

Bidding and Pricing Concerns with Select Alternative Delivery Methods



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A Balanced Approach to Construction Law.

Alternative delivery methods have become more widely accepted and more widely used on various projects of all types. As I have written previously, the portion of Texas' statutory codes that contain the provisions authorizing and governing alternative delivery methods is chapter 2269 of the government code. Generally speaking, the statutory language only provides the basic framework for each delivery method.

Contract documents that have been drafted by experienced professionals or trade organizations as standard form contracts provide the substance that fills in the frame provided by statute. Often the contracts or contract implementation by parties with little experience in these methods is lacking and results in actual or perceived errors. Almost every legislative session, there are bills that are filed with an intent to fill gaps in the statutory framework. In the current session, bills have been proposed to address construction manager at-risk, job order contracting, design-build, and competitive sealed proposal method. Because the legislature is still in session as of the publication of this column, an overview of these bills may be premature since many of these bills may become law.

One issue that is currently part of multiple proposed construction bills for alternative delivery is pricing. Pricing in contractor selection is an issue that draws debate frequently in the industry because alternative delivery methods differ so greatly from traditional methods. Traditionally, contractor selection for design-bid-build projects was governed by either the lowest responsible or best value bidding. In those methods, price is the primary item of consideration by an owner. And, while not assigned a percent value, typically the contractor with the lowest price won the contract.

With alternative methods, pricing can be reduced in significance or even placed in a minority role for consideration. At times, owners bidding projects will assign less than 50 percent of weight for pricing because other items are deemed more important by the owner for a specific project. This change is dramatic for contractors who have been bidding public work

in this state for decades. When a request for proposals seeks information from a contractor that is not just price, the manner of evaluation shifts. Similarly, the manner of bid preparation and proposal drafting changes significantly.

When owners change the selection process so dramatically, the advantage in selling oneself as a contractor shifts to bigger companies that have staff focused on marketing services and producing proposal packages for projects. Smaller contractors may not be able to compete in selling, even though they might be able to compete effectively in pricing and production. There are bills this session that seek to address this scenario. However, whether these bills ever become law is not the focus of this discussion. Contractors must recognize that the landscape has shifted. Even if these bills succeed, the ability to demonstrate one's competence, quality, and attention to details matter more now than ever. Both procurement and contracting have shifted in ways that allow owners to avoid being forced to award contracts to questionably qualified contractors.

Another pricing issue associated with alternative delivery methods that deserves some attention presents itself with both construction manager at-risk and design-build projects. In both of these methods, the contractor is selected for a project well before the design is complete. Because of that fact, it's impossible to estimate the project accurately enough to establish pricing. As such, both methods typically utilize a cost of the work plus a guaranteed maximum price model. Errors in application of this method seem to arise with enough frequency that several bills have been filed seeking to address this situation.

Most form contracts address the manner of both establishing the guaranteed maximum price (GMP) as well as subcontractor bidding and selection in these methods. The statutory structure addresses pricing, generally, and the vagueness of the provisions can lead to abuses and mistakes. The intent of using a GMP is to shift some risk for price control to the contractor. Where a contract is cost-plus without the GMP, all of the risk of cost control falls to the owner. Because both

construction manager at-risk and design-build provisions of the government require GMPs, the clear legislative intent was to place part of that risk on the contractor. Almost all published contracts act in this manner.

Pricing for a GMP amendment should be accomplished when the construction documents are approximately 95 percent complete. The manner of estimating or soliciting subcontractor pricing is still the contractor's choice but waiting until actual bids are obtained and tallied does not confirm to statutory intent and would be a breach of contract under many contracts for these deliver methods.

Similarly, the portion of chapter 2269 for construction managers at-risk projects requires that the contractor bid major elements of work. This statutory obligation implies that the manner of bidding should be compliant with controlling procurement laws, but the language does not direct construction managers at-risk to utilize any particular method. In order to comply with the legislature's intent, the construction manager should select contractors for performance of these major elements of the work using an accepted method bidding – either best value or lowest responsible bidder. Bear in mind that this issue is unique to construction managers at-risk and is only for awarding subcontracts or choosing to self-perform major scopes of work. This discussion does not apply to the manner in which a construction manager estimates the entire work or complies the GMP.

With respect to the interplay of establishing the GMP and awarding subcontracts, the construction manager should not wait to establish the GMP until it receives bids. Likewise, the construction manager should not issue GMP's for each scope of work. The GMP is intended to apply to the entire project and not successive scopes of work. If the lowest-priced and qualified subcontractors are awarded the work, then the risk of cost control and function of the GMP will be in-line with the language of the law and the intent behind it.

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