ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

REPORT ON ALTERNATE METHODS OF PUBLIC WORKS PROCUREMENT

BY THE COMMITTTEE ON CONSTUCTION LAW

I.

Introduction

By mandating the traditional design-bid-build ("DBB") approach to procuring public works, with only limited exceptions, New York law places major public works projects outside of the mainstream of current construction practice and unnecessarily prolongs the time needed to deliver such projects. At a time when frustrations with public works contracting are leading to calls for privatization of such contracting, it is time to lift the constraints on public works and bring this portion of the industry into the 21st Century.

Under DBB, a public agency identifies a public works need, engages a designer to prepare a complete design for the work, awards a contract to construct the work to the lowest responsible bidder after competitive bidding based on the completed design documents, finances the work with public funds and thereafter operates the completed project with public employees. Not only is this DBB model, which contemplates a fully completed design prior to the award of a construction contract, rarely used for major private procurements but there is increasing use of alternate methods of public procurement by governments outside New York and, in limited circumstances, within New York. Such alternate methods of procurement include design-build ("DB"), turnkey, design-build-operate ("DBO") and design-build-finance-operate ("DBFO"). The finance and operate elements sometimes include ownership of a completed facility for a

period of time, after which ownership is transferred to the public agency, and this approach is sometimes called build-own-transfer ("BOT"). All of these alternate methods combine design and construction, with operation and/or financing sometimes added.

The Federal Government and many states have enacted new laws permitting greater use of such alternate procurement methods. A bill allowing combination of design and construction on certain New York State Department of Transportation and Thruway Authority projects was submitted to last year's session of the New York State Legislature but failed to pass. It should be adopted. However, this bill is too limited in scope. Legislation permitting other State agencies and local governments to use, on a regular basis, alternate procurement methods that are both routinely used in the private sector and also utilized by governments outside New York should be enacted. The anticipated result will be greater efficiency in public works procurement and construction throughout the State.

II.

Use of Alternate Procurement Methods

There is a growing national, and international, trend toward use of alternate methods of procuring construction of public works. A 1997 study identified 356 privatized infrastructure projects worth $146 billion in forty-two countries during the preceding decade.[1]

---

[1] See Christopher L. Rissetto, Stephen A. Diaz and Mary F. Withum, "Privatization of Public Infrastructure," 1997 Wiley Construction Law Update at 51, fn. 1.

News articles report frequent use of alternate methods. Following are examples of such reports:

- The new light rail line in the City of Minneapolis is to be designed and built under a single contract. 1/7/01 Star Tribune at 1B.
- The Franklin, Ohio, City Council has authorized a contract to design, build and finance a new library and other facilities. 11/23/00 Dayton Daily News at 1.
- The contract for the Jackson Street Garage in downtown Phoenix has been awarded to a design/build team based on a substantive list of fourteen major evaluation criteria. 62 Southwest Contractor 11 at 27 (11/00).
- Since 1990, twenty-three states and the District of Columbia have started or approved design-build transportation projects. 56 Intermountain Contractor 12 at 33 (10/00).
- The State of Oklahoma is using design-build for a new dome atop the State Capitol. 8/19/00 Saturday Oklahoman.
- The City of Deltona, Florida, is contracting on a design-build basis for a new fleet-maintenance facility. 8/17/00 Orlando Sentinel at D8.
- San Francisco's Bay Area Rapid Transit District (BART) has undertaken a $1.5 billion subway extension on a design-build basis. 2/00 Design-Build at 15.
- The Bexar Metropolitan Water District in Texas has created a nonprofit corporation for purposes of contracting on a design-build-operate basis

for a new water intake, pumping, transmission and filtration project. 1/00 Governing Magazine at 56.

- The City of New York has awarded an emergency design-build deck replacement contract for the Brooklyn Bridge. 5 City Law 101 (9-10/99).

- The City of Seattle has contracted on a design-build-operate basis for procurement of a new 120-million-gallons-per-day water filtration plant. 6/15/98 Engineering News Record at 50.

- The Utah Department of Transportation has contracted on a design-build basis for the $1.5 billion reconstruction of Interstate 15 in Salt Lake City. 1/98 Design-Build at 33.

- The Port Authority of New York and New Jersey has contracted for private development of the new International Arrivals Terminal at JFK Airport. 11/17/97 Engineering News Record at 36.

- The Massachusetts Port Authority has opted for private development and operation of a new terminal at Logan Airport. 6/23/97 Engineering News Record at 14.

- The State of Georgia has awarded a contract to build and run a new prison in Charlton County. 6/3/97 Florida Times-Union at B-1.

