Legal Corner

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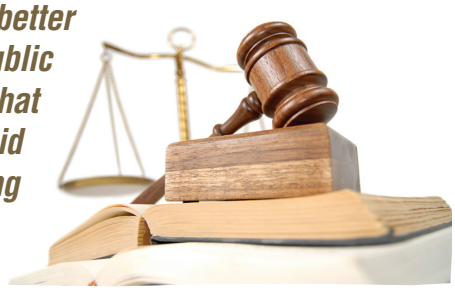
The New Rules Of Best Value Design-Build Procurement

Editor's Note: I would like to acknowledge the assistance of my colleague, Scott McQuilkin, who prepared this month's article. Scott is an Associate in Hinckley, Allen & Snyder's Construction and Public Contracts Group.



There has been a surge in "interest" by UCANE members to better understand the "new" Design-Build form of procurement for public projects. Accordingly, this article will provide some insight as to what it is and how it will work in Massachusetts. In traditional low-bid procurements, under Chapters 149 and 30, and other public bidding statutes, awarding authorities generally are without discretion. They are required to award contracts to the lowest responsible bidder and are prohibited from entering into post-award contract negotiations. In addition, the use of "problem-oriented" specifications, or virtually any other deficiency in the bid process itself, can be fatal to the entire solicitation, and cause for a re-bid.

In the relatively new world of "best value design-build" contracting under Chapter 149A, however, awarding authorities enjoy greater discretion to award contracts to the design-build team that provides the "best value," as opposed to the one that simply provides the lowest price. Awarding authorities are also *required* to engage in post-award negotiations with the selected design-build entity. In addition, because the design-build teams are responsible for developing a design for the proposed project, open-ended specifications that would be illegal in low bid procurements are *expected* under Chapter 149A.

The traditional rules have thus been altered dramatically for Chapter 149A projects. There are, however, no reported Massachusetts cases, and few Attorney General's Office ("AGO") decisions, interpreting Chapter 149A. Design-build teams are therefore left with little guidance in attempting to determine whether an awarding authority "crossed the line" in evaluating a design proposal, or whether a solicitation or specification deviated from the requirements of Chapter 149A to such an extent as to warrant a re-bidding.

It is helpful, however, to look to certain recent low procurement decisions in Massachusetts, as well as the more developed federal case law on best value design-bid procurements, as indications of how Massachusetts courts may analyze such cases. For example, in the federal context, awarding authorities routinely engage in post-award discussions and negotiations with bidders, and authorities enjoy great discretion in "reforming" or "correcting" deficiencies in the bid process. As such discussions, negotiations, and corrections are consistent with the principles of best value contracting, Massachusetts courts may look

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to federal law in determining the extent of discretion that is allowable under Chapter 149A.

This article summarizes the statutory requirements of Chapter 149A and Massachusetts and federal law on the topics of open-ended specifications, awarding authority discretion, and reforming bid solicitations in order to provide guidance as to how Massachusetts courts may analyze best value design-build cases.

The Best Value Design-Build Delivery Method Under Chapter 149A

Briefly stated, on a publicly bid design-build project, the awarding authority selects and executes a single contract with a single entity (usually a design-build firm or a joint venture) to design and construct the project. The design-build method transfers the risk of solving design-related problems from the awarding authority (and the awarding authority's designer) to the design-build entity. As the name suggests, design-build projects are bid based on "design concepts," rather than a full design.

Proceeding in this manner saves time and money, as only one contract solicitation is required. Moreover, construction schedules can be accelerated because construction will begin before the design is complete.

The requirements for the design-build method are set forth in Chapter 149A, Sections 14 – 21. The design-build method is available for public works projects with an estimated value of at least $5 million, provided that the awarding authority has obtained prior approval of the Office of the Inspector General to use the design-build method.[1]

Under Chapter 149A, Section 20, awarding authorities may evaluate and select design-build proposals on either a "best value" or low bid basis. Awarding authorities are to use the best value basis "[i]f the scope of work requires substantial engineering judgment, the quality of which may vary significantly as determined by the awarding authority[.]"[2]

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[1] In order to obtain this approval, the authority must demonstrate that (1) it is authorized by its own governing body to use the method, (2) it has the capacity to effectively procure and manage a design-build entity, (3) it has procedures in place to ensure fairness in the procurement process, and (4) the design-build method is appropriate for the particular project.

[2] See M.G.L. c. 149A, § 20.

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In a best value procurement, each design-build entity simultaneously submits two separate sealed proposals, a technical proposal and a price proposal. The awarding authority first evaluates the technical proposals while the price proposals remain sealed. After completing the technical evaluation, the awarding authority publicly opens the price proposals and then determines an "overall value rating" for each design-build entity. The awarding authority then is to "enter into good faith negotiations" with the selected design-build entity.[3] The primary purpose is to select the proposal that provides the best value to the awarding authority in terms of technical feasibility and cost.

