



Bricker & Eckler's
**Selecting Project Delivery
Methods & Bidding Public
Construction Contracts**

Eighth Edition

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Welcome & Introductions

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PROJECT DELIVERY METHODS AVAILABLE TO PUBLIC OWNERS – FIGURING OUT WHAT WORKS BEST FOR YOUR PROJECT

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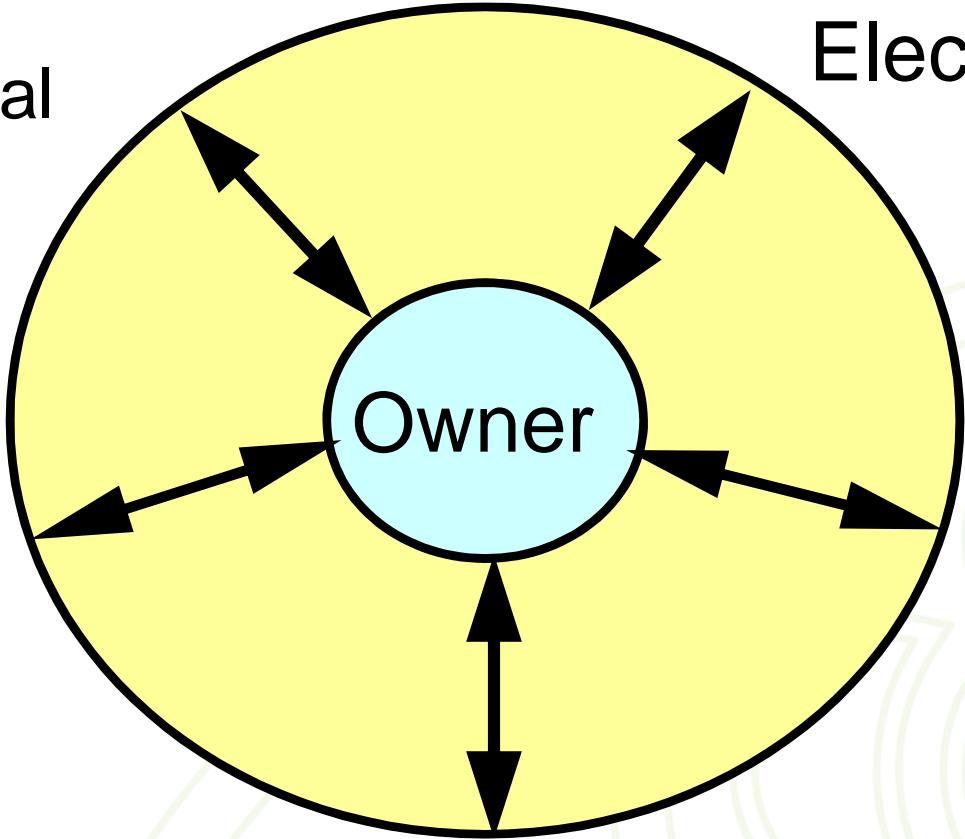
Project Delivery Methods

- Multiple Prime Contracting
- General Contracting (GC)
- Construction Manager at Risk (CMR)
- Design-Build (DB)

Multi-Prime: The Wheel of Misfortune

Design
Professional

Electrical



General
Trades

HVAC

Plumbing

Multiple Prime Contracting

Pros

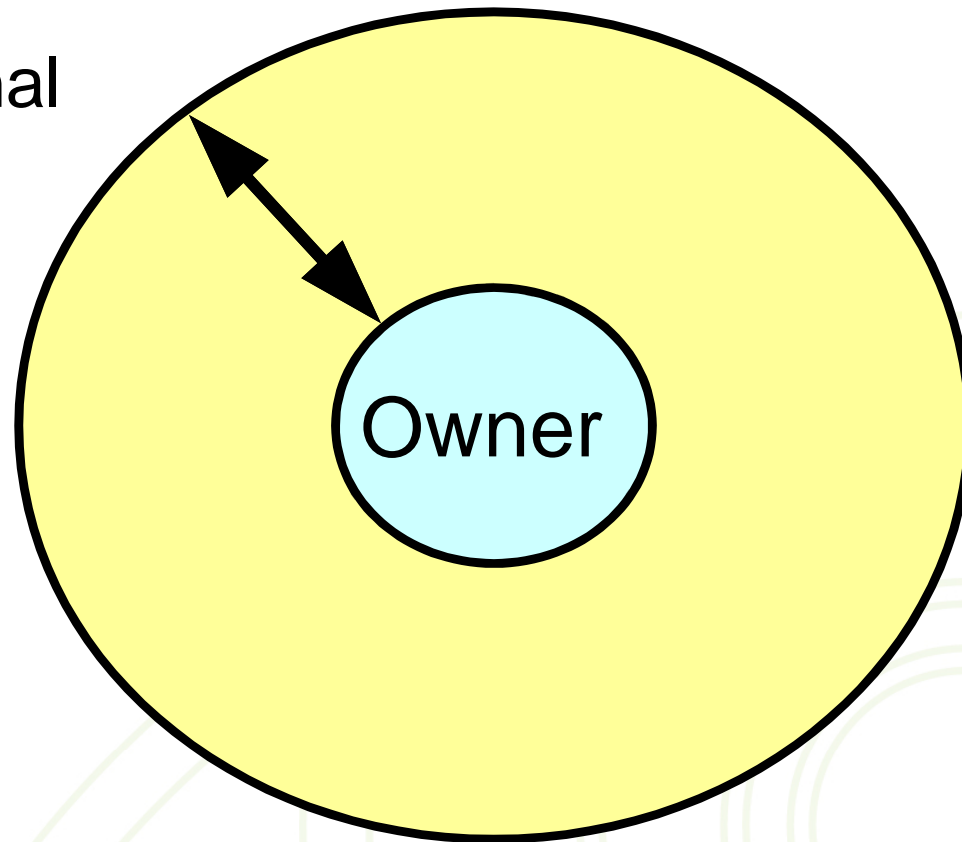
- Generally understood
- No GC markup

Cons

- Owner caught in the middle
- Increased Owner contract coordination (CMA)
- Scope of work disputes
- Prime contractor delay disputes
- Defective work disputes

General Contracting

Design
Professional



General
Contractor

General Contracting

Pros

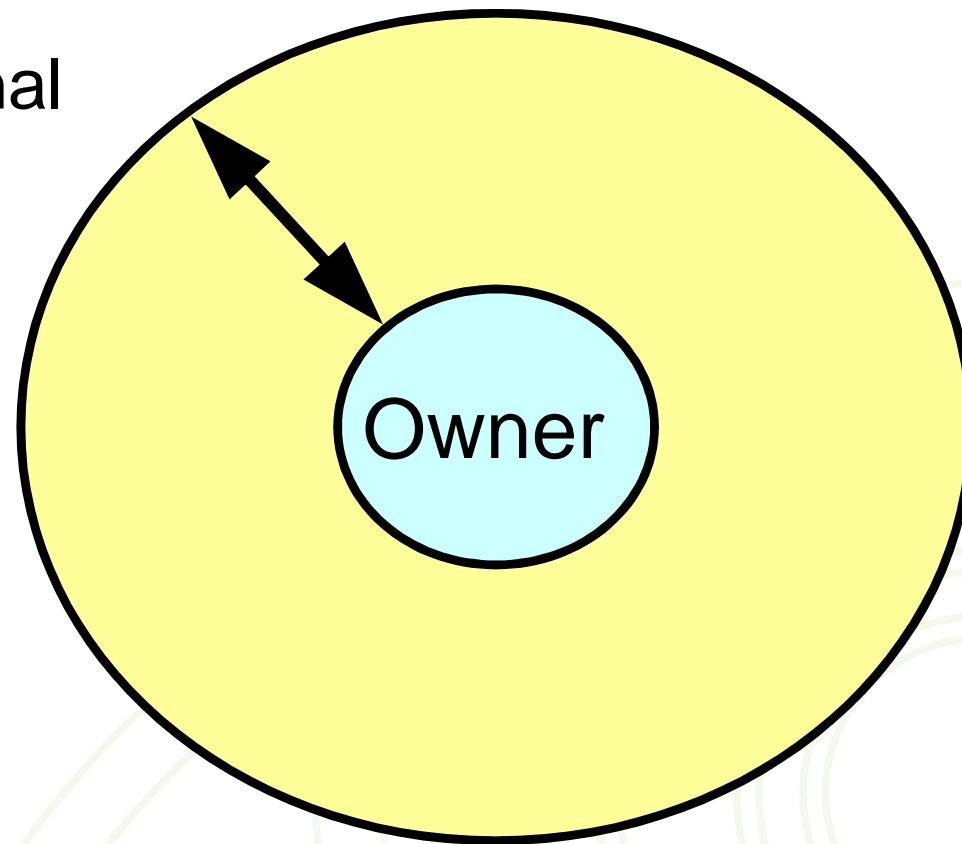
- Owner not caught in the middle
- Single point of responsibility for construction
- Reduced Owner coordination
- Generally understood