Commenting on the widespread use of alternate methods of construction procurement in general, one industry representative recently stated that "[t]he word 'alternate' doesn't seem appropriate anymore."[2]

[2] 6/14/99 Engineering News Record at 46.

In public works, particularly, alternate procurement methods offer the possibility of significant reduction in the total time necessary to progress a project from conception to completion, providing the strongest rationale for using such methods. Time savings can be achieved in two ways: (a) reduction in procurement time; and (b) reduction in design and construction time.

Due to elaborate procurement requirements (which can include extensive advertising of contracts, long time periods for pre-bid investigation and questions and post-bid responsiveness and responsibility evaluation), it is not uncommon for public agencies to require many months to progress a contract to the award stage. When design and construction contracts are pursued separately, one following the other, the procurement process can be greatly extended. Because alternate procurement methods involve a combination of design and construction, such methods almost always provide a substantial savings in time.

Furthermore, the traditional approach requires preparation of a complete design before any construction begins. Where design and construction are combined, a "fast track" method of construction may be used. For example, construction of building foundations may begin before the building itself is fully designed.

A second rationale for using alternate methods of procuring construction is the potential for improving the quality of design and reducing disputes by allowing for extensive construction-based input during design. With the traditional approach, the designer prepares and completes the design without input from the constructor, who then prepares a price based on

reading the designer's drawings and specifications. Almost inevitably, this process yields at least some instances of inadequate communication of the designer's intent, because of incomplete or ambiguous designs or contractor misreading of the design documents. It also minimizes the opportunity for contractor input on material specifications and design details, which can be handled only to a limited extent during bidding. Combining design and construction provides for a constant interaction of design and construction expertise during design, potentially improving the design quality and minimizing disputes.

In addition to the advantages of combining design and construction, alternate methods can alleviate burdens on public resources by providing for financing and operation of facilities, which is another reason for the trend toward use of such methods. "The shortage of public funds and the desperate need for new or rehabilitated infrastructure have created an increased reliance on the private sector to finance, operate, manage, and even own facilities and services traditionally supplied by government."[3]

Combining design and construction with operation also can allow the public owner to benefit more fully from the expertise of specialized companies. For example, a company with special expertise in transit vehicles might be hired to build and equip a new transit line, including vehicles, and then to operate and maintain those vehicles over a period of years. The company's expertise as manufacturer of the vehicles would aid not only in design and construction of the line but also in maintenance and reliability after the line begins operation. A

[3] John D. Carter and Susan L. Schwegman, "Privatization: A Contractor's Perspective," 1993 Wiley Construction Law Update at 99.

complex waste-water treatment plant or recycling plant also might benefit significantly from combining design and construction with operation, especially if state-of-the-art electronic systems are a critical element of the project.

None of this means that alternate means of procurement are in the process of replacing the traditional design-bid-build approach, or that they should do so. Not every public owner that has tried an alternate approach has been satisfied with the results.[4] Also, there are policy reasons behind the traditional approach (such as making public works opportunities available to many potential bidders, both large and small, and protecting against favoritism) that should not be ignored. However, it does suggest that alternate methods should be available to public owners, for use when appropriate and with procedures aimed at assuring competition and impartiality in the contract awards.

This is the very conclusion reached in a recent paper titled "The End of Privatization and the Rediscovery of Competitive Procurement Mechanisms." The author, an expert in infrastructure development strategy, concluded as follows:

> A public/private infrastructure strategy is emerging in the United States. This strategy will be led by technological contributions from the private sector (originating across the globe), and implemented through intense private sector competition to meet the public's need for services. The emerging strategy will not rely on a single project delivery method as the exclusive means for providing infrastructure facilities or services. Instead, a risk mixture of DBB, DB, DBO, BOT, and Pure O&M [operation and maintenance] will increasingly be used by private firms and by governments to meet the public's evolving need for infrastructure services.

---

[4] See William G. Krizan, "Big Tests Ahead for Design-Build," 6/15/98 Engineering News Record at 47, 50 ("A design-build experiment in Loudon County, Va., may have spelled the end for that method of project delivery in the [local] school construction program").

This will be accomplished by matching technologies, capital sources, and engineering expertise to particular projects and delivery methods.[5]

The point is that no single approach to public works projects should be viewed as correct. Each public works need should be analyzed separately, and a sound determination made as to the best "delivery system" to meet that need. Such analysis and determination can only be accomplished if a full array of procurement methods are available for use by public agencies.

III.

