PA 12-70—sSB 33
Transportation Committee
Labor and Public Employees Committee

AN ACT CONCERNING DEPARTMENT OF TRANSPORTATION PROJECT DELIVERY AND PROJECT LABOR AGREEMENTS FOR CERTAIN PUBLIC WORKS PROJECTS

SUMMARY: This act authorizes the transportation commissioner to designate that highway construction projects be built using either a (1) "construction-manager-at-risk" contract with a guaranteed maximum price or (2) design-build contract, as alternatives to the department's traditional "design-bid-build" process. It prescribes how he must do this. The act requires the commissioner to have Department of Transportation (DOT) employees conduct development and inspection work when possible to reduce the need for this work to be performed by consultants.

The act also authorizes the state, its agencies and political subdivisions, to require a "project labor agreement" (PLA) for public works projects when they determine it is in the public's interest to do so. A public entity must determine if a PLA is in the public's interest before entering into a design-build contract of at least $10 million to (1) build a new public school or (2) renovate or reconstruct an existing public school.

The act specifies that if any of the provisions concerning PLAs and their possible use in public school construction or renovation is found to contravene state or federal law, the act's remaining provisions concerning PLAs remain in effect.

EFFECTIVE DATE: Upon passage

DIFFERENT BIDDING METHODS

"Design-bid-build," "construction-manager-at-risk (CMAR)," and "design-build" use different approaches to design and build construction projects. The methods chiefly differ in how they assign responsibility for design and construction services.

1. In design-bid-build, the most traditional method, the owner (e.g., DOT) has separate contracts with the designer and the builder, and the project design is completed before bids are solicited for a construction contract.
2. In CMAR, the owner generally contracts with a construction manager who works with the designer and provides labor, material, and project management during construction. Under this approach, the CMAR typically guarantees the maximum cost of the work.
3. In the design-build approach, the owner contracts with a single entity that both designs and builds the project.

DOT has traditionally put highway projects out to bid under the design-bid-build method; prior law did not authorize it to use the other methods. The act allows the commissioner to designate specific highway construction projects to be put to bid under either a CMAR or design-build contract.

CMAR CONTRACT PROCEDURE

Under the act, the commissioner may enter into one contract with an architect or engineer for the project design, and a second contract with a CMAR contractor. The CMAR contractor is responsible for (1) providing input during the design process and (2) building the project, using a low sealed bid process (see BACKGROUND) to select trade subcontractors. The CMAR contract must include a guaranteed maximum price.

The act allows the commissioner to select the architect, engineer, or contractor from among the contractors selected and recommended by a selection panel. It is not clear if the selection panel selects and recommends architects and engineers or just contractors. The act also does not discuss panel membership or how it is appointed, although the law establishes within DOT at least one panel to evaluate and select DOT architecture, engineering, and other consultants (CGS § 13b-20c).

The CMAR contract must be based on competitive proposals received by the commissioner after he has advertised the project at least once in a newspaper with a substantial circulation in the project area. The commissioner must establish the criteria, requirements, and conditions of the proposals and the award. He must award the contract based on the general conditions and staff costs, plus qualitative criteria. It is not clear to what "general conditions" and "staff costs" refer. The act makes the commissioner solely responsible for other aspects of the project, but does not specify what these might be.

The contract must clearly state (1) the contractor's responsibilities to deliver a completed and acceptable project on a particular date; (2) the project's maximum cost; and (3) if applicable, the cost of acquiring the property as a separate item.

DESIGN BUILD CONTRACT

Under this alternative, the act allows the commissioner to enter into a single contract with a design-builder, whom he may select from among those a selection panel recommends. The commissioner must advertise the project and its specifications at least once in a newspaper with a substantial circulation in the project area.

The contract must (1) include such project elements as site acquisition, permitting, engineering design and construction and (2) be based on competitive proposals. The commissioner must award the contract based on a predetermined "metric" (measurement) provided to design-build contractors before they develop technical proposals. This metric may be unique to a project, but must consist of a score combining the (1) proposer's qualifications and past performance, (2) proposal's technical merit, and (3) cost. The commissioner must establish a selection panel for each project to score the first two elements according to the applicable metric. The proposal's sealed cost portion must be opened in a public

ceremony only after this scoring has taken place.

As with the CMAR process, the commissioner must determine all criteria, requirements, and conditions for the proposals and award, and is solely responsible for other aspects of the contract. Also, as with the CMAR process, the contract must clearly state (1) the design-builder's responsibility to deliver a complete and acceptable project on a particular date; (2) the project's maximum cost; and (3) if applicable, the cost of acquiring the property as a separate item.

USE OF DOT EMPLOYEES FOR DEVELOPMENT AND INSPECTION WORK

The act requires, for any contract entered into under it, the DOT commissioner to perform project development services, which may include the size, type, and desired design character of the project; performance specifications; quality of material; equipment; workmanship; preliminary plans; or any other information needed for the department to issue a bid package. The commissioner also must oversee the projects and provide inspection services. Inspection services include inspection of the construction, surveying, testing, monitoring of environmental compliance, quality control inspection, and quality assurance audits.