Cons

- Additional GC markup
- Does not eliminate design disputes

CMR: Similar to General Contracting

Design
Professional



CMR

Construction Manager at Risk

Pros

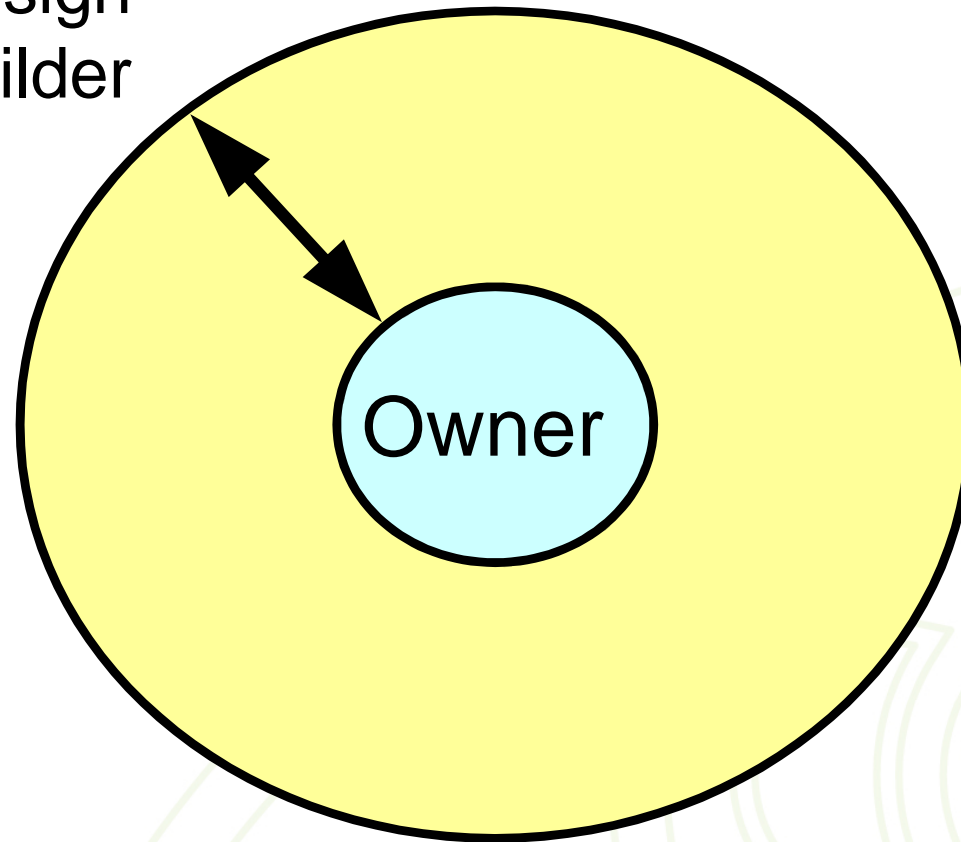
- Same as single prime (GC)
- Can be on board throughout design
- Preconstruction services
- Best value selection
- Familiarity
 - Design
 - Design team
 - Public Owner

Cons

- Same as single prime (GC)
- Additional CMR markup
- Does not eliminate design disputes -- should reduce design dispute
- Does not eliminate lien claims

Design-Build

Design-
Builder



Design-Build

Pros

- Single point of responsibility
- Greater collaboration between designer and builder
- Preconstruction services
- Best value selection
- Speed of delivery

Cons

- Fees (overhead & profit) traditionally greater
- Owner will not be in direct contract with architect
- Owner may need to engage party monitor quality

Side-by-Side Comparisons of Project Delivery Methods: GC, CMR, DB



Procurement

<u>Type</u>	<u>Differences</u>
General Contracting	Competitive Bidding (standard varies)
Construction Manager at Risk	RFQ + RFP (best value)
Design-Build	Criteria A/E selection; RFQ + RFP (best value)

Project Cost

<u>Type</u>	<u>Differences</u>
General Contracting	Lump Sum Bid
Construction Manager at Risk	Guaranteed Maximum Price
Design-Build	Guaranteed Maximum Price

Constructor's Design Phase Involvement

<u>Type</u>	<u>Differences</u>
General Contracting	None
Construction Manager at Risk	Varies <ul style="list-style-type: none">• Constructability• Cost Estimating
Design-Build	Part of Services

Effort by Owner (Pre-Construction)

<u>Type</u>	<u>Differences</u>
General Contracting	No Coordination with GC (traditional A/E services)
Construction Manager at Risk	Varies (depends on CMR scope)
Design-Build	Extensive (develop design requirements, etc.)

Effort by Owner (Construction)

<u>Type</u>	<u>Differences</u>
General Contracting	Less than Multi-Prime (typical contract administration)
Construction Manager at Risk	Less than Multi-Prime
Design-Build	Can be Extensive (Owner required to make timely decisions)

Design-Related Claims

<u>Type</u>	<u>Differences</u>
General Contracting	Not Eliminated – Can be frequent
Construction Manager at Risk	Not Eliminated – Should be reduced
Design-Build	Eliminated, except program-based disputes

Constructor's Ability to Self-Perform Work

<u>Type</u>	<u>Differences</u>
General Contracting	No Restrictions
Construction Manager at Risk	Optional – Sealed Bid Required
Design-Build	Optional – Sealed Bid Required

Selection of Subcontractors

<u>Type</u>	<u>Differences</u>
General Contracting	Prequalification of Subs Not Required
Construction Manager at Risk	Prequalification of Subs Required – Open Book Pricing
Design-Build	Prequalification of Subs Required – Open Book Pricing

Rejection of Subcontractors by Owner

<u>Type</u>	<u>Differences</u>
General Contracting	Owner Can Reject
Construction Manager at Risk	Owner Can Reject
Design-Build	Owner Can Reject

Project Length

<u>Type</u>	<u>Differences</u>
General Contracting	Longest Project Duration
Construction Manager at Risk	Potential for some Fast-Track
Design-Build	Shortest Project Duration (can also be Fast-Track)

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BIDDING REQUIREMENTS FOR PUBLIC CONSTRUCTION CONTRACTS AND OTHER PROCUREMENT OPTIONS – AN OVERVIEW

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Bidding Basics

Questions to ask:

- Is the statutory competitive bidding process required?
- What process is required?
- What is the standard for award?

Is the Statutory Competitive Bidding Process Required?

- Check the ORC. Each type of public entity is governed by specific statutory requirements. Some state statutes have been expanded to include other public entities.
- Confirm applicable policies and regulations; these may be more restrictive and specific than the ORC. Note that charter municipalities have the authority to adopt requirements that differ from the ORC.

Is the Statutory Competitive Bidding Process Required?

- If bidding is required, define the process to be followed and steps to be taken.
- Describe the process and standard for award of the contract(s) in the contract documents issued in the Project Manual for the Project.

Why Might the Statutory Process not be Required?

Project value is below the threshold stated in the ORC.

– State	\$ 200,000
– County	\$ 50,000
– Municipality	\$ 50,000
– Village	\$ 50,000
– Public Library	\$ 50,000
– School District	\$ 25,000

New project delivery method is used:

- Design-Build
- Construction Manager at Risk

Why Might the Statutory Process not be Required?