Legal Restrictions on the Use of Alternate Procurement Methods

Various New York statutes require as a general rule that contracts by State agencies for construction work be awarded to the lowest responsible bidder based on open competitive bidding.[6] Section 103 of the General Municipal Law contains a similar requirement applicable to all municipal corporations and other political subdivisions. These requirements essentially mandate the traditional design-bid-build approach to public works procurement, since competitive bidding requires a completed design, meaning that design services must be procured separately and before construction work is procured, and that the selection process cannot be based on comparative evaluation of proposals. Alternate methods of procurement are prohibited, unless an exception to the general requirements applies. See Long Meadow Associates v. City of Glen Cove, 171 A.D.2d 731, 567 N.Y.S.2d 287 (2d Dep't 1991) (agreement by which developer would construct sewerage pumping facility and city would pay cost of construction

[5] John B. Miller, "The End of Privatization and the Rediscovery of Competitive Procurement Mechanisms," reprinted in Advanced Delivery Systems, American Bar Association (1998) at 268-69.
[6] See, e.g., Public Buildings Law § 8, Highway Law § 38, Public Authorities Law § 359 and Education Law § 6218.

less developer's agreed share was awarded in violation of GML § 103); Attorney General Informal Opinion No. 82-54 (1982) (village may not enter into lease-purchase agreement under "turnkey" concept for construction of a fire hall on village property).

GML § 103 contains an exception applicable where "otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three…." As a result of this exception, municipalities and other political subdivisions with pre-existing laws permitting construction procurement without competitive bidding may be permitted to combine design and construction and use alternate procurement methods. For example, the City of New Rochelle's pre-existing City Charter permits waiver of competitive bids by the City Council when "in the judgment of the city manager the subject matter of a proposed contract is such that completion is impossible or impracticable" by means of the competitive bidding process.[7] As a result, the City's award of a negotiated turnkey contract for a new court and police facility was upheld, based on the City Manager's determination, adopted by the City Council, that timely completion and a cost effective fixed price were needed. Imburgia v. City of New Rochelle, 223 A.D.2d 44, 645 N.Y.S.2d 111 (3d Dep't 1996).

Section 312b.1 of the New York City Charter also permits procurement without competitive bidding "except that, in a special case as defined in subdivision b of this section, the head of an agency proposing to award such contract may order otherwise in accordance with

[7] New Rochelle City Charter, Art. XIII, § 143[A][6].

policies and procedures established by the procurement policy board." Section 312c.1 of the Charter sets forth the parameters of this "special case" exception:

> For the purposes of this chapter, the term "special case" shall be defined as a situation in which it is either not practicable or not advantageous to the city to use competitive sealed bidding for one of the following reasons:
>
> i. specifications cannot be made sufficiently definite and certain to permit selection based on price alone;
>
> ii. judgment is required in evaluating competing proposals, and it is in the best interest of the city to require a balancing of price, quality, and other factors;
>
> iii. the good, service or construction to be procured is available only from a single source;
>
> iv. testing or experimentation is required with a product or technology, or a new source for a product or technology, or to evaluate the service or reliability of such product or technology; or
>
> v. such other reasons as defined by rule of the procurement policy board.

Under Section 312b.2, the agency head's determination must be in writing, stating the reasons why competitive bidding is not practicable or advantageous and why the selected alternative procurement procedure is the most competitive alternative under the circumstances. Sections 317-21 of the Charter spell out permissible alternative procedures (competitive sealed bids from prequalified vendors, competitive sealed proposals, competitive sealed proposals from prequalified vendors and sole source). Section 322 of the Charter permits use of other procedures as determined by the City's procurement policy board. The board has adopted

regulations further detailing the appropriate circumstances and alternative procedures for "special case" procurement.[8]

The City has relied on this "special case" exception to use alternative procurement methods such as design-build. Informal discussion with City officials indicates nearly all "special case" determinations for construction projects over the last several years, have been based on a need to complete construction within a particularly short period of time because of health or safety concerns or legal mandates. Recent "special case" projects by the City include renovation of severely deteriorated firehouses, remediation of several petroleum-contaminated sites, a schools rehabilitation program and construction of new jail cells on Rikers Island.

Although the City Charter's "special case" exception provides a basis for departure from the traditional design-bid-build procurement method on a case-by-case basis, the recent Court of Appeals decision in Diamond Asphalt Corp. v. Sanders[9] raises a serious question as to the permissibility of using this exception. That case involved the mayor's authority under City Charter § 313b.2 to bypass the results of competitive bidding and "in the best interests of the city" accept a bid from someone other than the lowest responsible bidder. The Court rejected the City's argument that the transfer of that pre-1953 by-pass authority to the Mayor in the Charter adopted in 1989 was merely a "revision, simplification, consolidation, codification or restatement" of the former City Charter.

