

Client Alert: Alternative Project Delivery Methods for Public Construction in Arizona

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House Bill 2340 became effective in Arizona on August 15, 2000. Arizona public entities gained significant flexibility in the procurement of construction projects with the ability to select from three alternative project delivery methods previously available only to private owners. In addition to the traditional design-bid-build delivery method, which is still available, public entities may (with certain restrictions) choose from the following alternative methods:

Design Build
Construction Manager At Risk
Job Order Contracting

While this article does not provide comprehensive analysis as to the complexities of this new law, it is intended to put public owners, design professionals, general contractors and subcontractors on notice of options now available to improve the procurement and delivery of construction services on Arizona public projects. Understanding these options and putting together a competitive and complementary design-build team are critical to remaining competitive on Arizona public projects in the future.

Project Delivery Methods Now Available to Public Entities

Traditional Design-Bid-Build

Traditionally, public projects were constructed according to the Design-Bid-Build delivery method. Under this method, (a) there was a sequential award of two separate contracts; (b) the first contract was for design services; (c) the second contract was for construction; (d) design and construction of the project were in sequential phases; and (e) finance services, maintenance services and operations services were not included.

While this method provides familiarity and a defined project scope, it also may lead to longer schedule duration, more expense, and an adversarial relationship between the design team and construction team which leads to claims and other legal issues.

Design-Build

Under the Design-Build method, (a) there is a single contract for design services and construction services; (b) design and construction of the project may be in sequential or concurrent phases; and (c) finance services maintenance services, operating services, design services, preconstruction services and other related services may be included. Benefits of this method include a single point of responsibility for design and construction, faster schedule delivery and fewer claims and legal issues between the design build team and the public owner. The contractor obviously cannot claim an extra for design problems from the owner, and the contractor and design team will have to resolve these issues amongst themselves. Design-Build is particularly well suited for highway expansion projects (in fact, ADOT is restricted to the use of this method along with Design-Bid-Build). Design-Build may not be well suited, however, for projects that are difficult to define and less schedule sensitive, or involve participants lacking an understanding of the Design-Build process. However, if the public entity bids the project Design-Build, and you lack the understanding of or experience with this process, you may be left on the side-

lines.

Construction Manager-At-Risk

Construction Manager-At-Risk is a project delivery method in which (a) there is a separate contract for design services and a separate contract for construction services; (b) the contract for construction services may be entered into at the same time as the contract for design services or at a later time; (c) design and construction of the project may be in sequential phases or concurrent phases; and (d) finance services, maintenance services, operations services, preconstruction services and other related services may be included. This method provides more of a team concept than Design-Bid-Build, in that the Construction Manager at Risk is actively involved in the design from the perspective of budgetary concerns and constructability. This method also brings with it the potential for faster schedule delivery at reduced cost if the team concept is effectively implemented. Primary school projects in which the owner has a favored architect, yet desires the participation of a construction manager to fit the project into the allowable budget, will probably be well suited to this method.

Job Order Contracting

Finally, under the Job Order Contracting method, (a) the contract is a requirements contract for indefinite quantities of construction; (b) the construction to be performed is specified in job orders issued during the contract; and (c) finance services, maintenance services, operating services, preconstruction services, design services and other related services may be included. This method is best suited for schedule sensitive, single or multi-trade, repair, alteration, or renovation projects. It provides for reduced up-front time and cost, faster delivery and the incentive for higher quality, but requires trained owner personnel to effectively administer the contract. This method may be used for such contracts as mechanical system renovations or landscaping on a large project in which the work may be performed in phases not yet determined. The maximum amount for an individual job order – as opposed to the total contract amount – may not be more than \$750,000.

The Selection Process

The new selection process for design build, construction manager at risk and job order contracting begins with the issuance of the request for qualifications (RFQ) for each contract. An appropriately qualified selection committee evaluates the statements of qualifications and performance and data which are submitted in response to the RFQ, and will interview a predetermined number of firms regarding the proposed contract and the relative methods for furnishing the required professional services or construction services. The selection committee then creates a short list in order of preference of the firms which the selection committee deems the most qualified to provide the services. The selection and order of preference is based on criteria established and published by the selection committee and included in the RFQ,

and may not be based upon information relating to fees, price, man-hours or any other cost information, nor may the selection committee ask applicants about such matters.

Once the short list has been determined, depending on the type of contract to be awarded, there are two different methods through which the contract is ultimately awarded. One involves directly negotiating with the firms on the short list. The owner is required to enter into negotiations with the highest qualified firm. The owner is required to take into account the estimated value, scope, complexity, and nature of the services to be rendered. If the owner is unable to negotiate a price and other contract terms which the owner considers to be fair and reasonable, it must terminate negotiations with that firm, and may then proceed to the next most qualified firm on the list until an agreement is made or a determination is made to reject all firms on the short list.

The second method involves the request for proposal (RFP) process and is only an option for Design-Build and Job Order Contracting. In the Job Order Contracting situation, the selection committee may conduct preliminary technical discussion with all firms on the short list for the purpose of clarifying and to assure full understanding of, and responsiveness to, the solicitation requirements. Each firm then submits separately to the selection committee (a) a final technical proposal and (b) a price proposal. The final selection of the offeror is a two-step process. First, the selection committee, without opening the price proposal, uses evaluation and scoring criteria previously established and set forth in the RFP to evaluate and score the final technical proposal. Second, the selection committee scores the pricing proposal as described in the RFP. The offeror with the highest score under the method previously established and set forth in the RFP is awarded the contract.

Contract Terms and Other Matters

The law imposes new bid security requirements for Design-Build and Job Order Contracting construction services projects. In particular, in order to guarantee that the firm selected will enter into a contract, if there is a Design-Build or Job Order Contracting construction services contract which exceeds \$100,000, excluding amounts relating to finance services, maintenance services, operations services, design services, preconstruction services or other related services, a predetermined bid security of ten percent of the proposed contract is required.

Payment and performance bonds are still required. The performance bond must now be furnished upon execution of a contract or an amendment to a contract that commits the contractor to provide construction for a fixed price, a guaranteed maximum price or any other fixed amount within a designated time frame. In addition, reasonable attorneys' fees continue to be recoverable by the prevailing party in the event of suit on the bond.

Agents of the public entity who knowingly violate statutory

contracting requirements are subject to liability for a civil penalty of no more than \$5,000 for each violation. A violation of statutory contracting requirements by any individual is also considered a class 2 misdemeanor.

Conclusion

You should discuss these new delivery methods with your attorney. You should also legally organize and license your Design Build team in order to remain competitive and be ready to bid on such Arizona public projects in the future.

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