An exception is included in the bidding statute; for example:

- Emergency
- Urgent Necessity or Security and Protection of Owner's property
- Sole Source Availability
- HB 264 for schools (energy conservation projects)
- Other (e.g., professional services)

Why Might the Statutory Process not be Required?

An exception is provided in another statute; these include:

- State Cooperative Purchasing Program
- Joint Purchasing Cooperatives
- Council of Governments
- Energy conservation projects (e.g., libraries, municipalities, and counties)

Why Might the Statutory Process not be Required?

Professional Services

- Design Professionals (architects, engineers, landscape architects, surveyors) – selection process is outlined in ORC 153.65, et seq.
 - Note that Interior Designers are not regulated by the State.
 - Design-Build firm selection is included in this category.
- Construction Managers (Agency Role) – ORC 9.33 – 9.333
- Others may fall outside any statutory requirements (e.g., legal, insurance)

Why Might the Statutory Process not be Required?

Summary

- If statute requires competitive bidding, there are no alternatives for the project, and no exceptions apply, the project must be bid following the specified process.
- Statutory requirements for the bidding process vary by public entity.
 - Construction counsel can help determine which rules apply to a specific project and the required process.

Required Process – Legal Notice

- Legal Notice or Advertisement
 - What does the ORC require?
 - Scope of work
 - Time and place for receipt of bids
 - Where to view and/or obtain contract documents
 - Domestic steel use requirement for State projects
 - What is not required?
 - Estimated construction cost
 - More details about the project

A notice to bidders is not necessarily a legal notice for publication in the newspaper.

Required Process – Bid Period

■ Bid Period & Publication

– What does the ORC require?

- Minimum or defined bid period
- Publish in a newspaper of general circulation in the territory of the public entity
 - PublicNoticeOhio.com – newspaper should post to this website (the “State Public Notice Website”)
- May be option to publish one time in a newspaper of general circulation and not to publish any additional notices or to publish subsequent notices in an abbreviated form if the statutory direction is followed (applicable bidding statute and ORC 7.16)

Required Process – Bid Information

- Bid Package or Project Manual includes:
 - Legal Notice (Advertisement)
 - Instructions to Bidders
 - Bid Form
 - Contract Form, including General Conditions
 - Other required documents, including:
 - Bid guaranty and contract bond form
 - Contract bond form
 - Personal property tax affidavit
 - Prevailing wage documents (for all but schools and port authority projects), if project exceeds the threshold for project size when prevailing wage is required
 - Technical Specifications

Required Process – Bid Information

- Required Information for the Bid Package:
 - Estimate of construction cost for the work
 - Project completion date or time period for completion

Required Process – Bid Opening

- Open bids on the date and at the time and place specified in the legal notice (or in an addendum that changes the initial information).
 - Have appropriate person at the bid opening; this may be prescribed by ORC or policy.
 - Note that Ohio public libraries are required to open bids at the next regularly scheduled Board meeting, unless the Board has authorized the opening at the time bids are received.

Required Process – Bid Opening

- Bids submitted late or delivered to the wrong location cannot be accepted.
 - Recommendation: have an official clock to record the time received.
- Record bids received and basic information on a bid tabulation summary.
- Provide a copy of the bid tab to those present or on request.
 - May publish on public entity's website.
 - Plan rooms may request this; for PW projects, a bid tab must be submitted to the Commerce Department.

What is the Standard for Award?

Apply the applicable standard.

- Lowest and Best (applies to counties; cities, subject to the home rule exception; villages; townships)
- Lowest Responsible (applies to school districts and libraries) – note that this includes a “responsive” factor
- Lowest Responsive and Responsible (applies to the State and any public entity that adopts the standard and process outlined in ORC 9.312)

Bid Review Process

1. Determine the low bid (identify all alternates to be included in the contract sum).
2. Determine if the bid is responsive.
3. If the low bid is responsive, determine if the bidder submitting that bid is responsible to perform the work.

OR, if the standard is “lowest and best” whether the bidder is “best” to perform the work.

Bid Review Process – Responsiveness

- Determine if the bid is responsive.
 - Examine the BID, not the bidder.
 - First level of review:
 - The Bid Submittal must be delivered to the correct location before the deadline.
 - The Bid Form must be signed.
 - The Bid Submittal must include the required documents (bid guaranty, at a minimum).

Bid Review Process – Responsiveness

– Second level of review:

- The Bid Form must contain no irregularities or deviations from the specifications or other contract requirements that:
 - Affect the amount of the bid, or
 - Give the bidder a competitive advantage.
- The Bid Form must have no conditions or exceptions to the specifications or other contract requirements noted on the form or in a separate writing.

Bid Review Process – Responsiveness

Note: Owner may waive minor irregularities or omissions **IF** the waiver does not destroy the competitive nature of the bid.

Bid Review Standards

- Lowest and Best
 - Allows the Owner the most discretion; more than price can be considered
 - Allows the Owner to consider and compare the qualifications of the bidders based on announced criteria
 - Owner must apply its criteria as announced in the instructions to bidders or other documents
 - A “responsive” element is inferred; *i.e.*, the bid must include the required form of bid guaranty and all of the specified work

Bid Review Standards

- **Lowest Responsive and Responsible**
 - Allows the Owner less discretion than the lowest and best standard
 - Does not allow a comparison between bidders
 - Owner must evaluate the low bidder independently
 - If low bidder is not responsible, then Owner can move on to evaluate the second lowest bidder
 - In the interest of time, the Owner may evaluate responsibility of the two low bidders simultaneously and independently, so long as a comparison is not made.
 - Must apply same bidder criteria for all bidders

Bid Review Standards

- What does “responsible” mean?
 - It is based on the Owner’s evaluation of a bidder based on announced criteria.
 - Courts will defer to the public owner’s determination of responsibility in the absence of an abuse of discretion.
 - ORC 9.312 includes criteria that provide good guidance even if the statute does not apply.

Bid Review Standards

- How is responsibility determined?
 - Determined by examining the **BIDDER**, not the bid
 - ORC 9.312 lists factors to be considered:
 - Experience
 - Financial condition
 - Conduct and performance on all previous contracts
 - Facilities/equipment
 - Management skills
 - Ability to properly execute and carry out the contract

Bid Review Standards

Public owners may specify particular requirements for the work, including bidder qualifications, in:

- Legal Notice or Advertisement
- Instructions to Bidders
- Bid Form
- Technical Specifications

Certain forms may also be required in the Contract Documents provided to bidders (e.g., specific bond forms, affidavits, or other forms that will be required during the course of the project). Failure to provide these forms may impact both the responsiveness of the bid and the responsibility of the bidder.

Bid Review Standards

- When reviewing the bid submittals:
 - Be thorough.
 - Provide sufficient time for review
 - Be consistent in all evaluations, *i.e.*, apply the bidder evaluation criteria equally.
 - Document the review and all relevant information (THIS IS IMPORTANT!!).
 - If an Owner chooses to disregard recommendations for award, it should state its reasons and these should relate to the criteria announced.

Summary

- Competitive bidding requirements are defined in the ORC for each type of public owner.
- Be aware of exceptions to competitive bidding and options for procuring work.
- Identify the specific requirements and documents needed when bidding.
- Understand the required process and include the requirements and documents in the bidding documents.

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Break

We will reconvene at 10 a.m.



THE BID REVIEW PROCESS – EVALUATING AND DOCUMENTING THE PROCESS, BIDDER PROTESTS, AND LITIGATION

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Owner Discretion

[I]n the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner.

Cedar Bay Construction, Inc. v. City of Fremont (1990),
50 Ohio St.3d 19.

Defining the Standard for Award

- Statutes
- Contract Documents
 - Legal advertisement
 - Instructions to Bidders
 - Technical Specifications
 - Bid Form

Review & Evaluation Process

- Include the standard for award, bidder evaluation criteria, and outline of the review and evaluation process in the contract documents
- Bids are received:
 - Prepare Bid Tab
 - Review each bid for responsiveness
 - Post-Bid scope review meeting with low bidder for each bid package
 - Evaluate each bidder based upon criteria
 - Recommendation for award (or reject one or all bids and rebid)

General Tips for Reviewing Bids

- Know and understand the applicable standard for award of a contract
 - Be familiar with applicable policies
- Understand the concept of “responsiveness”
- Be familiar with the bidder evaluation criteria included in the Contract Documents
- Be thorough in review and evaluation steps
- Be consistent in all steps taken with each bidder
- Document the process – use forms
- Define roles in the review/evaluation process
 - Who prepares recommendation for award?

