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Connecticut's Overtaxed Highways and the Construction Lawyer's Role

By Jared Cohane and Peter J. Martin

If singer-songwriter Tom Cochrane were writing about his life as a Connecticut highway, he probably would not advocate driving it. Indeed, for those who frequent the highways and byways of Connecticut as lawyers often do, it does not take a person with an engineering background to appreciate that our infrastructure is either failing or well past its useful life.

According to a report recently issued by TRIP, a Washington, D.C.-based national transportation organization, Connecticut's urban interstates have the third-highest rate of vehicle travel per lane mile and are the eighth most congested with 60 percent of urban interstates experiencing congestion during peak hours. Moreover, according to TRIP, 7 percent of Connecticut's interstate bridges are "structurally deficient," meaning they have significant deterioration of a major

component of the bridge. That is the fifth highest in the nation. TRIP also reports that 19 percent of Connecticut bridges are "functionally obsolete," meaning they no longer meet modern design standards due to narrow lane width, poor lane alignment or low overhead clearances.

The yeoman's task of rectifying the failing and overtaxed infrastructure is too great for the Connecticut Department of Transportation's workforce alone, necessitating the retention of outside engineering consultants to make roads and bridges safe for the traveling public.

The annual state budget crisis and increasing focus on the size of the state employee workforce creates an obvious tension between



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state employees, who consistently fight to retain internal control over infrastructure design, and realities the traveling public faces on congested and deteriorating Connecticut roadways and bridges. But how reliable is the use of consultants?

CDOT recently ordered reinspections of a number of bridges throughout the state following the arrest by New York State authorities of Akram Ahmad, a consulting engineer hailing from Bridgeport. The basis of arrest was the alleged

falsification of a safety inspection report on a bridge in upstate New York. It has been reported that Ahmad lead inspection teams on 35 inspections of bridges throughout Connecticut, resulting in the CDOT ordering reinspection of those bridges out of an abundance of caution. While the arrest of Ahmad is fodder for those critical of using consultants, the fact remains that engineering consultants are critical to the CDOT's implementation of its construction program going forward.

Prequalification and Oversight of Engineering Consultants

There is a significant legal system of checks and balances in place to ensure that engineering consultants are prequalified and receive oversight during the life of a state project. The CDOT's process for obtaining professional consulting services is set forth in Section 13b-20b through 13b-20k of the Connecticut General Statutes. This process complies with federal laws, including the Federal Highway Administration regulations and policies.

Consultants must submit to statutory prequalification and selection processes. Each year, the CDOT publishes notices in newspapers and trade publications soliciting consultants for prequalification in certain technical categories where

there is an expected need for that particular year. Submittals by prospective consultants are reviewed by a technical qualifications panel typically consisting of the chief engineer, the engineering administrator and the construction administrator. The panel recommends consultants for prequalification in categories that they are deemed technically capable.

After receiving recommendation by the panel, consultant prequalification submittals are turned over to the consultant selection panel. That panel consists of three individuals from within the CDOT at large appointed by the commissioner, one individual appointed by the bureau head for which the specific project is being performed, and one individual appointed by the bureau head of any other bureau if such other bureau is requesting the specific consultant services and if such bureau will be responsible for the administration of the consultant contract.

The selection panel evaluates, interviews and provides the CDOT commissioner with a list of the most qualified consultants. The CDOT commissioner ultimately makes the final selection as to which consultants are prequalified guided by statutory criteria.

Once prequalified, a consultant may only be engaged on a project

whenever a bureau within the CDOT determines there is such a need and obtains written approval from the CDOT commissioner. Additionally, where federal funds are to be used in a CDOT contract, permission must be obtained from the Federal Highway Administration in order to solicit consultant services in management roles or for "major projects" with total estimated project costs greater than \$500 million.

Once engaged, the CDOT is required to evaluate consultants at six-month intervals and at the completion of each project. For project durations under six months, the CDOT must perform at least one performance evaluation during the course of the project. The CDOT selection panels are directed to consider the evaluations in the consultant selection process for future projects and are empowered to contact outside sources familiar with a consultant's work for additional input and references.

The CDOT Bureau of Finance and Administration is responsible for monitoring for each consultant the total dollar amount of work performed for the prior three years, the dollar volume of work remaining, the number of projects and comparing the amount of each consultant's work to the total amount of

consultant work being performed. This attempts to ensure the CDOT appropriately assigns workloads to qualified consultants.

Thus, sufficient oversight in selecting, monitoring and evaluating consultants is in place by statute provided those charged with implementing the evaluation system do so faithfully.

Implications for Lawyers Representing Construction Industry Clientele

For attorneys representing consultants and construction contractors performing state engineering, construction and maintenance work, it remains critical to keep apprised of the battleground between the interests of state employees and the interests in the prompt implementation of the overall construction program to improve safety and quality of roadways and bridges. The faster release of these projects not only benefits construction contractors bidding this work, but it will ultimately improve the dire state of Connecticut's interstate infrastructure. The starting point from the construction lawyer's perspective is to track proposed legislation that impacts public procurement.

Roadblocks to aggressive implementation of design efforts through privatization can have significant impact on the CDOT's ability to capitalize on public funding. Such roadblocks should be brought to the attention of construction industry clients. For instance, S.B. No. 439, "An Act Concerning the State Contracting Standards Board and Requirements for Privatization Contracts," sought to "redefine privatization to cover almost every procurement contract entered by the state, causing more delays and increased costs," according to the legislative testimony of Paul W. Brady, of the Executive Council of Engineering Companies of Connecticut.

Similarly, the Department of Administrative Services, which also oversees state construction projects, opposed S.B. No. 439, with Commissioner Melody Curry noting in her testimony that "this is a time for removing bureaucratic hurdles and administrative obstacles, not adding more bureaucracy and delay to the already rigorous process to which all contracts for outside services are subjected." Although S.B. No. 439 did not pass during this year's legislative session, it exemplifies the type of legislation that

continues to be proposed, has been previously passed and will likely to be introduced in future sessions.

It is equally important for the construction lawyer representing this sector of the construction industry to remain versed in the prequalification laws, regulations and processes, and to monitor proposed changes to the process that could make it more difficult for consulting engineers to become prequalified and used on projects, thereby reducing competition for services and driving up costs. If properly followed, safety measures are currently in place to make sure only qualified consultants and contractors bid for public projects. More consultants mean more design, funding and construction to improve our ever-deteriorating roadways and bridges. ■

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