The commissioner must, after the first two projects performed under the act, conduct the above development and inspection work using DOT employees. (It is not clear at what point a project is considered "performed.") Under the act, the Department of Administrative Services (DAS) commissioner must place the positions required for this work on continuous recruitment according to law (see BACKGROUND). In addition, DOT employees may be appointed to durational positions to reduce the need for consultants to perform inspection or development work. These DOT employees may be appointed as engineers to fill durational positions without an examination if they meet DAS' education, knowledge, and training requirements. Any contract with a consultant for an initial bid on a project must include a provision providing for the training of DOT employees in the bidding process and in managing projects entered into under the act.

Regardless of the provisions in the previous paragraph, the act requires a transition period during which the DOT commissioner may authorize the continued use of consultants if needed to complete contracts the act authorizes. During this transition period the commissioner must make all reasonable efforts to perform development and inspection work using DOT employees where available in order to reduce, and where possible eliminate, dependency on outside consultants. Under the act, the authority to use consultants ends on the earlier of (1) the date that the governor transmits to the Transportation Committee a letter certifying that use of consultants is no longer necessary to complete projects under the act or (2) January 1, 2019. The authority to use consultants cannot continue beyond the termination date unless the legislature reauthorizes it.

In addition, the DOT commissioner must seek to reduce the number of consultants engaged to review work performed by other consultants, and must report to the Transportation Committee by July 1, 2013, and annually thereafter on the status of such efforts.

PROJECT LABOR AGREEMENTS

Regardless of any law, regulation, or requirement concerning procurement of goods or services, the act authorizes the state, or any of its agencies, instrumentalities, or political subdivisions (public entity), to require a PLA for any public works project when the entity determines, for a particular project and acting in its discretion, that it is in the public's interest to require such an agreement. Under the act, a PLA is a pre-hire agreement covering the terms and conditions for everyone working on a specific public works project (building, reconstructing, altering, remodeling, repairing, or demolishing a public building or other public works project).

Before a public entity enters into a design-build contract of at least $10 million to (1) build a new public school or (2) renovate or reconstruct an existing public school, it must determine if a PLA is in the public's interest.

Determining the Need for a PLA

In deciding whether to require a PLA, the public entity may consider the effects a PLA may have on:

1. the efficiency, cost, and direct and indirect economic benefits to the public entity;
2. the availability of a skilled workforce to complete the project;
3. the prevention of construction delays;
4. the project's safety and quality;
5. the advancement of minority and women-owned businesses; and
6. community employment opportunities.

Under the act, a PLA must:

1. set forth mutually binding procedures for dispute resolution that can be implemented without delay;
2. include guarantees against a strike, lockout, or other concerted action meant to slow or stop work on the project;
3. ensure a reliable source of skilled and experienced labor;
4. include goals for the number of apprentices and for the percentage of work to be performed by minorities, women, and veterans;
5. invite all contractors to bid on a project regardless of whether the contractor's employees are union members;
6. permit the selection of the lowest responsible qualified bidder regardless of union affiliation;
7. not require compulsory union membership for people working on the project; and
8. bind all contractors and subcontractors to the terms of the agreement.

A bidder that does not agree to abide by the PLA's terms or a requirement to negotiate a PLA cannot be considered a responsible qualified bidder.

Under the act, a public entity's decision to require a PLA is not evidence of fraud, corruption, or favoritism. The legal effect of this provision is unclear.

BACKGROUND

Related Case

The Connecticut Supreme Court has held that a nonunion plaintiff had standing to challenge pre-bid specifications requiring the successful bidder on two state-financed school construction projects to perform all project work with union labor under the terms of a PLA. The court found that the plaintiff met the standing test, in part, "because the complaint, the supporting affidavits, and other evidence, considered in their most favorable light, contained detailed allegations as to the discriminatory effect of the PLA requirement" on the plaintiff and other nonunion contractors. The court remanded the case for further proceedings against certain defendants (*Electrical Contractors Inc. v. Department of Education*, 303 Conn. 402 (2012)).

Continuous Recruitment

The DAS commissioner holds examinations to establish candidate lists for classified positions in state service. These examinations may be held on a continuous basis when the commissioner deems it necessary to supply the needs of the state service (CGS § 5-216).

Lowest Responsible Bidder

By law, the DOT commissioner must award contracts to build, alter, reconstruct, improve, relocate, widen, or change the grade of, sections of state highways or bridges to the lowest bidder deemed responsible (CGS § 13a-95).

Prequalification

DOT's *Construction Contract Bidding and Award Manual* states that "with few exceptions, only contractors prequalified by the department are eligible to receive awards of department construction contracts." Prequalification is the process by which DOT determines which general contractors are qualified and eligible for different types of DOT contracts.

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