WASHINGTON STATE PUBLIC WORKS' PROCUREMENT:
Existing Statutes Versus Modern Practices

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Washington State Institute for Public Policy

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Introduction

Until the 1980s, the state of Washington conducted its public works' procurement almost exclusively in a traditional manner. The process is rather sequential and has the following steps:

1. Program development
2. Capital budgeting
3. Legislative appropriation
4. Architect/engineer selection
5. Project design
6. Production of contract documents
7. Lump-sum competitive bidding
8. Contractor selection
9. Contract award
10. Construction
11. Project acceptance
12. Warranty period

Steps 2 and 3 may be repeated, as circumstances dictate, to provide separately for planning/design and construction funding.

Existing System: Competitive Bidding Process

The competitive bidding process has remained virtually unchanged since the state's primary statute[1] was codified in 1923.[2] Once the contract documents are issued, a public bid opening is held at the publicized deadline. Bids are evaluated for *responsiveness,* that is, whether they have met all of the advertised requirements. From the responsive bids, an apparent low bidder is identified. That bidder is evaluated for *responsibility,* that is, its ability, financial capacity, past performance, etc.[3] Finally, a contract is awarded to the low responsible bidder.[4]

The world of public works has changed dramatically since 1923, with refinements of and alternatives to the traditional process being practiced by the state and other public entities nationally.

Refinement: Bidder Prequalification

Bidder prequalification refines the traditional approach by permitting only bids from "prequalified" contractors. As early as 1928, the State Highway Engineer asked the Attorney General if there was authority to prequalify contractors. The answer was "no."[5] There followed three unsuccessful attempts—in 1929, 1931, and 1933—to pass prequalification bills for all state public works.[6] In 1935, prequalification was limited to an unsuccessful omnibus highway bill.[7]

In 1937, the highway bill became law[8] and bidder prequalification was initiated for transportation work.[9] The program has been effective, yet has never been adopted for public works generally due in large part to contractor opposition. In fact, even as Transportation is now modernizing its administrative rules on prequalification,[10] it has again faced organized contractor opposition.

In 1971, prequalification laws for municipal and public utility district electrical facilities were enacted.[11] In 1983, a prequalification law for state ferry bidders was enacted.[12] So the Legislature recognizes the validity of such a concept. Its application to roads, highways, bridges, electrical facilities, and ferries could logically be extended to all public works.

As recently as 1987–88, a prequalification bill for municipal construction was unsuccessfully introduced.[13] Yet prequalification has been used for the Seattle Art Museum by the Museum Development Authority of Seattle, a public corporation chartered by the city of Seattle,[14] and for the Bellevue Convention Center by the Bellevue Convention Center Authority, a public corporation chartered by the city of Bellevue.[15]

Advantages

- Better overall pool of bidders
- Greater potential for more "realistic" bids
- Less potential for below-average project quality
- Less potential for below-average project delivery
- Less potential for legal disputes

Disadvantages

- The potential for favoritism or subjectivity
- Limited to specific projects absent statutory change

Refinement: Construction Administration

Construction administration (CA) refines the traditional approach. The agency retains a professional firm to administer the project on its behalf and interact with both the architect/engineer and contractor. The scope and complexity of some agencies' programs demand sophisticated CA services.

Local current CA examples include the Department of Corrections at McNeil Island[16] and the University of Washington at Magnuson Health Sciences Center.

Advantages

- Experienced specialists working with the architect and contractor
- Less need for large permanent staff at the agency

Disadvantage

- Agency staff may feel "threatened" by the outside firm

Alternative: Construction Management

Construction management (CM) alters the traditional approach by replacing the general contractor with a construction manager, an entity that is selected in a manner similar to architects/engineers; that is, without regard to cost until after selection. In CM's most common form, the agency contracts separately for major elements of the project. The CM coordinates the work of the contractors. CM for public works is not now legally permissible in Washington.[17]

The Department of Corrections has had a bill introduced in the 1991 session[18] to allow a form of CM for five years on projects exceeding $10 million "for the purpose of expediting contracting and construction processes…." Major subcontract work would be competitively bid. The bill's approach is similar to Oregon's recently proposed administrative rule covering all state public works.[19] The stated purpose of both is to enable an awarding agency to exercise some discretion in the selection of the firm that will oversee construction.

Advantages

- Manager selection similar to architect/engineer
- Fixed fee and "guaranteed maximum price"
- Input during design process
- Potential for better control of construction

Disadvantages

- Bypasses competitive bidding of construction
- Requires statutory changes

Alternative: Design/Build/Bid

Design/build/bid (DBB) alters the traditional approach by combining design and construction responsibility under a single team's control. DBB bypasses traditional competitive bidding of the project's construction. Selection of the team by the public agency demands a two-stage approach:

1. Evaluation of all responses to a request for qualifications (RFQ) to identify a "short list" of finalists, followed by
2. Evaluation of finalists' responses to a request for proposals (RFP).

