

Operating Effectively Under New Legislative Restrictions



97th State Education Convention
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What We Will Cover

1. Foundational Understanding of Project Delivery Methods
2. Understanding the AIA Document Set - Contracting Tips to Bring a Project in On Time and Under Budget
3. Competitive Bidding ... Coming to a School District Near You!!

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Performance Contracts

- There is a 1,000 year hiatus on performance contracts.
- Please contact Steve Nelson in our Milwaukee office (414-287-1463) in December of 2018 to evaluate performance contracts. Prior to contacting Steve, however, we will need a nonrefundable retainer. As well, please call now to ensure there is appropriate time in Steve's schedule.

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COMPARISON OF PROJECT DELIVERY METHODS

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AIA Document Set

The American Institute of Architects has created a set of architect and contractor agreements to deliver design and construction services using several different platforms. The agreements are integrated to work together for each platform utilized.

- Different platforms allocate risk differently between the owner and the contractor.
- The AIA is a trade association for architects so its forms protect the architect first, then the contractor and lastly, the owner. The standard contract should be significantly modified to protect the owner.

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Platform 1 - Architect Designs and Contractor Builds

This platform is not used often in commercial or institutional projects unless the project is very small. The main issue with this platform is that the risk of cost over-runs or schedule delays is mostly transferred to the owner.

- Often plans and specifications are not as detailed as they should be resulting in the contractor issuing Requests for Information ("*RFI*") to the architect for clarification. The time to answer these RFIs slows the construction schedule.
- The contractor may find that the plans and specifications are not constructible or require work that was not apparent when the project started. If the contractor is on a time and materials basis, this could cause the project cost to increase because of change orders. The architect is not liable for cost estimates that are not accurate.

One reason for using this platform is that the architect's and contractor's fees are often lower than using Platform 2.

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Platform 2 - Contractor Involved with Design from Beginning

- Since the contractor is involved with the design while it is being created, the contractor should have the opportunity to clarify its questions and suggest cheaper or faster ways to construct the project. If the contractor does its job, it will reduce or eliminate RFIs and Change Orders.
- The contractor, rather than the architect, develops costs estimates for the project as the design proceeds. The contractor usually has a better idea of cost than an architect. The contractor becomes bound to its cost estimates when it delivers a Guaranteed Maximum Price ("*GMP*") Contract.

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Platform 2 cont'd

- The owner is better protected from cost overruns by the GMP and has leverage to cause the contractor to put more workers on the project if it is behind schedule.
- If the contractor and architect work together as envisioned by this platform, then the extra costs of fees may be offset by having the project come in on-time and within budget. In any case, the risk to the owner of cost over-runs is significantly reduced.

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Platform 3 - Design/Build

- Growing in popularity - especially on larger projects.
- Under this method, the Owner engages one entity to act as architect and contractor.
- The primary advantage to this method is the single point of contact to which the Owner can turn with issues.
- The primary disadvantage is the “all eggs in one basket” syndrome. There is a lack of checks and balances - if the single point of contact fails, the project fails.

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CONTRACTUAL TIPS FOR BRINGING THE PROJECT IN ON TIME AND UNDER BUDGET

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1. Control bids from subcontractors to bring a project in below the Guaranteed Maximum Price (“GMP”)

- A contractor may win a bid with the lowest Guaranteed Maximum Bid but it has a financial interest in bringing a project in as close to that GMP as possible, rather than under it, because its fee is often a percentage of the cost of the work.
- Modify the contract to require sealed bids from multiple contractors that are given directly to the owner. Specify the amount of mark-up the contractor may receive on the subcontractor’s invoice. Require that no contractor fee be taken on the mark-up.

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Control bids from subcontractors to bring a project in below the Guaranteed Maximum Price (“GMP”) (Cont’d)

- ***Practical suggestion:*** The review of the bids by an owner’s representative may reduce your cost if you do not have an experienced in-house facilities group who know material and labor costs. The rep may find that all of the bids are above market and recommend a sub that can do the work for less.

