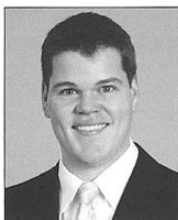


Changing Legal Landscape for Public Project Delivery

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Few areas in the construction industry have received as much attention during the last five years, both in the industry at large and in the field of construction law, as that of project delivery systems and their use and availability on both public and private projects.

There are many reasons for this focus. First, as contractors, owners, and design professionals have become more sophisticated in their understanding of why and how projects are completed successfully, on time and on budget, they also have come to understand the benefits of using non-standard project delivery systems which focus more on collaboration and coordination among all project participants from the inception of a project, and less on the individual roles and activities of those participants under traditional project delivery models.

Second, the new technology which has developed and become available to the construction industry during the last 10 years, including, most notably, Building Information Modeling (BIM), has allowed for, and emphasized, both greater collaboration among project participants, and better planning and implementation in the areas of project delivery.

While many project participants (and their lawyers) are still learning about this technology and how best to use it, the opportunities it has opened up for achieving greater efficiency in construction projects are enormous.

Third, as the domestic and world economy has weakened in all areas, its impact on the construction industry has been significant. As a result, project participants,

and especially sophisticated public owners, are looking for better ways to use the dollars that become available for projects, and they have gravitated toward less traditional project delivery approaches which can provide greater efficiencies and lower costs.

One impediment to the use of alternative project delivery systems, however, is the substantial body of public contracting statutes which imposes requirements for sealed bids, awarded to the lowest responsive and responsible bidder.

Because of the significant perceived benefits available through the use of alternative project delivery systems, many public entities have sought in recent years to secure relief through the California Legislature from some of the requirements of standard public bidding and award laws to allow them to use alternative project delivery systems, including design-build and best-value contracting.

That relief has come in the form of new laws which modify certain traditional public contracting requirements. These new laws have facilitated the use of alternate project delivery methods in public contracting, including especially the design-build delivery method. Authority for the use of design-build contracting in the education and transportation sectors, as well as a handful of other areas.

In the area of education, the Legislature has authorized design-build contracting by school districts (Cal. Educ. Code § 17250.10), community college districts (Cal. Educ. Code § 81700) and the California State University (Cal. Pub. Cont. Code § 10708).

In the area of transportation, it has authorized design-build contracting by transit operators (Cal. Pub. Cont. Code § 20209.5), local transportation entities and the Department of Transportation (Cal. Pub. Cont. Code § 6801).

Additionally, the Legislature has authorized design-build contracting for use by specific transportation agencies, including the Los Angeles County Metropolitan Transportation Commission (Cal. Pub. Cont. Code § 20360) and the Santa Clara Valley Transportation Authority (Cal. Pub. Cont. Code § 20301.5).

Outside education and transportation, design-build contracting has also been authorized for use by cities (Cal. Pub. Cont. Code § 20175.2), counties (Cal. Pub. Cont. Code § 20133), redevelopment agencies (Cal. Pub. Cont. Code § 20688.6), the Department of General Services (Cal. Gov't Code §§ 8169.5, 14661, 14016), the Judicial Council (Cal. Gov't Code § 70391.7), the Sonoma Valley Health Care District (Cal. Health & Safety Code § 32132.5) and certain entities building wastewater, solid waste, or water recycling facilities (Cal. Pub. Cont. Code § 20193).

Each of these statutes imposes specific restrictions on the types of projects on which the entities may use design-build contracting; it is not available to these entities on all projects.

An additional law of this type, SB 835, went into effect on January 1, 2012. (See Cal. Pub. Cont. Code § 10506.4.) SB 835 extends and expands the Best Value Construction Contract Pilot Program (SB 667 (Chapter 367, Statutes of 2006)), initially applicable only to projects at the University of California at San Francisco (UCSF), to all University of California (UC) campus construction projects over \$1 million. SB 667 authorized UCSF to use a best-value determination in awarding construction contracts during a five-year pilot program.

In support of the passage of SB 835, UC championed the benefits of the best-value system by stating in its letter to California Assembly member Mary Hayashi, Chair of the Assembly's Business, Professions and Consumer Protection Committee, that UC "has discovered . . . that for many projects – particularly complex projects such as large research facilities and medical centers – that the low bidder does not always deliver the project on time and at the bid amount."

UC also noted that "[s]ince the pilot was initiated, UCSF has awarded 30 contracts totaling \$960 million under the program (out of a total of 228 construction contracts totaling \$1.3 billion entered into during the same period), and their experience with these projects has demonstrated that best-value selection has been advantageous to the campus in the following ways:

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- decreases in bid protests, communication problems, disputes, the need for multiple inspections and re-work, change order requests and claims, and litigation;
- increases in incentives for contractors to perform high-quality work safely;
- increased likelihood of contractors

staffing a project with their best workers, and selection of subcontractors most appropriate for the work;

- reduced administrative oversight . . .”

Because of the successes UCSF had under the Pilot Program, the Legislature saw fit to allow it to be replicated throughout the UC system. Even before the approach is tested system wide, we predict

that other public entities will seek similar legislation to give them greater flexibility. Laws like SB 835 are here to stay. ■

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