STEP 1: Responsiveness Review

- Review bid form
 - Is cost information filled in properly?
 - Is cost information consistent (*i.e.*, do words & numbers match)
 - Alternates, allowances, unit prices (is requested information provided?)
 - Bid guaranty – is it included with the bid?
 - Correct form?
 - Correct amount?
 - Signed?
 - *Reviewing courts look for **material defects***

Responsiveness Review (cont.)

- Material **Defects** are irregularities or deviations from the bid specifications that would affect the amount of the bid or otherwise give the bidder a competitive advantage
- Responsiveness is addressed in:
 - ORC 9.312
 - *Leaseway Distrib. Ctr. v. Dept. of Adm. Serv.* (1988), 49 Ohio App.3d 99

STEP 2: Qualitative Review

- Review bidder for responsibility to perform the specified work based on criteria included in the contract documents, including:
 - Corporate history
 - Corporate makeup (ownership)
 - Subsidiaries & related companies
 - Project staffing (including key subcontractors)
 - Talent management

Qualitative Review (cont.)

- Equipment and resources
- Work history and experience (e.g., with similar projects; similar contract size; prior experience with the owner and its professional team)
- Financial condition (in relation to project size and payment of subcontractors and material/equipment suppliers)
- Default & dispute history
- Quality assurance / quality control / scheduling / change orders

Qualitative Review (cont.)

- Use forms to document review
 - Bid review and bidder qualification forms
 - Be sure information sought is consistent with bidder evaluation criteria in the Contract Documents
- Recommendation to award contract
 - Who prepares and presents to the awarding authority?
- Contract award
- Public records request
 - Option that a bidder or other interested party may use to obtain additional information about public contracts and the bidding process

Rejecting Bidders

- What is required to reject a bid?
 - Was the bid responsive?
 - If not, the bid may not be considered. Review the contract documents to see if rejection is required.
 - ORC 9.312 applies to state agencies and other public owners that adopt it by resolution.
 - If ORC 9.312 applies, a written notice is required to reject on the basis of non-responsiveness:
 - Issued by the awarding authority
 - Sent by certified mail
 - Include specific reasons for rejection
 - Provides 5-day period from receipt to request a meeting to protest the rejection

Rejecting Bidders (cont.)

- If meeting is requested, the meeting must be scheduled.
- After information is presented by the rejected bidder at the meeting, it must be reviewed and any additional investigation/evaluation deemed appropriate must be conducted.
- The awarding entity must affirm the rejection before awarding to the next qualified bidder or rescind the rejection and award to the bidder based on the additional information and evaluation.

Rejecting Bidders (cont.)

- What is required to reject a bid (cont.)?
 - Was the bidder not responsible?
 - If ORC 9.312 applies, the same process for rejection, notification and a protest meeting must be followed.
 - If ORC 9.312 does not apply:
 - No formal notice is required, but notice is recommended.
 - No protest meeting is required, but a meeting could be held to review concerns and discuss options.
 - Communication with bidder should include option to withdraw the bid.

Bid Withdrawal

- When can a bid be withdrawn?
 - ORC 9.31 establishes conditions for withdrawal:
 - The bid must have been submitted in good faith.
 - The mistake must have been clerical as opposed to a judgment mistake.
 - The price bid must have been substantially lower due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor or material made directly in the compilation of the bid.
 - Withdrawal must be in writing and made within two business days of the bid opening.
 - **Effect:** Withdrawing bidder cannot participate in another contract for work on the project without Owner approval.

Bid Withdrawal (cont.)

- What are the public owner's options if a bidder withdraws?
 - The Owner may:
 - Award the contract to the next lowest bidder that meets the criteria for award
 - Reject all bids and rebid the work
 - Contest the withdrawal
 - If Owner contests, a hearing must be scheduled within 10 days of the bid opening.
 - Bidder either "appeals" by filing a lawsuit, signs the contract, or refuses to sign the contract

Bid Withdrawal (cont.)

- Can a bidder that withdraws its bid participate in a rebid of the work?
 - Yes, the bidder may participate in a rebid of the same work.
 - Allowing the bidder to participate in the rebid maximizes the competitiveness of the process and provides the public potentially with a lower cost.

Bid Disputes

- You have advertised for bids.
- You have announced bidder evaluation criteria.
- You have evaluated the bids.
- You have documented your evaluation.
- You have awarded a contract.
- Are you in the clear?
 - Maybe not.
 - Bid disputes may arise after the contract is awarded.
 - You may face political pressures for not awarding to the lowest (dollar amount) bid.

Bid Protests

- Who is likely to protest the Owner's decision?
 - A dissatisfied bidder
 - Taxpayer
 - Case-by-case analysis
 - Not an easy process for the taxpayer
 - Procedural hurdles
 - Standing issues

Bid Protest by Dissatisfied Bidder

- Informal
 - Meet with protesting party
- Formal
 - Court procedure
 - Temporary restraining order (TRO)
 - Preliminary and permanent injunction
 - No damages for lost profits

Bid Disputes

- Why might a bidder dispute an award?
 - The Owner rejects a bidder, and the bidder objects.
 - Claims evaluation process was improper.
 - The award did not go to the lowest bidder.
 - A disappointed bidder claims a property interest, asserting that:
 - It was actually awarded a contract and then deprived of it without due process of law; or
 - Owner had no discretion to refuse the award to the disappointed bidder.

Bid Disputes

- Constitutionally protected property interest in award of contract
 - If Owner properly exercises its discretion in an award of contract there is no property interest created in disappointed bidder. *Cleveland Construction v. Cincinnati* (2008), 118 Ohio St.3d 283
 - If bidder can show it was actually awarded the contract and then deprived of it, it may have a protected property interest.
 - If so, the analysis turns to whether it was deprived of its property interest without due process of law.

Bid Disputes

- Constitutionally protected property interest in award of contract
 - How can an Owner protect itself from a claim under Section 1983 of Title 42 of the U.S. Code?
 - Reserve right (in the instructions to bidders) to reject any and all bids for any reason up until the time the contract is signed by the owner.
 - Reserve the right to reject all bids until the contract is signed in any notice of award.

Bid Disputes

- Be prepared to face a bid dispute.
 - Document all processes and reasons for rejecting bidders.
 - Rejecting a bid as nonresponsive should be in writing with an explanation.
 - Document the process for awarding the contract.
 - Make all awards subject to the Owner's right to reject all bids until the contract is signed by both contractor and the Owner.

Bid Disputes

- If informal meetings fail to resolve the dispute, the bidder may
 - Accept the decision and do nothing further, or
 - Seek injunctive relief to stop the award to another bidder.
- A disappointed bidder may not
 - Recover damages for lost profits, or
 - Force an award by the court if the Owner has the right to reject all bids.
- Damages for cost of preparing the bid may be recoverable.

Bid Disputes

- Recovery of bid preparation costs

When a rejected bidder establishes that a public authority violated state competitive-bidding laws in awarding a public-improvement contract, that bidder may recover reasonable bid-preparation costs as damages if that bidder promptly sought, but was denied, injunctive relief and it is later determined that the bidder was wrongfully rejected and injunctive relief is no longer available.

Meccon, Inc. v. Univ. of Akron, 126 Ohio St.3d 231 (2010)

Bid Disputes

- Injunctive relief by disappointed bidder
 - Must follow Rules of Civil Procedure
 - Civil Rule 65
 - A two- or three-step process
 1. Temporary restraining order
 2. Preliminary injunction
 3. Permanent injunction (may be consolidated with hearing on issuance of preliminary injunction)

Bid Disputes

- Temporary restraining order (TRO)
 - Must file verified complaint or affidavit to show facts to support issuance of TRO.
 - Must demonstrate immediate or irreparable injury, loss, or damage if TRO is not issued.
 - Bidder should give notice to Owner or Owner's counsel that it is going to court.
 - If Owner did not receive notice of the TRO hearing it may seek to dissolve or modify the TRO on 2 days' notice to bidder (or less if permitted by court).
 - Typically held on short notice in judge's chambers

Bid Disputes

- Effects of a TRO
 - Delay contract award for as much as 28 days
 - Will stop the award for 14 days until hearing on preliminary injunction can be held.
 - Court may extend for another 14 days on showing of good cause or even longer with consent of the Owner (rare).

