

BUILD**South**

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ALABAMA AGC'S VOICE FOR THE CONSTRUCTION INDUSTRY

A photograph of three men in dark suits and ties standing behind a trophy. The man on the left is older with glasses and a red tie. The man in the middle has a beard and glasses with a blue tie. The man on the right has a mustache and glasses with a purple tie. The trophy is a glass award with a gold ring and a silver ball, sitting on a black pedestal. The background is a textured grey.

2013 BUILDSOUTH AWARDS

Contractors Awarded for Outstanding Work and Safety

**Meeting the
Demands of
Obamacare**

**Considering
CM at Risk on
Public Works**

Considering Construction Delivery Methods on Public Works

By Nancy Fouad Carey, Burr & Forman, LLP

Historically, in Alabama, the project delivery methods available for owners to de-sign and construct private projects have differed from those delivery methods available to owners of public projects. Private owners are permitted to use any delivery method they choose based on their interests in time, budget, and quality. In contrast, under the current law, public owners in Alabama are required to use competitive bidding and, thus, the Design-Bid-Build (“DBB”) delivery method has traditionally been the method used to de-sign and construct public projects.

But construction trade groups such as the Alabama AGC are exploring introducing legislation that would allow use of CM at Risk on Public Works with certain restrictions.

The DBB project delivery method will continue to be popular in the public and private construction industry. The characteristics of this delivery method make it most suitable for projects with clear boundaries and for those with adequate time to prepare thorough documents and to execute the construction. DBB remains a safe method for public agencies to contract for most construction.

Alternatively, the CMAR project delivery method allows more of the owner’s interests to be met by giving the owner flexibility in selecting the CM at-Risk. CMAR creates a team concept by integrating the design and construction teams, and potentially reduces the project duration and project cost. This method is best suited for large projects with scopes that

are difficult to define and durations that require a more fast-track approach.

Design-Bid-Build

DBB consists of three separate and distinct phases – the design phase, the bidding phase, and the construction phase. Each is executed independently of the other, meaning each phase must be complete before the next phase can begin. With the DBB delivery method, the project owner first enters into a contract with a designer who prepares the contract documents and provides complete design documents. Next, if it is a public project, the owner enters into a separate contract with a general contractor selected through a competitive bidding process. Because the design documents are 100 percent complete, each contractor is able to bid on the same design.

One of the key attributes of DBB is competitive bidding. For public projects, sealed bids are used to achieve fairness and objectivity and are opened in public. The process for public bidding must be consistent with the law and administrative regulations. The construction contract is awarded to the lowest responsive bid that is submitted by a responsible bidder. A responsive bid refers to an unequivocal offer to perform all that is required by the contract documents. To be awarded the construction contract, the lowest responsive bid must be made by a responsible contractor, meaning the con-

tractor must possess the necessary financial and technical capability to perform the work.

Competitive bidding is mandated in the public sector primarily because of the use of public monies. Governments who tax the public are stewards of those tax dollars and are responsible for how those tax dollars are spent. Competitive bidding is popular in the public sector because it is relatively simple and straightforward, and provides the ability to construct a project for the lowest price with the least potential for political pressure and corruption. Competitive bidding benefits the public and the government as the rules are clear, and there is no subjectivity. This is why the DBB delivery method is still widely favored and used in the public sector.

However, what makes DBB attractive for public projects — the lack of subjectivity — is also a considerable drawback of this project delivery method. The lowest bid does not always guarantee the best value. The lowest bidder may not be an entity that a public owner wants to use based on characteristics other than price, such as speed, safety, quality of construction, claims history, reputation, experience with this particular type of construction, etc. (except that the owner can pre-qualify bidders). As a result, during the past several years, public owners have been compelled to find new and innovative ways to build and finance projects and have realized that alternative delivery methods could make more sense and might provide them with the best value in finished construction.

Construction Management at-Risk

Construction Management at-Risk (“CMAR”) is an alternative project delivery method that is becoming more widespread in the public sector. With this type of delivery method, the owner holds a contract with the Construction Manager

(“CM”) at-Risk and a separate contract with the designer. The CM at-Risk generally supplies preconstruction services, and also acts as the general contractor by contracting directly with the subcontractors, taking responsibility for the performance of the work, and guaranteeing the construction costs and schedule.

The CM at-Risk is typically selected at the same time the architect/engineer is selected. The early selection of the CM at-Risk allows the CM at-Risk to assist in evaluating the budget, scheduling, and constructability, which differs from the DBB delivery method where the contractor is not selected until after the design documents are complete. The CMAR delivery method also promotes a team concept and provides the project team with the opportunity to collaborate with one another to develop innovative and efficient solutions.

Another key factor that distinguishes CMAR from DBB is the process used to select the CM at-Risk. Unlike DBB in the public sector, where the contractor is selected primarily based on price, the CM at-Risk is chosen using either a qualifications-based method or a best value method. Under the qualifications-based method, the CM at-Risk is selected based on qualifications only, such as the CM at-Risk’s competence, experience, past performance, safety record, proposed personnel and methodology, and other factors that the owner may identify. The owner then evaluates the CM at-Risk in accordance with the criteria and weighting it has identified. Price is not a factor in evaluating and selecting the CM at-Risk. With the best value method, qualifications are evaluated as well, but the total construction cost is also a factor in the selection of the CM at-Risk under this method.

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Alabama AGC Working to Resolve CM at Risk Issues

The Alabama AGC Board of Directors voted in December to pursue consensus on legislation to allow the CM at Risk on Public Works delivery system in Alabama. The Board authorized the CM at Risk Committee to determine the best practices for the delivery system and report those back to the Board for final approval before the 2013 legislative session begins. Alabama AGC’s Board determined that if done properly, CM at Risk on Public Works could be a step to improve CM at Agency, which already is being used on public works.

Following are some issues being considered by the Alabama AGC CM at Risk Committee:

- **Minimum job-size threshold – possibly \$25 million – for the delivery system to be used. Necessary to protect smaller contractors.**
- **Selection process should be written into the law. The Committee also has voiced the opinion that the selection process should be followed on each job. Possibly use a five-person selection committee.**
- **Selection process for subcontractors. Set threshold – possibly \$250,000 – on selection for Tier 1 subs. Subs should then be bonded and bid using weighted criteria.**

The Alabama AGC Board has reached consensus that CM at Risk on Public Works could be a useful tool for sophisticated, larger public owners, but it must be applied properly to protect the public interest as well as the interest of the construction industry.

The committee is working with Alabama AGC attorneys to help draft legislation. Contact Jeff Rodgers with comments at (205) 451-1455 or by email at jeffr@alagc.org. Jeff will convey comments to the committee.