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2. Control the cost of self-performed work

- The contractor may self-perform work rather than have a subcontractor do it (for example, installing dry-wall).
- The standard AIA contract allows the contractor to self-perform work at a cost that is not subject to competitive bidding. This can be a profit center with inflated costs for the work.
- Recommend the contractor bid on self-performed work with other subs in the sealed bid process.
- ***Practical tip:*** If this change of the AIA contract is not possible, use an owner's rep or your experienced facilities group to assess the charges.

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3. Control the cost of contractor supplied rental equipment

- It is typical for a contractor to supply the project with equipment that it owns and charge a rental rate for the equipment. This is another profit-center for the contractor.
- The standard AIA contract allows the contractor to charge whatever it wants.
- There are many modifications that must be made to this section to control costs. One common modification is to tie the contractor's rental rates to the AED (Associated Equipment Distributors) Green Book of national rental rates for equipment.

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Control the cost of contractor supplied rental equipment (Cont'd)

- ***Practical tip:*** Sometimes it's cheaper to buy a used machine than pay for rental charges. The rental rate section is one of the most heavily modified sections because there are so many ways to lose money in equipment rentals.

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4. Control the cost of Change Orders

- Change Orders modify the scope of work that is being done and may increase the GMP and extend the construction schedule.
- The standard AIA contract has no real controls on the cost of a Change Order. Change Orders are probably the single most popular way for a contractor to increase the agreed upon GMP. It is a substantial profit center. Contractors can inflate the cost of labor and materials and take substantial mark-ups.
- Recommend the contractor's mark-up on Change Orders. Also see "General Requirements", which is a topic that crosses over into this one.

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Control the cost of Change Orders (Cont'd)

- **Practical tip:** We encourage owners to spend more in the pre-construction phase with actions such as team meetings with HVAC, electrical and other major subcontractors. These meetings tend to significantly reduce the amount of Change Orders encountered during construction. In addition, we strongly recommend that an owner have the clarifications and assumptions in the GMP amendment professionally reviewed to avoid Change Orders during construction for items the owner thought were included.

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5. Control the cost of General Requirements (also referred to in the trade as "General Conditions")

- General Requirements are the cost of items needed for the construction process (portable toilets, fencing, etc.) and the cost of supervisory personnel. It is also a profit center.
- The standard AIA contract puts no limits on General Requirements. It is not bid out and the contractor can increase the cost during construction.
- General Requirements should be fixed as a lump sum when the GMP Amendment is signed.
- **Practical tip:** Do not permit additional General Requirements to be added to Change Orders unless it can be demonstrated that the Change Order actually increases the cost of the General Requirements.

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6. Control costs and time in the Dispute Resolution Process

- The Standard AIA contract requires the parties to refer the dispute to the Initial Decision Maker, then enter into non-binding mediation, with the American Arbitration Association as the default mediator, and, if that fails, to binding arbitration, with the American Arbitration Association as the default arbitrator.
- This process is so long, so unfavorable and so expensive to the owner as to prevent most owners from starting it and to give up on claims. The contractor, on the other hand, merely has to stop working if the owner fails to make payments to enforce its claims. No owner can afford a stoppage of the work.

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Control the cost and time in the Dispute Resolution Process (Cont'd)

- The entire section should be deleted and provisions should be inserted allowing the owner to choose litigation or binding arbitration with agreed upon timelines for each phase of the process.
- **Practical tip:** Require the litigation to be held in the circuit court of the county where the owner is located.

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7. Control the use of the plans and specifications

- The architect owns the plans and specifications it develops for a project in the standard AIA contract. The contract provides that the owner must use the same architect if it renovates the building in the future or the owner cannot use the plans and specifications and cannot update them. The owner cannot easily choose the best architect for the renovation under these terms.
- Obtain a permanent license to do what the owner wants (regardless of any payment to the architect) and delete the requirement that the same architect must be used if the plans and specifications will be modified

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Control the use of the plans and specifications (Cont'd)

- ***Practical tip:*** Always require a record set of plans and specifications from the architect when the work is done. These are updated to show all of the modifications to the documents that were made during construction. It is essential to have the record drawings to guide future work on the building safely and with a minimum of cost.