[8] 3 NYCPPB Rules Chapter 3.
[9] Diamond Asphalt Corp. v. Sanders, 92 N.Y.2d 244, 678 N.Y.S.2d 567 (1998).

Instead, the Court of Appeals invalidated the City's award because the former City Charter lodged the "bypass" authority with the Board of Estimate, which was abolished by the new Charter, rather than with the Mayor. In rejecting the City's position, the Court explained:

> The transfer of bypass authority from the Board of Estimate to the Mayor would represent a major shift in the balance of authority originally provided for under the defunct Charter. Therefore, we hold the view that to override the plain language of the General Municipal Law, an express or definitive declaration would be required to establish that the Legislature intended to continue and transfer bypass authority of such sweeping proportions and nature, as is presented in this case, solely to the chief municipal executive or designee.[10]

Thus, the Court concluded that the bypass authority found in Section 313 (b) of the new City Charter was not a mere "restatement" or "codification" of the bypass authority in the former City Charter and accordingly that it postdates and therefore does not override Section 103 of the General Municipal Law.

The former City Charter required a two-thirds vote of the Board of Estimate to approve a "special case" exception to competitive bidding.[11] As with the "bypass" authority, the new Charter transferred the authority to approve a "special case" exception away from the Board of Estimate, giving it instead to the agency heads. While Diamond Asphalt deals solely with the "bypass" authority, the decision may well also mean that the City lacks authority today to depart from the traditional design-bid-build procurement method in a "special case."

[10] 92 N.Y.2d at 266, 678 N.Y.S.2d at 579.
[11] Former City Charter § 343(a).

The preference for competitive bidding of construction work, and hence for the design-bid-build method of procurement, exists not just in New York but also has existed in the procurement laws of the Federal Government and most other states. However, this preference has not always existed. As one commentator has written:

> The practice of employing one contractor to design and build a facility existed as early as 1800 B.C. when kings and emperors commissioned "master builders" to design and build works within their kingdoms and empires. This precursor to modern day "design-build" was the traditional method of construction contracting. It became "nontraditional," however, when the economic concepts of maximizing competition and obtaining reasonable prices in government procurement were introduced by the Continental Congress's establishment of the first Commissary General in 1775.[12]

In recent years, the Federal Government has recognized that sole reliance on the traditional procurement method is undesirable. The Competition in Contracting Act of 1984[13] eliminated sealed bidding as the exclusive method for obtaining competitive prices in Federal procurement. The Clinger-Cohen Act of 1996[14] enacted two-phase design-build selection procedures under which Federal agencies may select a single contractor to design and construct public buildings. In addition, the Federal Government has begun to support use of non-traditional procurement methods at the state and local levels. For example, the Intermodal Surface Transportation Efficiency Act of 1991[15] permits Federally-funded bridge, road and tunnel projects to be privately owned.

---

[12] Kurt A. Didier, "Construction Contracting and the New Two-Phase Design-Build Selection Procedures: Balancing Efficiency with Full and Open Competition, 27 Public Contract Law Journal (Spring 1998) 3 at 591 (footnotes omitted).
[13] Pub. L. 98-369, 98 Stat. 1175.
[14] Pub. L. 104-06, 110 Stat. 642.
[15] Pub. L. 102-240, 105 Stat. 1914.

Similarly, at least sixteen states have enacted laws over the past ten years expressly authorizing the use of alternate methods of procuring public works construction.[16] When adopting a new law in 1998 to allow design-build construction of state facilities, the California Legislature declared:

> The design-build process can improve the project delivery process by accelerating delivery schedules and saving costs by promoting improved coordination between contractor and architect, shifting management risk from the state to the design-build team and minimizing change orders through early collaboration between design and construction disciplines.[17]

According to a recent article, twenty-three states permit government agencies to use design-build either generally or in certain circumstances.[18]

To a large extent the trend toward increased use of alternate procurement methods and statutory changes permitting such use derives from a recognition that acceptable levels of competition can be obtained, and protection against favoritism assured, without sealed competitive bidding based on completed design. Many government agencies now have substantial experience with procedures, such as the two-step competitive sealed proposal