The US General Services Administration's Public Buildings Service (PBS) has issued new policies and procedures for federal DBB,[20] has two dozen proposed projects in its program, and has its first project under way in Chicago. PHS finds DBB "generally appropriate for projects which can be procured from clearly defined ... requirements.... For new construction, this is often interpreted to address simple space types such as general purpose office, warehouse/storage, and interior parking."[21]

Current DBB examples in Washington include General Administration's East Campus Plus, chartered on the assumption that DBB saves time and money.[22] Others are the University of Washington's Stevens Court and the Port of Seattle's SeaTac garage addition.[23] DBB was used by General Administration for Everett Community College's emergency library replacement in 1987.

To pass legal scrutiny in Washington, RFP evaluations must be done based on objective performance-oriented criteria. Even then, the Attorney General's memorandum that authorized DBB for East Campus Plus is unconvincing.[24] And the Port of Seattle's authority to use DBB is unclear.[25]

In 1977, a law was enacted for the procurement of ferries by DBB.[26] So the Legislature recognizes the validity of such a concept. Serious thought should be given to dealing with DBB for public works by statutory declaration, if the state's policy to use DBB continues.

Advantages

- Full design and construction appropriation at one time
- Perhaps better cost and schedule control
- Single point of design/construction responsibility
- Likely reduced claims

Disadvantages

- The architect/engineer is not the client's agent
- Less designer/client interaction so design arguably suffers
- The need for an elaborate client-developed program
- No arms' length relationship between designer and contractor
- Bypasses competitive bidding of construction
- Problems with designer's errors and omissions insurance
- Problems with contractor's surety bonding
- Marginal legality absent statutory changes

New Directions: Other States' Modern Procurement Codes

Many other states have modernized their procurement statutes over the past decade to reflect modern practices. Massachusetts, as an example, passed an omnibus reform of its public construction law in 1980 after an investigation and recommendations by a special commission.[27] The law[28] features elaborate prequalification provisions, as well as those for debarment—that is, exclusion of a firm found in violation of particular procurement statutes from bidding government work for a specified period.

Oregon enacted a comprehensive procurement code in 1975,[29] which allows for bidder prequalification[30] and "where appropriate, direct[s] the use of alternate contracting and purchasing practices that take account of market realities and modern or innovative contracting and purchasing methods, which are also consistent with the public policy of encouraging competition."[31] And bidder prequalification is mandated in California for the California State University,[32] among others.

The American Bar Association, through its Sections of Public Contract Law and Urban, State and Local Government Law, spent five years drafting, publicizing, receiving public input, and putting into final form The Model Procurement Code (MPC) for State and Local Governments. The MPC, adopted in 1979 and applicable to all public bodies regardless of the particular structures of any state, has been enacted in various forms by at least 13 states.[33] One of those—Virginia—has specific statutes on design/build and construction management[34] and bidder prequalification.[35]

New Directions: Washington's Proposed Model Procurement Code

In 1984, a group of interested attorneys and others met to explore the possibility of implementing the MPC in Washington. By 1987, the group had drafted an MPC for Washington. The drafters' underlying purpose was "to develop a set of laws [to] establish ground rules by which the procurement process would operate without getting unnecessarily involved in the substantive issues of procurement."[36] The proposed Washington version of the MPC consists of these articles:

1. General provisions: purpose, definitions, application
2. Procurement organization: policy office, regulations, impact on local procurement
3. Source selection and contract formation: bidding procedures, award, records
4. Specifications: encourage competition
5. Procurement of construction, architect/engineer, and land surveying services: bonds, retention, standard clauses
6. Modification and termination of contracts for suppliers and services
7. Cost principles
8. Disposal of assets
9. Legal and contractual remedies: bid disputes, debarment, interest, contract claims
10. Intergovernmental relations: cooperative purchasing
11. Assistance to M/WBEs: consolidated certification procedures, application of goals.

The proposed Washington MPC was presented in two April 1987 State Bar Association seminars, one in Seattle and the other in Spokane. Despite the proposal's positive reception, no bill on the subject has yet been introduced in the Washington legislature.

Advantages

- Focus on and implement state public procurement policies
- Consolidate and standardize fragmented procurement statutes
- Acknowledge and allow modern, flexible procurement techniques

Disadvantage

- Implementation challenges and transition period problems

Conclusion

In a recent issue of ENR,[37] editorial commentary on New York's "archaic contracting rules" would be equally valid for Washington. "[P]ublic servants need some flexibility in how they procure construction services. To tie the hands of government officials with contracting rules from the 1920s makes a mockery of the entire public works system."

Washington's fragmented and outdated statutory framework for public works' procurement does not contemplate modern practices. A thorough review of all relevant laws—scattered throughout the Revised Code of Washington—could determine whether they (1) support the state's policies on public works' procurement and (2) demand more uniformity than seems to prevail.[38]

Endnotes

[1] WASH. REV. CODE § 39.04.020.

