

BOSTWICK & PRICE

A PROFESSIONAL CORPORATION

MEMORANDUM

TO: Representative Mike Morley
FROM: Darrel Bostwick
DATE: October 20, 2004
RE: Design-Build Legislation Outline

Representative Morley:

Per your request, I am forwarding my proposed outline of the design-build legislation for government entities that we have discussed over the past several months. As you are aware, both UDOT and DFCM have ventured into the design-build arena previously and you will need to decide whether you want the proposed legislation to include those governmental entities or not. Hopefully, this outline will serve the purpose of generating additional discussion and comments to facilitate drafting of a proposed bill. Following the October Interim Committee meeting, I will begin drafting a proposed bill addressing the design-build issue for governmental entities in Utah.

As an initial observation, traditional public procurement has long been grounded in the concepts of obtaining the best price/value for the governmental entity and avoiding favoritism and self-dealing in the procurement process by government officials (obtaining the best price/value and avoidance of favoritism must be viewed from the procurement process as a whole and not the results of a particular project or two). That is why the foundation of public procurement has been to award contracts to the lowest responsive/responsible bidder. It is the integrity of the overall process that best assures the accomplishment of both of the goals of public procurement. It is a balancing between the interests of governmental entities that want unfettered discretion and those who have oversight of the process (the State Legislature, legal counsel for various governmental entities, legal counsel for contractors, etc.) who want certainty and objective standards against which to measure and remedy violations of the process.

Typically, public procurement methods that involve too much subjective analysis have been avoided. However, in recent years some erosion of those strict principles has occurred, but with much caution and with various attempts at establishing adequate safeguards to preserve the goals of the best price/value and to avoid favoritism. Traditional concepts of design-build push the envelope in both of these respects and for those reasons it has been sparingly and cautiously implemented for public procurement. In fact, there are many who believe that both the UDOT and DFCM design-build processes go too far and do not adequately achieve the goals of public procurement. The difficulty comes in establishing adequate objective criteria to measure against while giving the government entity sufficient discretion to get the best product for the best price/value and giving all qualified prospective contractors a fair opportunity to do the work. It is a delicate balance that will be difficult to achieve in light of the varying perspectives of the various participants in the public construction procurement process.

There are a number of pros and cons associated with selecting the design-build construction process over a traditional design-bid-build process. Often a perceived benefit also carries a disadvantage. For example, one perceived pro is that the design-builder, rather than the governmental entity, is ultimately at risk for the design of the project. However, a con is that while the design-build process can insulate the government entity from design errors on a given project, overall it can be more expensive. Contingencies are often build into design-build proposals to offset the design risks undertaken by the design-builder. Under a typical design-build process in the private sector, such contingencies most often accrue to the benefit of the design-

builder. If applied to the public sector without some modification, it is arguably more costly for governmental entities to pay for these possible contingencies on each project rather than pay the cost of the occasional design problem on typical design-bid-build projects. Another perceived pro is that the public entity is granted discretion in the selection process and can avoid contracting with design-builders with which the entity is not comfortable doing business. However, a correlation disadvantage or con is that competition could be severely limited due to unnecessary over-restrictive and subjective qualification criteria imposed by the governmental entity. Pricing will be increased if sufficient competition is not maintained. In addition to those mentioned herein, there are many other factors which bear on the determination of whether to allow governmental entities the authority to utilize design-build in construction procurement. While many of these issues have been discussed and debated over the preceding months, this outline is not intended to be an exhaustive discussion of all such issues.

You have conducted several meetings with various groups and associations that have a stake in the proposed design-build legislation. I have attempted to incorporate the best thinking of each of the groups while remaining true to your vision for this proposed legislation. Having provided this background, the outline below for the proposed legislation for utilization of the design-build process by government entities is contemplated to be a three step process:

1. Determination of Needs and Design Criteria to Establish an Objective Scope of Work

Initially, the governmental entity must determine its needs and develop a basic design criteria for the proposed project. This will accomplish many valuable goals. These goals include assuring that the public improvement is needed. It will assure that the finished project will meet the actual needs of the public. It will provide an opportunity to establish the parameters of the design to obtain the look and feel of the finished project. Some of these factors should include size (square feet of useable space), type of construction (structural steel, masonry, frame, etc.), architectural style, end use of various parts of the project (community center, senior citizens center, office space, storage space, shop space, etc.), etc. Thus, the process will provide somewhat of an objective standard against which to compare the proposals of those wishing to participate in the design-builder selection process. Without this requirement, many smaller governmental entities will be seduced into surrendering all of their responsibility to a contractor who will provide the most space for the least money, regardless of the value, need or usability of the project. While this element will invariably require the governmental entity to spend some time and money defining the proposed project, it is inconceivable that any responsible owner would not invest this effort to assure that the end project will meet the owner's needs. This is especially true for a public owner.