Bid Disputes

- Effects of a TRO
 - Owner may incur damages caused by delay.
 - Owner should request a bond or money deposit to cover damages caused by delay of the project if TRO is issued.
 - Owner must be prepared to support money amount requested with evidence explaining consequences.

Bid Disputes

- Preliminary injunction hearing
 - Entitled to preference on court calendar
 - Hearing on the merits (a trial)
 - Court may consolidate with permanent injunction hearing.
 - Owner should request consolidation to avoid unnecessary expense.
 - If party that obtained TRO fails to proceed, the court must dissolve the TRO.

Bid Disputes

- Preliminary injunction hearing must address:
 - Likelihood of success on the merits
 - Must prove abuse of discretion
 - Whether there is an adequate remedy at law (damages)
 - Whether the injunction would prevent irreparable harm
 - Balancing injury to bidder versus the public
 - Whether an injunction will maintain the status quo pending a final trial on the merits

Bid Disputes

- Preliminary injunction hearing
 - Hearing on the merits
 - Court will receive evidence
 - Testimony of witnesses
 - Admissible documents
 - Court will usually render decision quickly

Bid Disputes

- Preliminary injunction hearing
 - Order
 - Must set forth the reasons for issuing injunction
 - Must describe in reasonable detail the act or acts sought to be enjoined
 - Binding on parties to the action or those who have actual notice of the order who are in active concert with the enjoined party (other bidder to whom contract was awarded)

Bid Disputes

- Options if injunction granted
 - Owner may appeal to higher court.
 - Entitled to stay without appeal bond
 - Parties may negotiate settlement with disappointed bidder and obtain dismissal with prejudice.
 - This is tricky
 - Depends on facts and terms of order
 - Requires court approval
 - Reject all bids and rebid.

Bid Disputes

- If injunction denied:
 - Bidder may appeal.
 - Must prove abuse of discretion by Owner and abuse of discretion by court in not issuing injunction
 - May have to post bond if stay sought
 - Risk of mootness
 - Owner may still reject all bids and rebid (render appeal moot).
 - Owner may enforce the injunction bond.
 - By motion to the court
 - Requires proof of damages
 - Owner may proceed with original award and commence construction.

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DESIGN-BUILD AND CONSTRUCTION MANAGER AT RISK METHODS: SELECTING THE FIRM THAT WILL PROVIDE THE BEST VALUE – PART I

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Overview of Construction Reform

- Effective date for HB 153 was Sept. 29, 2011
- Policies and documents were prepared initially by ODAS in 2012; responsibility for policies and documents now with the Ohio Facilities Construction Commission (OFCC)
- Three new project delivery options:
 - General Contracting (Single Prime Contracting or GC)
 - Design Build (DB)
 - Construction Manager at Risk (CMR)

Overview of Construction Reform

- Award Standard
 - General Contracting: Lowest and Best or Lowest Responsible
 - DB & CMR: Best Value
- Contract Amount
 - General Contracting: Lump Sum
 - DB & CMR: Guaranteed Maximum Price (GMP)*

*Most often, the initial contract is based on preconstruction costs and fees; GMP is negotiated after design sufficiently complete to allow pricing of the work and then added to the contract by amendment.

Factors regarding selection of DB or CMR procurement?

Design-build

- Selection of DB procurement is not necessarily tied to project cost or type of project:
 - Is there an opportunity to benefit by the creativity of the DB?
 - Is there a need to shorten the project duration?

CMR

- Try to get CMR involved early
 - Constructability Reviews
 - Construction Estimates and Schedules

Involvement of Owner

- Bidding – Process generally understood by the parties and very little input required from Owner
- DB and CMR
 - Selection of the Criteria Architect/Engineer (DB)
 - Development of the RFQ (phase 1)
 - Development of the RFP (phase 2)
 - Evaluation Committee
- Design decisions on DB Projects

Owner Procurement Costs

- Bidding – Relatively low costs to procure contractor
- DB and CMR
 - More involvement of professionals
 - Prepare RFQ
 - Prepare RFP
 - Prepare Contract Documents
 - DB – Criteria Architect / Engineer (CA/E)
 - DB – Development of Design Criteria

When to Get the GMP?

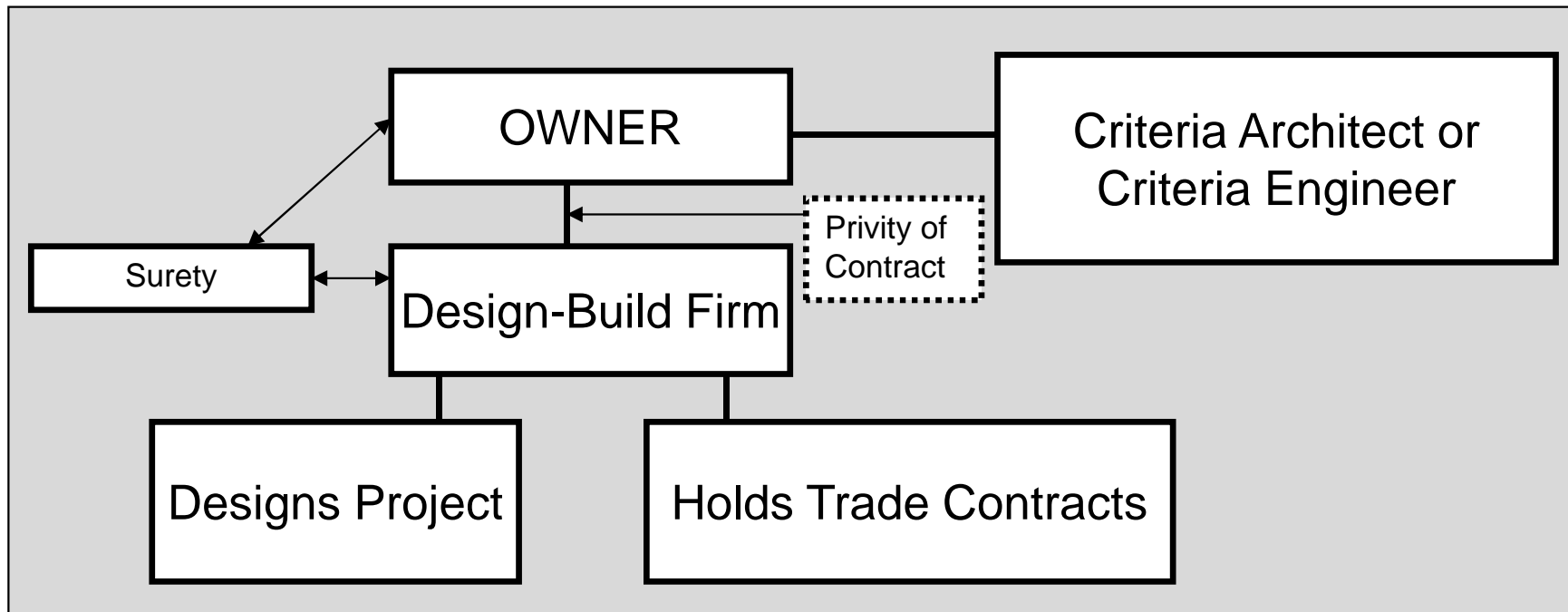
- Owner can get GMP with the proposals or at a pre-determined time after selection of DB or CMR
- GMP submitted with proposals:
 - Allows GMP to be set at time contract is executed
 - Requires a relatively complete design
 - Proposers may have limited amount of time with the design during proposal phase, which could result in higher or less accurate GMP

When to Get the GMP?