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8. Obtain builders risk insurance that conforms to the contract

- The standard AIA contract requires the owner to obtain builder's risk insurance and, if the owner doesn't do so, the contractor will obtain it and charge the cost to the owner. Builder's risk insurance will pay for damage to the building by uncontrollable causes such as high winds, tornado or vandalism. It permits the project to proceed since it pays for the repairs. Otherwise, the project could be stalled for years while the matter is litigated.

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Obtain builders risk insurance that conforms to the contract (Cont'd)

- The contract requires the insurance to be maintained until the later of final payment or until no one working on the project (contractor, subs, etc.) has a financial interest. These requirements are often at odds with the insurance owners carry. Revise the contract to conform to the coverage requirements of the owner's policy. Otherwise, the owner could be liable to pay for an uninsured loss.
- ***Practical tip:*** Sometimes an owner's existing policies of insurance allow the addition of builder's risk for all projects undertaken by the owner so an owner does not have to insure each project separately.

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9. Do not waive consequential damages

- Consequential damages are the damages an owner incurs in addition to the costs of repairing or replacing damaged property. For example, if a new building will not open on time because of the contractor's negligence, the owner may have to rent interim space, pay movers, install temporary wiring and IT equipment, etc.
- The standard AIA contract transfers the cost of consequential damages arising because of the contractor's negligence to the owner. Although consequential damages are much rarer than direct damages, if it happens it is very difficult to explain to an owner's constituency why they are paying for a contractor's negligence.

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Do not waive consequential damages (Cont'd)

- Modify the provision so that damages are not waived by the owner.
- Practical tip: Sometimes it's acceptable to cap the damages to the limits of the contractor's insurance. Obtain expert advice to make these modifications.

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COMPETITIVE BIDDING REQUIREMENTS FOR SCHOOL DISTRICTS: WAIT...WHAT?

Current Law

- Wisconsin Statutes require counties, cities, villages, and towns to adhere to the competitive bidding requirements set forth under Wis. Stat. § 66.0901 when the estimated cost of a public works or construction project exceeds a specified dollar amount (currently \$25,000).

Current Law (cont'd)

- No such blanket requirement currently exists for school districts.
- Absent three statutory exceptions, the use of a competitive bidding process by school districts is currently optional, allowing school districts to utilize discretion in how bids are awarded.
- HOWEVER, under current law, if a school board adopts a board policy specifying that a district will utilize a competitive bidding process, then such a district is bound to follow that process while the pertinent board policy is in effect.

Statutory Exceptions to Current Law

- Three Current Statutory Exceptions Which Require School Districts to Adhere to Competitive Bidding Requirements:
 - Contracts awarded for energy savings contracts (Wis. Stat. § 66.0133).
 - Contracts awarded for employee health care insurance contracts (Wis. Stat. § 120.12(24)).
 - Contracts awarded for food service (if a school district participates in the National School Lunch Program).

2017 Senate Bill 236

- Proposes to subject school district to the same competitive bid requirements that counties, cities, villages, and towns are currently subject to under Wis. Stat. § 66.0901.

So What is Bad About Bidding?

From businessdictionary.com:

“Competitive Bidding” is a transparent procurement method in which bids from competing contractors, suppliers or vendors are invited by open advertising the scope, specifications, and terms and conditions of the proposed contract as well as the criteria by which the bids will be evaluated. Competitive bidding aims at obtaining goods and services at the lowest prices by stimulating competition, and by preventing favoritism.

Isn't this a good thing??

Sometimes the Lowest Isn't the Best

From the movie *Armageddon*:

"You know we're sitting on four million pounds of fuel, one nuclear weapon and a thing that has 270,000 moving parts built by the lowest bidder. Makes you feel good, doesn't it?"

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In a Competitive Bidding Environment, the RFP is the KEY DOCUMENT...

- An RFP is a written request to contractors to (i) demonstrate that they are qualified to perform the work, (ii) demonstrate the project delivery on a common set of conditions and (iii) competitively bid the cost.
- The RFP process introduces competitive bidding on costs of the Project and is the best procedure to get the most project work for the least cost.

2017 Senate Bill 236

- Proposes to amend the current language of Wis. Stat. § 66.0901(1m)(a) to read as follows:
 - "Except when necessary to secure federal aid, whenever a political subdivision, school district, or the board of school directors of the school district operating under ch. 119 lets a public contract by bidding, the political subdivision, school district, or board of school directors shall comply with all of the following:
 1. The bidding shall be on the basis of sealed competitive bids.
 2. The contract shall be awarded to the lowest responsible bidder.