---

[16] Arizona Rev. Stat. §§ 5-807 (Tourism & Sports Authority projects), 28-7361 (transportation projects), 41-2579 (general); Cal. Gov. Code §§ 14016 (San Bernardino office & parking facilities), 14661 (state office & other facilities as specifically authorized); 2000 Cal. ALS 541 (AB 958) (transit operator projects); 2000 Cal. ALS 594 (AB 2296) (building projects in excess of $10,000,000 in certain counties); 2000 Cal. ALS 596 (AB 2909) (Fremont-South Bay Commuter Rail Project); Col. Rev. Stat. §§ 43-1-1401 et seq. (transportation projects); 2 Del. Code § 2003 (up to 4 transportation projects); La. R.S. § 48:250.2 (pilot program for transportation projects); 1999 Me. SP 892 (school projects); Md. Code Ann. Art. 29, § 3-102 (Washington Suburban Sanitary District projects); Nev. Rev. Stat. § 338.1711 et seq. (water or sewer projects above $100,000,000 & other projects above $30,000,000); N.M. Stat. Ann. §§ 13-1-111 et seq. (projects specifically authorized); N.C. Gen. Stat. § 136-28.1 (up to 3 transportation projects annually); Ohio Rev. Code Ann. § 5517.011 (up to 6 transportation projects); S.D. Cod. Laws § 5-18-26 (general); Tenn. Code Ann. § 12-10-124 (building authority projects); Tex. Ed. Code §§ 44.036 & 51.780 (school projects); Rev. Code Wash. §§ 39.10.050 et seq. (projects by certain public bodies & certain demonstration projects); W. Va. Code §§ 5-22A-1 (Design-Build Procurement Act). .

[17] Cal Stats 1998 ch. 252, § 1(b).

[18] 11/20/00 Engineering News Record at 43.

process, that allow for a substantial degree of open participation in the procurement as well as objective evaluation. The concept of "efficient competition," set forth in the Clinger-Cohen Act, reflects widespread recognition that maximizing competition, through the traditional method of procurement, is not always the most efficient means of procurement.

New York law, especially when viewed in light of the potential impact of the Diamond Asphalt decision on New York City procurement, is in the rear-guard of the law in this area. In 1999 the State Legislature took a small step in the direction of alternative procurement methods by authorizing the State University Construction Fund (until 2003) to "solicit proposals and award contracts for design/build projects to an entity or combination of entities for approved university related economic development facilities."[19] However, this is as far as New York has gone to date.

A Governor's Program Bill[20] was introduced in the New York State Legislature in 1999 that would have allowed the State Department of Transportation and the Thruway Authority to award design-build contracts under a five-year pilot program. The number of design-build contracts of certain amounts would have been limited to twenty-five by the Department of Transportation and ten by the Thruway Authority. It also would have restricted the combined dollar value of such contracts from exceeding three percent of the Department of Transportation's capital construction budget and five percent of the Thruway Authority's capital construction budget. Contracts above $50 million (for the Department of Transportation) and

[19] N.Y. Education Law § 376-11, added by Laws 1999, ch. 624.
[20] Governor's Program Bill #66 (1999); (A. 8745/S. 5996).

$40 million (for the Thruway Authority) would have been permitted without limitation. Contract awards would have been based on a two-step competitive proposal basis.

This bill died in committee but should have been adopted. Furthermore, it does not go far enough. As discussed below, broader legislation should be enacted permitting all State and municipal agencies to use alternative procurement methods at least on a "special case" basis.

IV.

Recommendation

Section 103 of the General Municipal Law, and the State's other statutes requiring competitive bidding for public works construction, should be amended specifically to permit all government agencies to make a "special case" determination to use alternate procurement methods. This "special case" exception should be modeled after Section 312b of the New York City Charter. Any agency using this "special case" exception to the general requirement of competitive bidding should be required to issue a public report every five years detailing the projects for which the exception was applied, the procurement method that was used and the project results in terms of duration and cost.

Such amendments would preserve the traditional method of procurement as the general rule, but permit agencies to try other methods where they determine other methods to be appropriate based on stated criteria and with safeguards to ensure competition and prevent favoritism. The reporting requirement would allow the Legislature, the Governor and others to

evaluate the experience of agencies with the use of alternate procurement methods to determine if further statutory action is desirable in the future. New York would be joining the Federal Government and most other states in recognizing that design-bid-build is not the only acceptable method of procuring public works construction and does not provide the most efficient results in all circumstances.

May 2003

Committee on Construction Law

James E. Raved – Chair
Heather McClintock – Secretary

Jose A. Aquino
Allan M. Bahn
Todd A. Bakal
Michelle J. Benyacar
Howard Mark Burger
Gregory H. Chertoff
Blake A. Coppotelli
Jeffrey R. Cruz
Timothy Dunphy
Daniel J. Friedman
Christopher G. Fusco
William Henry Grae
Steven L. Greenspan
David M. Grill
Fredrika V. Miller
Lynn A. Mourey
Russell Ann Nobles
James F. Oliviero
Mark F. Revello
Javier Rodriguez
Robert A. Sesti
John B. Simoni
Bruce M. Stephan
Marc H. Supcoff
Leonard O. Townsend