

Legal Perspective

DESIGN-BUILD PROCUREMENT IN PENNSYLVANIA? – SOMETIMES.

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As trustees of our taxpayer dollars, public entities are required to spend as little as possible to purchase quality construction projects. To ensure that the process is fair and results in the lowest possible cost, Pennsylvania law generally requires the bid process to be fair by being open and objective, with price as the primary distinguishing factor among bidders. Traditionally, this was accomplished through the design-bid-build project structure.

Public owners, however, have long envied the success of design-build projects in the private sector. Through a single source of responsibility for design and construction, overall project duration from the beginning of design to final closeout is reduced. Not only does the reduced duration result in lower costs, the risk of conflicts and claims is virtually eliminated. However, bidding a design-build project that will comply with laws that evolved using the design-bid-build project structure is like fitting a square peg in to a round hole.

With limited exceptions, Pennsylvania law requires that construction projects be awarded to a responsible contractor who has provided the lowest bid. The goal is to provide all responsible builders with an equal opportunity to perform the work and by doing so, the absolute best price will be obtained for taxpayers of the Commonwealth. Since all contractors are submitting bids to the same project criteria, who is best suited for the project is determined through an objective analysis, i.e. the estimated price to perform the work. Favoritism is avoided.

In a design-build contract, the owner establishes a "program", which is essentially a wish list for features it would like to see in the project. Unlike a design-bid-build project which requires all bidders to meet specific design and performance criteria, the requirements on a design-build project are much less specific, giving the design-build bidder more freedom

to submit its vision for a successful project. By their very nature, design-build proposals will not be the same, injecting some subjective evaluation into the process.

In an attempt to gain the benefits of single-source contracting, the Pennsylvania Department of Transportation ("PENNDOT") has pursued projects on a design-build platform. PENNDOT's use of a project structure called the Design-Build Best Value (DBBV) method was declared by the Pennsylvania Supreme Court to be unfair and, thereby, illegal. Pursuant to instructions from the Supreme Court, on October 5, 2011, the Pennsylvania Commonwealth Court permanently precluded PENNDOT from using DBBV in its original form.

DBBV was instituted by PENNDOT, ostensibly, to narrow the number of proposals required for review for a given project. The key to the DBBV system is PENNDOT's creation of a "short list" of qualified DBBV bidders. While a short list procedure is somewhat similar to a pre-qualification process, which has been used for years, it is different in a significant way. Typically, the number of pre-qualified contractors who are eligible to bid on a given project is limitless. Conversely, a short list reduces the number of design-build bidders to a handful of contractors who are selected by PENNDOT on what has been described as subjective qualitative criteria such as: experience with similar work, management strategy for design and construction, timely completion and budget control, experience of key personnel, and past performance reports. While these criteria are weighted and plugged into a formula which lends some objectivity to the evaluation, the values for each of the criteria are primarily subjective.



PENNDOT's DBBV program entitled "Publication 448, Innovative Bidding Tool Kit" had two phases, which included:

Phase I – identify short list contractor;

- a. PENNDOT advertises the project with a general description of the work, technical qualifications desired, and a deadline for interested design-build teams to submit their response.
- b. Interested teams submit a statement of interest which includes the various subjective criteria identified above, but does not include a bid or estimate for the work.
- c. PENNDOT reviews the statements of interest and selects three to five design-build teams and meets with them to provide more detail regarding the project.
- d. PENNDOT meets with the interested design-build teams who did not make the short list.

Phase II - Award of Contract

- a. Each short list team submits a technical approach and price which is used as the basis for a stipend agreement.
- b. A stipend agreement is negotiated with each interested design-build team. The stipend provides compensation to the design-build teams to prepare their proposal.
- c. Each participating design-build team submits their final proposal.
- d. PENNDOT reviews the submissions and awards the project based on its best value.

Obviously, best value is not necessarily the lowest price.

DBBV was used to bid, and ultimately award, a contract for a bridge project on Interstate 90 in Erie County. Subsequent to the establishment of the short list and before the date bids were due from the short list contractors, Brayman Construction Inc. and Steven M. Muck filed suit in the Pennsylvania Commonwealth Court seeking a temporary and permanent injunction to preclude award of the project. The basis of their objection was that the DBBV process was contrary to the Procurement Code and would compromise the integrity of the competitive bidding process by reducing competition.

From PENNDOT's perspective, the benefit of short listing was to incentivize those design-build teams truly interested and qualified to do the work. By providing a stipend to the short-listed design-build teams, detailed quality proposals would be received with little or no increase in design costs since upfront engineering costs to prepare detailed bid documents were largely avoided. Similarly, the design-build teams were properly motivated to submit quality proposals since they are being compensated to do so. In addition to reducing the cost of the construction itself, it is quite likely that PENNDOT would also realize savings in its engineering costs not only on a unit basis, but also due to the shortened design and construction duration.



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In *Brayman Construction Corporation and Steven M. Muck v. Commonwealth of Pennsylvania, Department of Transportation*, the Commonwealth Court agreed with Brayman and Mr. Muck that the DBBV process was overly subjective and not authorized by the Procurement Code. Although PENNDOT argued that short listing was nothing more than "a high end pre-qualification process," the court disagreed because the criteria used to establish the short list or evaluate bids from the short list contractors were not set forth in the invitation for bids.

Is this the end for alternatives to traditional design-bid-build? No, but what must a public owner do to satisfy the law?

Challenging the traditional method of a competitive sealed bid is nothing new. In 2007, the Pennsylvania Supreme Court held that the Procurement Code permitted the Department of General Services ("DGS") to use a sealed RFP / Negotiated Price approach in lieu of competitive sealed bids for "complex" construction projects, or those with a value in excess of \$5 million.

Interestingly, in *Brayman*, PENNDOT did not rely on the arguments successfully used by the DGS in *Associated Builders*. Nonetheless, the Supreme Court in *Brayman*, explicitly stated that the Procurement Code does not prohibit PENNDOT's use of a sealed RFP / Negotiated Price approach in other instances. This was nothing short of an

invitation to PENNDOT to try a different, more objective, method to bid projects.

There is little doubt now that PENNDOT will look for a new bid method. The Pennsylvania courts will permit alternatives to the traditional design-bid-build project obtained through a competitive sealed bid. However, they have repeatedly stated that the only way in which the public can be sure it is getting the "best" price, is for the bidding process to be open to all qualified bidders to compete against one another based on clearly stated criteria. Anything less will likely be rejected.

The challenge to buyers such as DGS and PENNDOT is how can they employ design-build project structures which use sufficient objective criteria and a sealed competitive proposal process to comply with the Procurement Code?

In the final analysis, criteria that can be measured and quantified, will lead to a perception of increased objectivity in the process. While design-build proposals often vary in a number of different ways, each proposal must include an objective, quantifiable analysis. In this way, subjective measurements such as those identified above can be quantified to level the playing field amongst all bidders. BG



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