[2] SB 92 § 2 enacted as C 183 L 23.

[3] *See*, Cole and Goldblatt, *Award of Construction Contracts: Public Institutions' Authority to Select the Lowest Responsible Bidder*, 16 J.C. & U.L. 177 (1989).

[4] *See*, Comment, *Competitive Bidding—Public Construction Contracts in the State of Washington,* 39 WASH. L. REV. 796 (1964).

[5] 1927-28 Op. Att'y Gen. 920.

[6] HB 328 (1929), SB 66 (1931), HB 384 (1933).

[7] SB 55 § 175 (1935).

[8] WASH. REV. CODE § 47.28.070 from SB 112 § 35 enacted by C 53 L 37.

[9] Transportation has no authority to impose additional prequalifications on prospective bidders. *Manson Constr. & Eng'g Co. v. State,* 24 Wn. App. 185, 600 P.2d 643 (1979), *review denied* (1980).

[10] A thoroughly updated WASH. ADMIN. CODE ch. 468-16, first proposed at Wash. St. Reg. 89-16-086 (Aug. 2, 1989), reappeared with many deletions at Wash. St. Reg. 90-22-092 (Nov. 7, 1990). Despite losing such features as a direct link between a prime contractor's performance report and that contractor's qualification rating, the new rules should enhance the prequalification process.

[11] WASH. REV. CODE § 35.92.350 from HB 813 § 1 enacted by C 220 L 71 E 1, and § 54.04.085 from HB 813 § 2 enacted by C 220 L 71 E 1.

[12] WASH. REV. CODE § 47.60.680 from SB 3250 § 1 enacted by C 133 L 83.

[13] HB 864.

[14] *Invitation for Prequalification of Contractors for the Seattle Art Museum Downtown Project,* Museum Dev. Auth. of Seattle (March 14, 1988).

[15] Notice, Seattle Daily J. of Com., Nov. 16, 1990.

[16] Corrections' Aug. 28, 1990, contract with Morrison-Knudsen Co. is called a "Construction Management (CM) Agreement," but it actually describes CA services as characterized in this paper.

[17] *See, e.g.,* 1984 Op. Att'y Gen. No. 17.

[18] HB 1777, SB 5529.

[19] OR. ADMIN. R. 125-310-026 (1990).

[20] Memorandum from PBS Commissioner Coleman to PBS Regional Administrators (April 13, 1990).

[21] *Id.* at 3.

[22] In a Sept. 29, 1989, letter to Governor Gardner, General Administration Director Holden stated that the East Campus Plus program strategy would "maximize the likelihood of success in building quality buildings on time and within budget." *East Campus Plus Program Charter* (Dec. 1989).

[23] For a description of the controversial contract award, *see,* Scott, *Port picks second low bid on garage,* Seattle Daily J. of Com., Aug. 16, 1990, at 1.

[24] From Ass't Att'y Gen. Jensen to General Administration's Brascher (Mar. 3, 1988).

[25] *See,* 1978 Op. Att'y Gen. No. 14.

[26] WASH. REV. CODE § 47.60.650 enacted by C 166 L 77 E 1. *See also,* Equitable Shipyards, Inc. v. State, 93 Wn. 2d 465, 611 P.2d 396 (1980).

[27] Nuccio, *Prescribing Preventive Remedies for an Ailing Public Construction Industry: Reforms Under the New Massachusetts Competitive Bidding Statute,* 23 B.C.L. REV. 1357 (1982).

[28] Fair Competition for Bidders on Construction, Etc., of Public Works, MASS. GEN. LAWS ANN. ch. 149, §§ 44A-M.

[29] OR. REV. STAT. ch. 279.

[30] *Id.*, §§ 279.039-.047.

[31] *Id.,* § 279.015(5).

[32] CAL. PUB. CONT. CODE §§ 10760-64.

[33] As of Sept. 1, 1989: Alaska, Arizona, Arkansas, Colorado, Indiana, Kentucky, Louisiana, Maryland, Montana, New Mexico, South Carolina, Utah, and Virginia; also, the District of Columbia, the Territory of Guam, and many local jurisdictions. *Second Supplement, Annotations to the Model Procurement Code for State and Local Governments with Analytical Summary of State Enactments,* A.B.A. SEC. URB., ST. & LOC. GOV'T. L. (1990).

[34] Virginia Public Procurement Act, VA. CODE ANN. § 11-41.

[35] *Id.* at § 11-46.

[36] Chism, *Introduction to the Washington State Model Procurement Code* (March 5, 1987).

[37] ENGINEERING NEWS-RECORD, Feb. 4, 1991, at 54.

[38] Two related efforts are (1) the ongoing Capital Forum, and (2) the Legislative Budget Committee's *Capital Projects Phase* II *Report* (No. 88-7, dated Dec. 16, 1988) with 22 recommendations for "increased oversight responsibilities" by General Administration "in order to control project costs and ensure consistency with the long-term planning process."