properly licensed to provide design services in the jurisdiction in which you will be operating. If you are teaming with another entity to provide design-build services, you must select the type of entity you wish to create to perform the contract – e.g., corporation, joint venture, or limited liability company. Design-build alliances should develop agreements governing finances, management procedures, liability, equity, confidentiality, defaults and remedies prior to submitting proposals. If you are hiring design subconsultants, you should make sure your contracts allocate and assign all performance requirements and describe how the design and construction process will be coordinated. Traditionally, design firms are reluctant to assume the warranty and performance guarantees that the Owner may require from the design-builder. The ownership of the design should also be negotiated between members of the design-build team prior to commencement of the design effort. Insurance coverages should be reviewed to ensure that your professional design services are covered. As an example, traditional E&O policies contain unique liability exclusions for which the design-builder may nevertheless be responsible. Investigate whether the performance requirements in the RFP are feasible given the specific, prescriptive design requirements that the Owner may be demanding. Also be aware that the implied warranty of design accuracy and adequacy may be shifted from the Owner to design-builder in the design-build delivery system.

In short, the project delivery methods allowed by the new legislation change the many risks and obligations involved in traditional public bidding. It is prudent to not only look, but also plan before you leap into this new opportunity.

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ANNOUNCEMENTS

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Members of our firm will be participating in the following events:

ASA MN Seminar	12/1
PHCC Seminar	2/8/06

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