Open-Ended Specifications Under The Best Value Design Build Method

A key facet of a best value design-build procurement is that contract procurement is based on a scope of work statement and performance requirements, rather than a complete set of plans and specifications.[4] For example, on a particular project, there may be two or three alternative construction methods to accomplish a certain task – some more expensive than others. On a design-build project, it is entirely appropriate for the awarding authority to issue an open-ended specification that provides a defined scope of work describing the end goal and leaves it up to the design-build teams to select between the various alternative construction methods to achieve that goal.

In the context of a low bid procurement, such open-ended, conceptual specifications, would be illegal, as they would be deemed to violate the "equal footing principle."[5]

Because of the time saving and other benefits of the best value design-build method – including the transfer of a large portion of the design risk to the design-build team – however, this method will likely become the "method of choice" on large energy and utility projects. In fact, in a recent bid protest decision concerning a renewable energy project, the AGO distinguished between the use of open-ended specifications in low bid vs. design build procurements and recommended that going forward awarding authorities should use the design-build delivery method, rather than a low-bid procurement, on similar energy projects.

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[3] See M.G.L. c. 149A, § 20(b).

[4] See M.G.L. c. 149A, §§ 18 and 19.

[5] See, e.g., Datatrol, Inc. v. State Purchasing Agent, 379 Mass. 679 (1980).

Specifically, the AGO noted:

> With more public agencies considering constructing renewable energy projects, we urge awarding authorities to consider using procurement mechanisms other than M.G.L. c. 30, § 39M for these projects. If projects are estimated to cost more than $5 million then awarding authorities should use the procedures described in M.G.L. c. 149A, §§ 14-20 and request approval from the Inspector General in order to issue design-build contracts.[6]

While problem-oriented specifications are contemplated under Chapter 149A, it is possible that specifications on a particular design-build project could be so open-ended as to violate the equal footing principle. Although there are no Massachusetts cases dealing with this issue, there have been low-bid procurement cases in which agencies were allowed to exercise discretion by requesting bids on alternate materials. The Supreme Judicial Court has determined that, in those situations, the equal footing principle is satisfied even though the bidders are unaware of the awarding authority's preference for one of the alternatives, as long as the bid documents "fully explained and defined" the alternatives and the bidders "were given prior notice of the particular work involved, and the quantity and type of materials that would be used in both alternatives."[7]

Applying this principle to best value design-build procurements, the key factor would be whether the RFP fully explains and defines the scope of work. If this is the case, the fact that the RFP leaves it to the design-build entities to determine a method that would provide the "best value" solution for the awarding authority would not violate the equal footing principle.

Post-Award Negotiations Of Best Value Contracts

Another key distinction between best value design-build and low bid procurements is the greater discretion enjoyed by awarding authorities both in selecting a design-build entity and in being able to negotiate a contract with the selected design-build entity post-award. As noted above, the awarding authority is to select the design-build team based on a two-step process in which the technical proposals are evaluated first, and price proposals are opened publicly only after the technical evaluations are completed, to be followed by good faith negotiations with the selected design-build entity.

The requirement of post-award negotiations under Chapter 149A is consistent with the principles of best value design-build contracting. In fact, under federal law – which is much more developed in the area of best value contracting than is Massachusetts law – post-award negotiations, clarifications, and even changes are commonplace.

This process allows the awarding authority to exercise discretion both during the technical evaluation, and also post-award, when it negotiates contract terms with the selected design-build entity.

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For example, federal regulations for best value procurements allow for agencies to conduct "discussions" and "negotiations" with offerors that are undertaken "with the intent of allowing the offeror to revise its proposal."[8] These discussions/negotiations take place after proposals are received and are to include all responsible offerors whose proposals are within the competitive range.[9] Discussions/negotiations entail "persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract or other terms of a proposed contract."[10]

The greater discretion afforded to awarding authorities on best value federal projects has led federal courts to impose a higher burden on disappointed bidders seeking to overturn a contract award. Disappointed bidders must show that the award "had no rational basis or involved a clear and prejudicial violation of applicable statutes or regulations."[11] In fact,

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[6] See In re: City of Boston: Construction and Installation of Wind Turbines, AGO Decision, November 25, 2008.

[7] See e.g., J.F. White Contracting Co. v. Massachusetts Port Authority 51 Mass. App. Ct. 811, 816 (2001).

[8] See Galen Medical Associates, Inc. v. United States, 369 F.3d 1324, 1332 (Fed. Cir. 2004).

[9] See Information Technology & Applications Corp. v. United States, 316 F.3d 1312, 1318 (Fed. Cir. 2003).

[10] See id. at 1321.

[11] Saco Defense System Division v. Caspar W. Weinberger, 806 F.2d 308, 311 (1st Cir. 1986).

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in Galen Medical Associates, Inc. v. United States, the Court commented that "[i]t may be that even a proven violation of some procurement regulation, in selecting the competitor, will not necessarily make a good claim."[12]

Although there are no Massachusetts cases directly on point, Massachusetts courts may follow the lead of the federal courts in cases dealing with statutes allowing awarding authorities to exercise discretion.

For example, in LeClair v. Town of Norwell,[13] the Court held that a violation of a statutory requirement did not require the voiding of a contract where the public interest would be harmed by voiding the contract, and where the statutory purpose would not be served by voiding the contract.