2017 Senate Bill 236

- Proposes to create Wis. Stat. § 120.12(5m):
 - Before entering into a contract for the construction, repair, remodeling, or improvement of a public school building or public school facilities or for the furnishing of supplies or materials with an estimated cost greater than \$5,000 but not more than \$50,000, school districts would have to give notice of that contract or a contract with person qualified as a bidder under s. 66.0901(2) by publishing a class 1 notice under ch. 985.
 - Would allow a school board, by three-fourths vote of all the members, to provide that any construction, repair, remodeling, or improvement described above or any part thereof may be done directly by the school district without submitting the same for bids.
 - The aforementioned requirements would also not apply to the construction, repair, remodeling, or improvement of a public school building or public school facilities or to the furnishing or supplies or materials if the materials for such a project are donated or if the labor for such a project is provided by volunteers.

2017 Senate Bill 236

- Wis. Stat. § 120.12(5m)(cont'd):
 - Before entering into a contract for the construction, repair, remodeling, or improvement of a public school building or public school facilities or for the furnishing of supplies or materials with an estimated cost greater than \$50,000, school districts would have to advertise for proposals to perform the terms of the contract by publishing a class 2 notice under ch. 985. School districts would be **required** to select the lowest **responsible** bidder for such projects.
 - Wis. Stat. § 66.0901 would apply to contracts let under this paragraph.

2017 Senate Bill 236

- Proposes to also create Wis. Stat. § 120.127:
 - Would create an exception where the provisions of Wis. Stat. § 120.12(5m) are not mandatory for the repair or reconstruction of a public school building or public school facilities when damage or threatened damage thereto creates an **emergency**, as determined by a resolution of the school board, in which the **public health or welfare** of the school district is **endangered**.
 - Such an “emergency” would exist until the board, via a majority board vote at a regular or special meeting, determines that it no longer exists.

Bidding Process under Wis. Stat. § 66.0901

If 2017 Senate Bill 236 eventually becomes the law, the following is the process that school districts would be required to follow:

- All bids must be on the basis of sealed competitive bids (§ 66.0901(1m)(a)1).
- All contracts awarded in response to such bids must be awarded the lowest **responsible** bidder (§ 66.0901(1m)(a)2).

What is NOT Subject to Competitive Bidding?

- Professional Services
- Equipment
- Supplies (unless part of a construction project)

Project Delivery and Public Bidding

- A traditional Design/Bid/Build model fits well with competitive bidding
 - Architectural and engineering services are excluded from the bidding requirements (as professional services)
 - Contractors evaluated on common set of plans

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Project Delivery and Public Bidding

(continued)

- Construction Manager At-Risk Fits (Sort Of)
 - Typical CM providing professional services is not subject to competitive bidding
 - When CM converts to At-Risk, issues arise under bidding laws

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Bidding and CM At-Risk

- Phase I - Design
 - Architect
 - CM
 - Owner
- What gets bid??

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Bidding and CM At-Risk

- Phase II - Construction
 - Architect
 - CM
 - Owner
- What gets bid??

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Bidding and CM At-Risk

- The Hybrid CM At-Risk Bid Structure
 - Phase I (design) CM cost is fixed
 - Phase II (contractor) CM cost is bid based upon percentage of GMP
 - All subcontracts having an anticipated value of greater than \$50,000 are bid according to statute
 - Owner controls the bid process

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Project Delivery and Public Bidding

(continued)

- A Design/Build Model does not work under competitive bidding laws
 - A “turnkey” project that avoids bidding runs afoul of the bidding requirements.
 - A “turnkey” project that is competitively bid could work, but all of the advantages of the Design/Build delivery method are lost.

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The Takeaways

1. One size does not fit all. Different project delivery methods fit different projects.
2. Understand the nature and reasoning behind the AIA documents and the provisions therein in order to negotiate the best result.
3. Competitive bidding works if done properly.
4. Feel free to call your lawyer for help - that makes us happy!

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Questions?





For more information, visit our website:

www.vonbriesen.com