- Owner can get GMP with the proposals or at a pre-determined time after selection of DB or CMR
- GMP submitted after selection of DB or CMR:
 - Proposal includes performance-based design criteria
 - 50% to 100% complete documents
 - DB or CMR has greater familiarity with project before providing a GMP

Design-Build

Public authority contracts with a single entity for both design services and construction of the project.



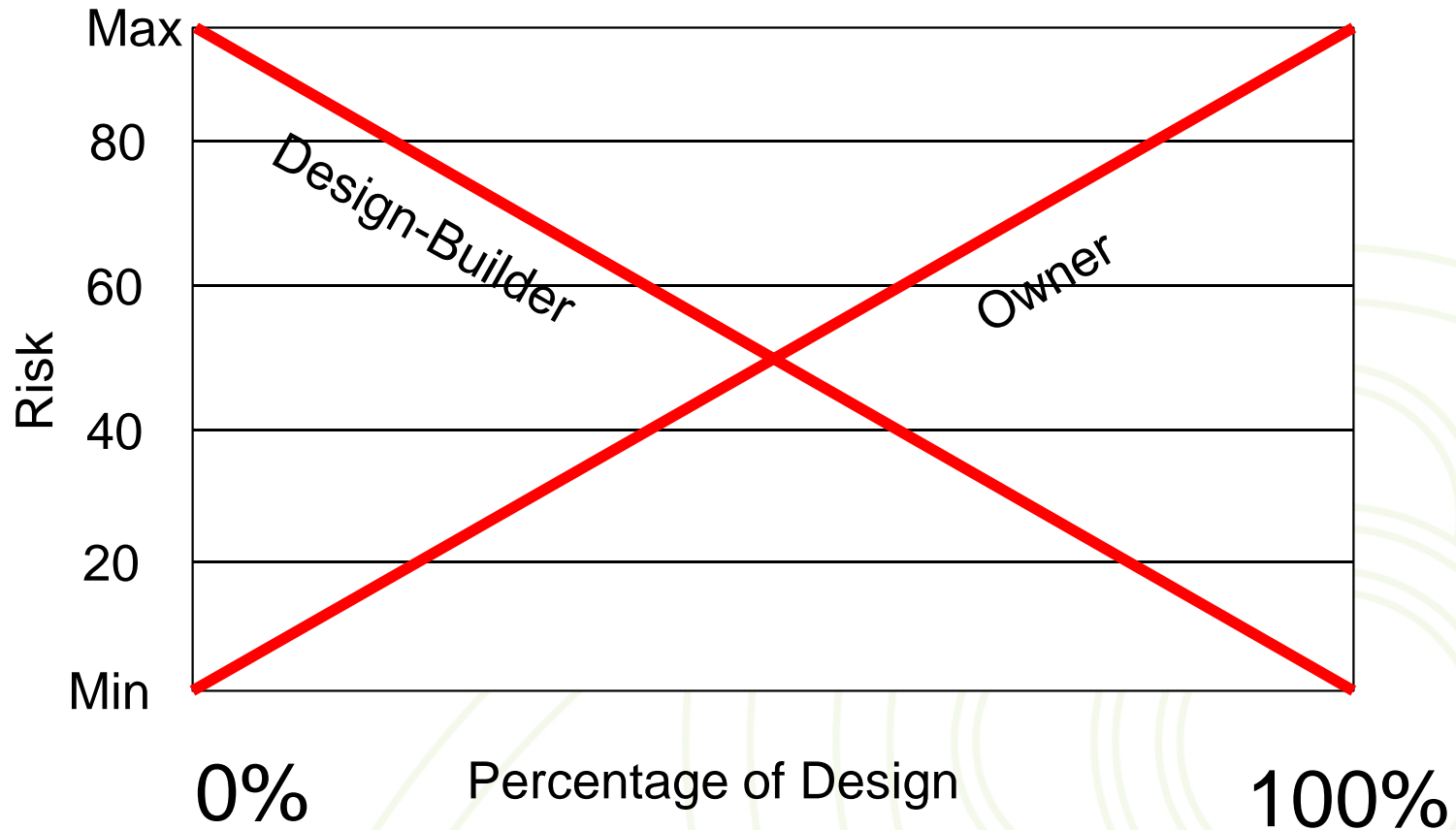
DB firm is responsible for design of the project, construction of the project, and performance of the project when completed.

Design-Build

Design Criteria

- Prescriptive Design v. Performance Design
 - More Detail = Less Creativity by DB and More Liability for Owner
 - Less Detail does not mean less control over design
- Owners are beginning to see benefit of Performance Design Criteria

Design-Build



Design-Build Firm Selection Process

- Owner must engage a Criteria Architect or Engineer (CA/E) to assist in process
 - Engage the services of a CA/E by either:
 - Contracting for the services consistent with how design firms are selected (statutory QBS process), or
 - Using an employee of the public authority who is a licensed design professional and notifying the OFCC

Design-Build Firm Selection Process

- Prepare the RFQ
- The RFQ should include:
 - General description of the Project
 - Description of how qualifications should be submitted
 - Criteria for the DB firm

Design-Build Firm Selection Process

- The RFQ may also request information on:
 - Competence of DB to perform services
 - Workload and availability of key employees
 - Past performance
 - Financial ability to perform project, bonding
 - History of meeting inclusion and diversity goals
 - Other qualifications that are consistent with the scope and needs of the project

Design-Build Firm Selection Process

- Select the Evaluation Committee
- Evaluation Committee:
 - Composition is at owner's discretion; CA/E acts as advisor
 - Other advisors and consultants can be involved as non-voting members
 - Usually about five members

Design-Build Firm Selection Process

■ Scoring Process

- Evaluation Committee involvement in development of scoring sheets
- Consensus of Evaluation Committee on score for each respondent

Design-Build Firm Selection Process

- Public announcement of RFQ for DB services:
 - Occurs after preparation of qualifications and selection of Evaluation Committee
 - Sufficiently in advance of time when responses are due (Note: CMR requires 30 days)
 - Advertise in manner the public entity deems appropriate; Owner may send to DB firms
- All questions must be answered in writing and sent to all interested firms

Design-Build Firm Selection Process

- Upon receipt of the responses, Evaluation Committee:
 - Reviews all statements
 - Evaluates and selects a minimum of 3 firms determined to be most qualified
 - Exception: Can determine in writing that fewer than 3 qualified DB firms are available, and continue with fewer than 3 firms to evaluate and rank for determination of firm that will provide the best value for the project.

Design-Build Firm Selection Process

- Prepare the RFP
 - RFP is sent to the short-listed firms
 - RFP contains Project Information
 - RFP also requests:
 - Pricing Proposal
 - Technical Proposal
 - Stipend (optional)

Design-Build Firm Selection Process

- **Project Information:**
 - a description of the project and project delivery,
 - the design criteria produced by the CA/E,
 - a preliminary project schedule,
 - a description of any pre-construction services and the proposed design services,
 - a description of a guaranteed maximum price, including the estimated level of design on which it will be based, and
 - the contract (lock in the terms).

Design-Build Firm Selection Process

- Pricing Proposal:
 - Design services fee
 - Preconstruction fee
 - Design-build services fee
 - General conditions
 - Contingency and
 - If applicable, Guaranteed Maximum Price

Contingency

How contingency gets used needs to be carefully defined.

- DBs want to be able to use contingency at their discretion
- Need to determine if Owner has access to contingency
 - Hazardous conditions?
 - Scope changes?