LeClair involved a failure of a town to publicly advertise a contract in accordance with the requirements of Chapter 7, Section 38A1/2, the "designer selection" statute, but the Court also considered how the statutory violation affected the public interest. The Court conducted this analysis in the context of the purpose of the designer selection statute – which is to "ensure that the commonwealth receives the highest quality design services…and provide safeguards for the maintenance of the integrity of the system for procurement of designers' services within the commonwealth."[14]

The Court noted that "[t]here is no evidence that the Legislature favors the voiding of contracts as the proper remedy for a violation of G.L. c. 7, § 38A1/2." Further, to enter an injunction "might do serious damage to the interests of the public", as it would "halt an important school construction project" and the town could lose funding.[15]

Notably, the purpose of Chapter 149A, Section 20(b) to provide the "best value" to the awarding authority is akin to the purpose of the designer selection statute (i.e., to provide the highest quality design services to the commonwealth). Thus, under LeClair, and in light of the well-established federal law, courts will likely – before declaring a contract void – consider whether the "purpose" of Chapter 149A, Section 20(b) to provide the "best value" to the awarding authority would be served by voiding the contract.

[12] Galen, 369 F.3d at 1330.

[13] 430 Mass. 328 (1999).

[14] LeClair, 430 Mass. at 332-33.

[15] Id. at 339.

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Reformation Of The Bid Process

Another area in which Massachusetts courts interpreting Chapter 149A may follow the lead of federal law is with respect to reformation of the bid process. Federal statutes and regulations provide great discretion to awarding authorities to take corrective action to "reform" deficient bid solicitations without requiring a re-bidding of the contract. For example, 31 U.S.C. § 3554(b)(1) provides that if the Comptroller General determines that a solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the federal contracting agency implement a resolution including, among other things, recompeting the contract, cancelling the solicitation, issuing a new solicitation, and ***awarding a contract consistent with the requirements of the statute or regulation.***[16] Where a solicitation does not comply with the requirements of a statute, awarding a contract consistent with the requirements of that statute can only be accomplished by reforming the solicitation to comply with the statute.

Similarly, 4 C.F.R. 21.8, provides that if the Government Accountability Office ("GAO") determines that a solicitation or proposed award does not comply with a statute or regulation, the GAO may, among other remedies, recommend that the awarding agency "[a]ward a contract consistent with [the] statute or regulation."[17]

Although there are no Massachusetts decisions specifically allowing a bid solicitation to be reformed, the AGO recently "reformed" a bid solicitation in its decision in In Re: Boston Water & Sewer Commission, AGO Decision, December 23, 2010. The AGO determined that an invitation for bids ("IFB") by the Boston Water and Sewer Commission ("BWSC") did not comply with a requirement under Chapter 30, Section 39M to open all bids because the IFB included a prequalification process that did not require BWSC to open bids that did not comply with the prequalification process. To correct the non-compliance with the statute, the AGO reformed the process by remanding the case to the BWSC for the purpose of opening the unopened bids.[18]

More specifically, the IFB required all bidders to submit a statement of qualifications ("SOQ") with their bid proposal in a separate envelope from the envelope containing the cost proposal, and provided that the SOQ was to be opened before the cost proposal. Thus, the IFB established a type of "prequalification" process that was not included in Chapter 30, Section 39M.

Two bidders, including D'Allessandro Corp., did not include the SOQ in a separate envelope. BWSC refused to open the two bids because they did not comply with the IFB. D'Allessandro protested, claiming that its bid was $50,000 lower than the low bidder.

The Attorney General's Office determined that there was no prequalification requirement under Chapter 30, Section 39M, and that under that statute, "awarding authorities are required to open all bids." The AGO therefore held that "BWSC had an obligation to accept D'Allessandro's bid without the prequalification document being submitted in a separate envelope at the beginning of the bid." To correct the non-compliant IFB, the AGO simply remanded the case to BWSC for the purpose of opening the two unopened bids. In other words, the AGO severed the non-compliant portion of the bid process, the "extra step" of prequalification, and allowed the process to continue under the terms of the statute.[19]

Although Boston Water & Sewer Commission was not a Chapter 149A procurement, given the purpose of Chapter 149, Section 20(b) to find the "best value" solution for the awarding authority, courts may be more open to reforming bid solicitations that do not conform exactly to statutory requirements if doing so will serve the "best value" goal of the statute.

Conclusion

Best value design-build procurement is a "different game" than low-bid procurement. Design-build entities and awarding authorities must become accustomed to the increased discretion and the risk allocation in best value design-build procurements. In addition, although Massachusetts case law under Chapter 149A is undeveloped, design-build entities should look to the underlying goals of best value procurement, as well as the rules established in other jurisdictions, for guidance both in responding to best value RFP's and in determining whether a challenge to best value contract award is likely to be successful. ■

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[16] See 31 U.S.C. § 3554(b).

[17] See 4 C.F.R. 21.8. The regulation also provides that in fashioning a recommendation, the GAO is to "consider all circumstances surrounding the procurement or proposed procurement including the seriousness of the procurement deficiency, the degree of prejudice to the other parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of the recommendation(s) on the agency's mission."

[18] See id.

[19] Id. at 3 – 5.