

# LAW: The Contractor's Side



by *Cordell Parvin*

A lawyer's view of legal issues affecting the roadbuilding industry

## *Design-build: evaluation and award*

As time passes, constructing transportation projects by the design-build method becomes increasingly popular. The Federal Highway Administration (FHWA) and state DOTs see potential time savings and the elimination of claims based on defective design as strong arguments to construct the most complex projects by the design-build method. In some states, contractors who have successfully competed in this arena are encouraging their state DOT and legislature to permit more of it.

During the past year, I had the opportunity to make a presentation at the AGC convention and at the DBIA-, U.S. DOT- and AASHTO-sponsored conference on design-build on risks being passed to design-builders by the state DOTs in their contracts. That subject will be addressed next month. This month, I will discuss problems I am witnessing in the evaluation and award process.

### *Marked for dispute*

Increasingly, design-build and even other types of contracts are being awarded on the basis of "best value," a clearly subjective criterion that invites disputes. Contractors with no design-build experience are virtually excluded from the market. In some states, contractors not excluded are asked to identify the litigation history and any instance of liquidated damages being assessed over the last 10 years. Some states also ask contractors to identify the volume of changes or claims on projects they have constructed. It doesn't seem to matter whether the contractor was successful in the litigation, whether liquidated damages were assessed as a defense to a valid contractor claim or what caused the changes.

The requested information contributes to the perception of a subjective evaluation process. I discovered clear-cut evidence of subjectivity in a hotly contested project. I had the opportunity during the protest of award to review the evaluation by each of the five evaluators. Two clearly favored one of the two competitors, giving that firm higher marks in virtually every category. Another two favored the other competitor. The fifth must have felt like the swing vote of a supreme court justice. Could the evaluators really have seen the proposals so differently?

The state DOTs have used a variety of different processes to award design-build contracts. One example is a multi-step process similar to one used by the federal government. The steps include the Request for Qualification (RFQ) phase, the Request for Proposals (RFP) phase and the Request for Best and Final Offer (BAFO) phase. After the qualified contractors submit proposals in response to the RFP, they are each allowed the opportunity to make a two-hour oral presentation on their proposals.

Another example of a multi-step process includes a two-step process consisting of preparing a Proposal of Qualifications (POQ) in response to a Request for Qualifications (RFQ) and then a Best and Final Proposal (BAFP). The RFP is the

second step and contains the technical requirements for developing the design and construction of the project as well as the contract documents for execution of the project. Award of the contract is based on the "best value" determination selecting the BAFP in which the combination of technical, quality operating and pricing factors most closely meets the owner's requirements. The DOT is then required to negotiate with the highest scored design-builder to execute a contract.

### *Fair game*

The FHWA, AGC and several other groups have made suggestions to encourage a fair evaluation and award of contract. In almost every case, a two-step process is recommended with a stipend to be paid to the losing teams. Having been involved in several protests based on "best value" awards of transportation construction projects, I believe there are several steps that can be taken. I suggest public agencies:

- Select projects appropriate for design-build and explain why the agency intends to use the design-build approach for the particular project;
- Engage a registered design professional to prepare the detailed project scope, level of quality expected, budget requirements and schedule so that they are clearly understood by the design-build builders;
- Select the design-build team based on a two-step process with a limited number of design-build builders "short-listed";
- Leave no doubt about the honesty and integrity of the public agency's evaluation team, made up of design and construction professionals;
- Clearly state the evaluation criteria and weight given for each item and ensure the evaluation team uses them;
- Clearly state the requirements of the RFP including what will be considered to be a non-responsive proposal;
- Include the terms and conditions of the proposed design-build contract in the RFP and make clear whether any of those terms are negotiable;
- Do not seek from design-builders the number or dollar amount of changes or claims on projects constructed by them;
- Give equal opportunity in the second stage for each short-listed team to converse with the representatives of the public agency's evaluation team to clarify their proposal and any of the requirements of the RFP; and
- Provide candid feedback and a stipend to the unsuccessful bidders. <sup>RB</sup>

*"Design-Build Legal Issues" from Jenkens & Gilchrist is available for \$42 (includes shipping and handling). For more information on how to purchase the book, contact Joyce Flo at 214/855-4490; e-mail: jflo@jenkens.com.*