2. Selection of a Design-Builder

In a pure form of design-build, the owner pre-qualifies contractors to submit general proposals for the work based upon the criteria established by the owner. Once pre-qualified, a contractor would be required to submit a general proposal, including a list of the participants in the design-build team, experience and other qualifications, mark-ups for overhead and profit, etc. Upon evaluation of these general proposals, a short list of contractors would be invited to participate in a design competition. In this scenario, the owner often provides a stipend to the short-listed contractors to partially offset the cost of creating a detailed design proposal. From the detailed design proposals, the owner then chooses the one that best meets the owner's needs. What has been described in this process is similar to the process that was followed on both the Matheson Courthouse project for DFCM and the I-15 reconstruction project through Salt Lake County for UDOT.

As can be easily seen from the foregoing narrative, this is the part of the process, if unaltered, that is the most difficult to maintain the underlying goals of public procurement due to the great amount of discretion given to owners in the private sector. Such unfettered discretion is not appropriate in public procurement and should be avoided. Unfortunately, the design-build process in public procurement for smaller governmental entities can degenerate even further if no objective criteria are established and/or no design competition is conducted. There has been much discussion about how this part of the process be degenerate into nothing more than a mere “beauty contest.” This is one of the many reason why it is important to have the governmental entity establish some objective standards in step one above.

This is the part of the process that many smaller and medium-sized contractors oppose for public procurement because too many governmental entities place an undue amount of weight on the experience of contractors who have built similar projects. In public procurement, the goal isn’t to have the “best qualified contractor” build the project but, rather, to have “a qualified contractor” build the project for the best price. If the best qualified contractor can build the project for the best price, that is acceptable. But the fact that one contractor is more qualified than another (e.g., may have more experience, etc.) does not make that contractor the best selection in obtaining the best price/value. And, if the most qualified contractor is selected solely on experience, it would be a bar to all other qualified contractors who could do the work but have somewhat less experience. This is not to say that inexperienced contractors should be given the opportunity to gain experience at the public’s expense but, rather, to provide all qualified contractors a fair opportunity to participate in the process and have a fair opportunity to obtain the work. In the end, the public gets the best value because the projects are contracted by qualified contractors for the best price/value. Fair and open competition is maintained, assuring that the best price is an integral factor in determining overall value.

It is true that the experience factor may be more important for more unique projects. However, over-emphasis on experience could easily subvert the process by funneling projects to only those who have the most experience or those who the governmental entity is predisposed to use. While the governmental entities may bristle at such a suggestion, it is a necessary observation and precaution to maintain the integrity of the process.

In short, every effort should be made to limit subjective criteria in the selection of the design-builder, and specific and general criteria should be built into the legislation to assist governmental entities in the selection process.

3. Competitive Bidding of First Tier Subcontractor Work

As mentioned above, one of the most important safeguards of the public procurement process historically has been maintained by awarding contracts to the lowest responsive, responsible bidder. In this way, the best price/value is obtained. In the proposed legislation, the design-builder will become the agent of the governmental entity in assuring the best price/value by competitively bidding the work (according to public procurement standards) to the first tier subcontractors and suppliers. In addition, to assure that work which is anticipated to be self-performed by the design-builder meets this standard, the design-builder will be required to competitively bid the proposed self-performed portion of the work as well. If the design-builder is the low bidder for that work, it may undertake to perform that work. However, safeguards will need to be established to assure that the design-builders’ bids are fair, open-market, bids and include an appropriate portion of the design-builder’s overhead and profit so that a fair comparison can be made against all other bidders for that

work. In this way, any cost savings will accrue to the public to assure that the public is obtaining the best price for the work.

The use of the established criteria discussed in step one above combined with the competitive bidding of first tier subcontractors and suppliers, discussed in this step three, are necessary to avoid abuse of the process and undue expense for the public in the procurement process. One example of the need for these safeguards which has been discussed at length arises from a government entity accepting a proposal from a design-builder which did not include sufficient detail and planning. Sufficient competition was not achieved and the design-builder's proposal was general in nature and was to construct a building with a certain number of square feet. While the design-builder included the price of cast-iron drain piping in the proposal, there was no requirement that cast-iron pipe actually be used. During construction, the design-builder opted to use plastic ABS drain pipe. The cost savings was significant and accrued solely to the benefit of the design-builder. The public received a lower quality project for an inflated price. The practice of proposing projects designed to a high standard of quality and then constructing those projects to a lower standard of quality, is only one reason to be cautious in establishing detailed criteria for the utilization of design-build procurement methods by governmental entities.

However, the goal of the proposed legislation should be to provide reasonable authority to governmental entities for the use of design-build procurement in a reasonably concise statutory framework. The statutory authority should be placed in one location in the code and be incorporated by reference into those sections dealing with construction procurement for the various governmental entities. The likely placement of the new legislation would be in Part E of the Utah Procurement Code, Procurement of Construction (currently Utah Code Annotated Sections 63-56-36 to 39). In addition, the scope of coverage should be specifically defined to include or exclude all state and local governmental and quasi governmental entities, as deemed appropriate. Some possible examples of possible coverage of the proposed legislation are: all state agencies (with the possible exception of UDOT and DFCM which already have some specific design-build authority in other parts of the code), all county governments, all city and town governments, all special improvement districts, all school districts, other local governmental entities, etc.

I trust that this discussion will be sufficient for your current needs. I look forward to the Interim Committee meeting where we can discuss and further refine these important issues.