Shared Savings

- Typical split is either:
 - 50% – 50%; or,
 - 60% – 40%.
- Need to carefully define when the shared savings will be paid
- May cap amount of shared savings
- May determine that there will be no sharing; all savings revert to the Owner

Design-build Firm Selection Process

- **Technical (or performance) Proposal:**
 - Proposed Project Schedule
 - Approach to the Work, including any anticipated self-performed work
 - Work sequence
 - Plan for anticipated procurement difficulties
 - Design concepts based on design criteria

Design-Build Firm Selection Process

- **Technical Proposal (cont.):**
 - Project specific approach to deliver services
 - List of key personnel and consultants for the project
 - Plan to meet diversity and inclusion goals, if any are applicable to the project

Design-Build Firm Selection Process

- Meetings & Interviews with Evaluation Committee
 - **May** meet with short-listed firms to clarify and respond to questions regarding the pricing and technical proposals to be submitted
 - **Must** interview each firm that submits a proposal; this interview is not scored
 - May provide list of questions in advance of interview

Design-Build Firm Selection Process

- Selection Requirements
 - Evaluate each pricing and technical proposal based on the requirements in the RFP
 - Performance (technical) Proposal is evaluated separately from the Pricing Proposal
 - Rank the DB firms based on pricing and technical proposals to determine Best Value (the firm submitting the offer deemed most advantageous and of the greatest value to the public authority)

Design-Build Firm Selection Process

- Enter into negotiations with the DB firm whose pricing and technical proposal the Owner determines to be the “best value.”
 - “Best value” - price is a factor, but not the only factor

Design-Build Firm Selection Process

- What if negotiations with the highest-ranked firm fail?
 - Owner may:
 - enter into negotiations with the next highest ranked DB firm, or
 - select additional DB firms to provide proposals, or
 - select an alternative delivery method.

Design-Build Subcontractor Selection

- DB is responsible for all of the work and holds all subcontracts (State subcontract form is required)
- DB required to establish criteria for prequalifying prospective subcontract bidders (with public authority approval)
- DB not required to award subcontract to lowest bidder
- Public authority may reject subcontractors as not qualified
- DB can self-perform work, if permitted by the public authority and work is bid properly

DESIGN-BUILD AND CONSTRUCTION MANAGER AT RISK METHODS: SELECTING THE FIRM THAT WILL PROVIDE THE BEST VALUE – PART I

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Lunch

We will reconvene at 1 p.m.



DESIGN-BUILD AND CONSTRUCTION MANAGER AT RISK METHODS: SELECTING THE FIRM THAT WILL PROVIDE THE BEST VALUE – PART II

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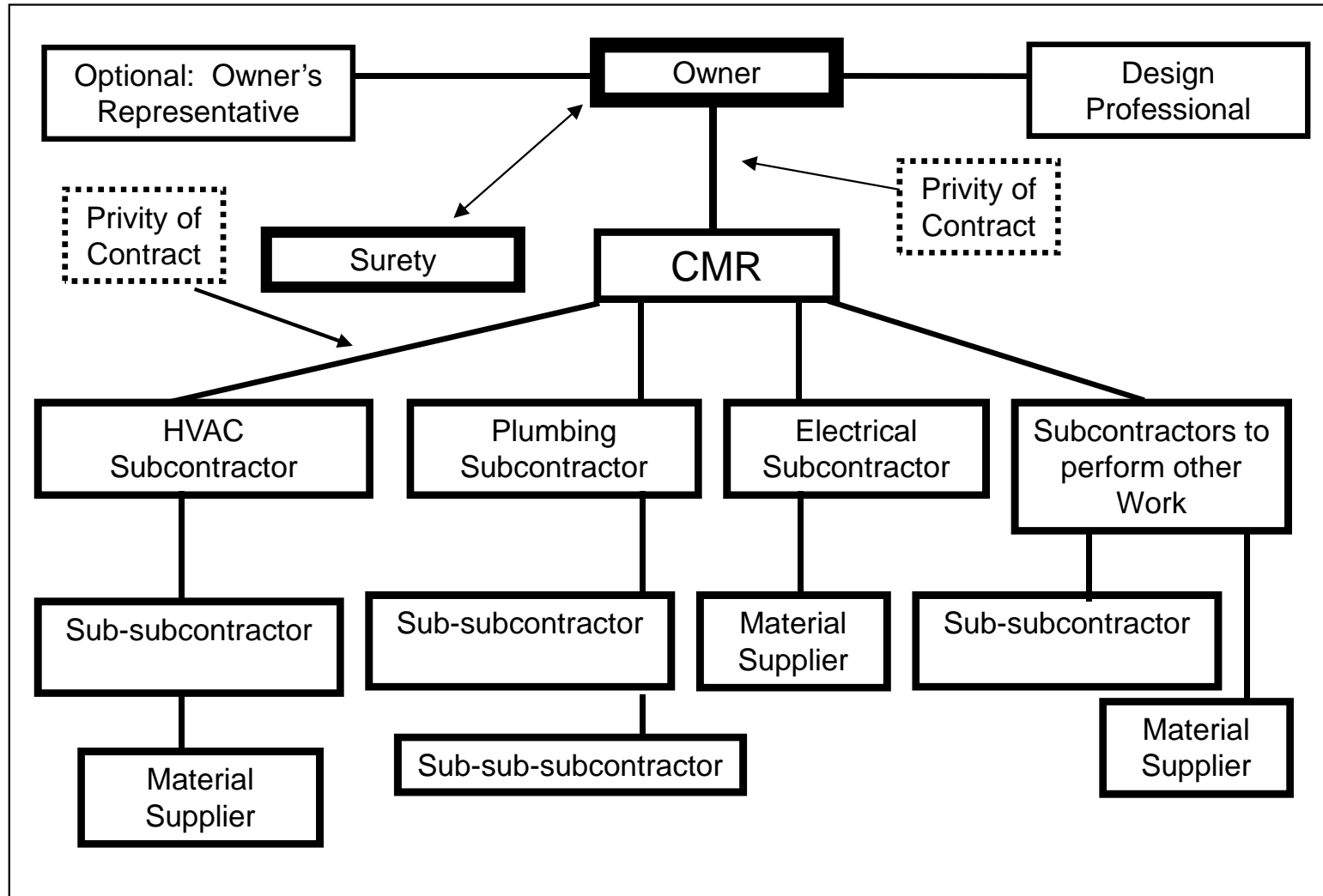
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Construction Manager at Risk



Initial CMR Considerations

- CMR v. General Contractor
- Pricing:
 - GMP (CMR)
 - Lump Sum (GC)

Initial CMR Considerations

- CMR v. General Contractor
- Involvement with design development:
 - Can (and should) involve CMR early in design development
 - GC involved once design is complete and it is awarded a contract based upon design documents included in the Bid Package

Initial CMR Considerations

- CMR v. General Contractor
- Selection Standard:
 - Best Value (CMR)
 - Competitive Bidding Standard (GC) – *e.g.*, lowest and best; lowest responsive and responsible; lowest responsible (applicable standard for the public owner)

CMR Firm Selection Process

- Prepare RFQ
- The RFQ should include:
 - General description of the Project
 - Description of process to submit qualifications
 - Qualifications criteria

CMR Firm Selection Process

- Qualifications criteria:
 - Competence of CMR to perform services
 - Workload and availability of key employees
 - Past performance
 - Financial ability to perform project, bonding
 - History of meeting inclusion and diversity goals, if applicable to the project
 - Other qualifications that are consistent with the scope and needs of the project

CMR Firm Selection Process

- Select the Evaluation Committee
- Evaluation Committee:
 - Composition is at Owner's discretion
 - Other advisors can be involved as non-voting members (e.g., the design professional)

CMR Firm Selection Process

- Public announcement of RFQ for CMR services:
 - Occurs after preparation of qualifications for CMR services and selection of the evaluation committee
 - **30 days in advance of time when response is due**
 - Advertised in a newspaper of general circulation in the county in which the services will be provided; may also be published electronically and provided to firms believed to be interested in providing the services
- All question must be answered in writing and sent to all firms that requested the RFQ

CMR Firm Selection Process

- Upon receipt of the responses, Evaluation Committee:
 - Reviews all statements
 - Determines a minimum of 3 most qualified firms (“short-listed firms”)
 - Exception: Can determine in writing that fewer than 3 CMR firms are available, and proceed with the selection process.

CMR Firm Selection Process

- RFP is sent to the “short-listed firms.”
- RFP contains Project Information.
- RFP also requests:
 - Pricing Proposal
 - Technical (or performance) Proposal

CMR Firm Selection Process

- **Project Information:**

- a description of the project, including statement of available design detail,
- a description of any pre-construction services to be provided,
- a description of how the guaranteed maximum price will be determined, and
- the contract.

CMR Firm Selection Process

- Pricing Proposal:
 - Preconstruction fee,
 - **Construction fee,**
 - **At-risk fee,**
 - General conditions cost,
 - Contingency amount, and
 - If applicable, Guaranteed Maximum Price.

