

CONSTRUCTION AND THE LAW IN TEXAS

Alternative Delivery Methods: The New Normal in Procurement

For the heavy construction industry, alternative delivery methods are the new normal for many types of procurement. Many local governmental entities, municipalities, utility districts, counties, and even state-agencies are frequently turning to alternative procurement methods for projects. On the local governmental entity side of the industry, alternative delivery methods such as competitive sealed proposals, design-build, and construction manager at-risk are becoming the go-to methods for larger, complex projects.

In this column, and articles that will follow in the upcoming months, I will address this shift in the marketplace and the various methods currently allowed under the Texas procurement code. The columns will discuss the statutory structure for each method as well as strategic considerations for contractors facing new challenges in the current economic climate and construction market.

The shift away from lowest responsible or best value bidding for civil projects has occurred for a number of reasons. Over time, public owners worked with the legislature to move from lowest responsible bidding to best value bidding. The use of best-value bidding allowed public owners to consider more than price and a contractor's safety record in awarding projects. The best value method allows an owner to consider a list of eight items as proscribed by statute in determining which contractor wins a particular project. This method allows for slightly more discretion in awarding work than the lowest price, but is still largely tied to price.

For civil works contractors, the best value method was limited by statute. Accordingly, the vast majority of heavy construction contractors have become accustomed to lowest responsible bidding. This method creates fully transparent bidding, fairness, and open competition for work. With the only limiting factor being bonding capacity, any contractor of any size or any experience could bid any public civil project.

Under the lowest responsible bidding method, many public owners felt that they were forced into selecting lesser quality contractors who may prove to be difficult to work with and who may not provide the highest quality of product. This contracting relationship was forced on the owner simply because a particular contractor offered a lower price at bid time. An unsophisticated or undercapitalized contractor creates an increased risk of default due to unreasonably optimistic expectations or overly aggressive bids. Both situations create the possibility of getting into difficult constructability scenarios or getting in financial trouble that negatively impacts a challenging projects. Because, in part, of the lowest bidder system, some public owners felt that they and their projects often suffered the brunt of the impact when these less desirable contractors found themselves in default.

Accordingly, owners who found themselves in this position advocated for more freedom in contracting. This sentiment led to increased efforts by both owners and politically-active contractors to open Texas procurement to alternative delivery methods. In addition to the public owners and contractors, large engineering firms

and their advocacy groups worked hard to open Texas' construction market to alternative methods because they saw an opportunity to build on expertise gained in other states if the alternative methods were allowed in Texas.

Public owners using alternative methods are taking advantage of statutory authorizations that allow them more subjectivity in contractor selection. The appeal of this authorization is that owners can select contractors that provide a higher level of comfort and confidence that the project's being bid will be performed well, of high initial quality, and have lower long term costs for operation and maintenance.

The shift towards alternative delivery has created challenges for many contractors who built their companies on a low-bid business model. Many of these contractors feel that these new contract award methods have created a system that lacks the transparency and fairness of a low bid method. The frustration of losing work to competitors that might not have offered the lowest price is certainly understandable.

Because public owners are routinely turning towards competitive sealed proposals and other alternative methods that allow weighting of offers and bids based on factors other than price, these contractors must adapt their bidding practices, sales, and owner outreach programs to secure their position in the marketplace.

While the statutes contain language and obligations intended to ensure fairness and open competition when using alternative procurement methods, there exists concern amongst the contracting community that many project awards using alternative methods are either unpredictable or inconsistent. Owners who choose to employ selection criteria that weigh factors other than price should take care to comply with the statutory language and intent to preserve trust and interest from contractors seeking to bid on their projects.

On the contracting front, the reality of alternative delivery and selective criteria must be accepted and business practices need to be modified or adapted to meet the new competitive environment of public construction. Contractors need to establish connections with owner's representatives and build long-term client relationships to enable owner's to score the non-price based criteria high based on that confidence and trust.

Additionally, contractors need to recognize that many decisions relating to the selection of delivery method, drafting of the selection criteria contained in the request for proposals, and the scoring of



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A Balanced Approach to Construction Law.

the contractors are often engineer driven processes. For this reason, contractors should also focus on building relationships of trust and confidence with engineers practicing in the areas where the contractor focuses its operations.

When working on business development, contractors need to be aware of the ethical obligations that apply when dealing with public owners and their representatives. Chapter 176 of the Texas Local Government Code requires public officials to file disclosure reports depending on certain contacts with vendors. Likewise, vendors must file questionnaires and reports that detail certain types of contacts with public officials. These same disclosure requirements do not apply to private engineers that may work for a public owner.

In general, alternative delivery methods are here to stay and will continue to gain in popularity. Contractors must recognize this and adapt to remain competitive. 🐾