Note: DB contracts include a Design Services Fee and a Design-Build Fee.

CMR Firm Selection Process

- **Technical Proposal:**
 - Proposed Project Schedule
 - Approach to the Work, including any anticipated self-performed work
 - Work sequence
 - Performance history
 - Plan for anticipated procurement difficulties

CMR Firm Selection Process

- **Technical Proposal (cont.):**
 - Plan to meet diversity and inclusion goals, if applicable to the project
 - Additional considerations, which may include technical design, technical approach, quality of proposed personnel and management team

CMR Firm Selection Process

- Interviews
 - Evaluation Committee must interview each short-listed firm.
 - The purpose is to clarify and respond to questions regarding the proposals submitted.
 - May provide list of questions in advance.
 - Interview is not scored.

CMR Firm Selection Process

- Selection Requirements. The Evaluation Committee:
 - Evaluates each pricing and technical proposal based on the requirements in the RFP.
 - Performance Proposal is evaluated separately from the Pricing Proposal.
 - Ranks the short-listed firms based on its evaluation of the firm’s pricing and technical proposals to determine the “Best Value” (the offer deemed most advantageous to and of the greatest value to the public authority).

CMR Firm Selection Process

- Enter into negotiations with the firm determined to have submitted the pricing and technical proposals that are the “best value,” considering the proposed cost and performance.
 - “Best value” - price is a factor, but not the only factor
 - Negotiations directed towards ensuring understanding of requirements and availability of personnel, equipment, and facilities

CMR Firm Selection Process

- If negotiations with the highest-ranked firm fail:
 - Public Authority may:
 - enter into negotiations with the next highest ranked CMR firm, or
 - select additional CMR firms to provide proposals, or
 - select an alternative delivery method.

CMR Subcontractor Selection

- CMR is responsible for all of the work and holds all subcontracts (form prescribed by OAC and available on the OFCC website)
- CMR required to establish criteria for prequalifying prospective subcontractors (with public authority approval)
- CMR not required to award subcontract to lowest bidder
- Public authority may reject subcontractors as not qualified
- CMR can self-perform work, if permitted by the public authority and work is bid properly

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BID ALTERNATES AND SOLE SOURCE

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What Are Bid Alternates?

- Bid Alternates are typically specific construction or renovation components of the project that are not included in the base price of a bid, but are priced separately.
- Whether or not alternates are accepted is not, by practice, determined until the time of the contract award.
- Alternates are different from an allowance that may be requested as part of a base bid amount.

What Are Bid Alternates?

- Alternatives to Base Bid
 - Different/additional materials
 - Different/additional equipment or systems
 - Different/additional construction methods
 - Different time to complete project
 - Measure of protection, not mechanism to edge bidders out

Why Use Bid Alternates?

- Comparison shopping
 - Compare costs of different materials
 - Compare costs of different equipment or systems
 - Compare costs of different construction methods
 - Encourage aggressive schedule

Why Use Bid Alternates?

- Avoid change orders and higher costs later in project
 - Pricing at bid likely less than subsequent change order
 - Can preserve right to reinstate alternates, if additional funding becomes available

The Courts' View of Alternates

- HVAC system example #1
 - *State, ex rel. Akers, v. Buckeye Valley LSD*, 1996 Ohio App. LEXIS 6090
 - Advertised for chiller and hot water system for HVAC.
 - Received one bid for hot air system at substantially lower price.
 - Rejected bids.
 - Issued alternative specifications allowing for either type of system.
 - Contractor challenged bid rejection and rebid using nonconforming system as alternate.

The Courts' View of Alternates

- HVAC system example #1 – *State, ex rel. Akers, v. Buckeye Valley LSD*
 - Owner could not accept nonconforming bid,
 - But Owner could reject all bids and rebid.
 - OK to rebid to consider a potentially more economical system.
 - Rejection and rebid was not an abuse of discretion by the Owner.

The Courts' View of Alternates

- HVAC system example #2
 - *Metzger-Gleisinger Mechanical, Inc. v. Mansfield CSD*, 2005 Ohio 2727
 - Metzger's base bid using Carrier equipment was \$6,095,571.
 - Metzger's bid alternate using Trane included cost increase of \$650,000.
 - Guenther's base bid and bid alternate both used Trane.
 - Guenther's base bid was \$6,339,000 with no increase for the bid alternate.
 - Challenge to award of Trane alternate bid to Guenther.

The Courts' View of Alternates

- HVAC system example #2 – *Metzger-Gleisinger Mechanical, Inc. v. Mansfield CSD*
 - OK to compare cost of Trane equipment with other manufacturers
 - Discretion to decide if additional cost worth it
 - Specifications gave bidders information needed to assemble bids
 - Bidders informed of criteria used in making choice

The Courts' View of Alternates

- Instructions to Bidders
 - Set forth rules under which bids will be evaluated.
 - Inform bidders of possible inclusion of alternates on the bid form.
 - Indicate that alternates will be accepted or rejected after bid opening in Owner's discretion.

The Courts' View of Alternates

- Alternate bids must be submitted on “apples-to-apples” basis
 - *Mech. Contrs. Ass'n of Cincinnati, Inc. v. Univ. of Cincinnati.*, 152 Ohio App.3d 466
 - Bidders were allowed to propose their own alternates for materials or design work.
 - Alternate materials or designs proposed by bidders were not shared with other bidders.
 - No opportunity provided for all bidders to bid on proposed material or design alternatives.
 - Bids not subject to “apples-to-apples” comparison.

The Courts' View of Alternates

- Bid guaranty must cover base bid or base bid + alternates.
 - *State, ex rel. Steinle, v. Faust, 55 Ohio App. 370*
 - Statute required bid guaranty of 5% of bid
 - Bids received on base bid and alternates A to J
 - Base bid and alternates E, F, A and H accepted

Sample Alternates Language

- **Sample ITB language (for lowest responsible bidder standard):**
 - The Owner will award the contract for the work to the bidder determined to be responsible and that submits the lowest responsive bid, taking into consideration accepted alternates. At the time of the contract award, the Owner will accept or reject alternates as it determines, in its sole discretion, is in its best interest.

Summary - Alternates

- Good budget management tool
- Award on the total of base bid and accepted alternates
- Decide whether to accept or reject following bid opening
- Be clear in Instructions to Bidders
- Provide same opportunity to all bidders

Sole Source

- Unique Technologies & Public Works
 - Conflicting interests

Owner's desire to get exactly what it wants

vs.

Statutory requirements for competitive bidding
(and demands of funding agencies)

Sole Source

■ Sole Source

- Some statutory law: Recognizing when you need to match existing equipment or highly specialized equipment (e.g., school districts, transit authorities)
- Case law: Implied blessing of sole source
- Owner’s discretion (“lowest and best” or “lowest responsive and responsible”): Courts are not supposed to substitute their judgment for that of the owner.

Sole Source

- Transparency, due process and technical justification are the public owner's best friends.
 - Uniformity of equipment (O&M Concerns)
 - Pilot or bench scale testing
 - Investigations of in-place installations
 - Patented processes and equipment
 - Federal acquisition regulations

Sole Source

- Getting What You Want
 - Performance/descriptive specifications
 - Generic \longrightarrow Implied Sole Source
 - *Schaefer v. Montgomery County* – the incinerator case
 - *Fischer Auto v. Cincinnati* – the Hudson case

Sole Source

- Getting What You Want
 - Pre-approved vendors / processes
 - Multiple → Express Sole Source

Quasi-Sole Source

- Getting What You Want
 - Owner’s pre-construction procurement of equipment
 - Sometimes practically necessary
 - Works best with “lowest and best”

Sole Source

- Caveats when contractor buying the equipment!!
 - Owner still has Spearin liability
 - Owner pays markup
 - Take care to preserve equipment manufacturer's liability

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Interactive Workshop

Workgroup Breakout Sessions.
We will reconvene at 3:15 p.m.



Interactive Workshop

Workgroup Reports, Observations,
Q&A



Thank You for Participating

Members of the Construction Group are available for questions/comments.

To learn more, check out upcoming events or follow up with our group, visit www.bricker.com or call 614.227.2321.

