

Public Construction and Project Delivery Systems

At the outset, it may be helpful to discuss the different methods of public construction, including construction manager at-risk contracts ("CM At-Risk"). The traditional method of contract delivery, is of course, the design-bid method. Under design-bid, an independent architect prepares drawings and specifications and contractors bid on such work through a formal process. (Public Contract Code section 20651) With limited exceptions, the project goes to the lowest responsive bidder.

Multiple-Prime Method - However, over the years a number of alternatives to the design-bid method have arisen for community colleges. The advisability of using any one method, often depends on the resources of the District involved and the type of Project it contemplates. The multiple-prime contractor method is often used. The name is arguably a misnomer because multiple-prime contracts usually involve multiple subcontractors. (*California Community College Facilities Manual*, page 18.) Under this system, the District becomes the general contractor, competitively bidding out each trade construction contract so that it has direct contact with each trade, i.e., plumbing carpenter, and structural steel. In contrast, under the bid-build method the District has a direct contract relationship only with the general contractor. Usually, a District using a multiple-prime project system has the active support of a construction manager.

Lease-Leaseback Method - The lease-leaseback process has been recognized by statute. (See e.g., Education Code section 81700, et seq.) Under this method, a general contractor is selected through a competitive process (but not one based on price alone). The contractor selected is then leased the project site by the district pursuant to a lease agreement. The District then leases the project back from the contractor. The District pays rent on the sublease, which matches the amount of the project built the previous month and reflected in a progress payment application.

A lease-leaseback agreement almost always contains a guaranteed maximum price ("GMP"). Although not strictly required by the lease-leaseback, it is almost always used. We think there are (2) reasons why it is used. First, it is generally recognized that lease-leaseback agreements are modestly more expensive than the design-bid-build approach. The reason for this is simple. The Lease-leaseback number has not been subjected to the rigors of the marketplace. To compensate for this premium, District's control upside risk by restricting the issuance of change orders.

The main advantage of the lease-leaseback method is that the District's administrative burdens are significantly reduced, as are its risks.

Construction-Manager-At-Risk - The Construction Manager at-Risk method tries to steer between multiple-prime contracts and the lease-leaseback method, and attempts to secure the advantages of both. Under construction manager at risk, the District selects the construction manager through a competitive process (something we will discuss below.) The Construction Manager then assists the District in selecting the different subcontractors through a formal bid process. Requiring competitive bidding by the trade

insures that over 80% of the Project budget will be subjected to the competitive bid process.

(a) *Bundling Trade Bids* - In this way, and up to this point, the construction manager at-risk process is almost the same as the multiple-prime selection process. But here is where the switch comes in. After the separate trade contractors are selected and contracts signed, the contracts are then legally assigned to the construction manager. (The District then no longer has a direct relationship with the trades, unlike a multiple prime). The various amounts of the subcontractor agreement are then bundled together for one (1) combined price. The construction manager is then entitled to his general conditions costs (i.e., cost of supervising and operating the site), as well as a fee.

Construction Manager-at risk contracts are different from lease-leaseback agreements in that they do not have a guaranteed maximum price. The construction manager is at risk because he is responsible for the overall construction quality of the project. He is also responsible for bringing the contractor budget, although that amount can be adjusted by change order, just as in a traditional general contractor project.

Bonds Based on Trade - The second other important difference between CM At-Risk and LLB (as well as conventional contracting for that matter), is that a "CM At-Risk" should not be required to bond the total cost of the Project. Rather, performance and payment bonds should be obtained from the separate trades. The CM should only bond the value of his contract, as it is derived from his fee and general conditions. This may seem like an odd requirement. However courts have specifically mentioned that having overall bond responsibility is a factor that can convert the CM into a general contractor, forcing the CM to leave the CM "At-Risk" model.

The Selection of a Construction Manager At Risk

Unlike LLB agreements, CM At-Risk agreements are not specifically mentioned in the Public Contract or Education. (This should not concern us since a number of regularly used construction alternatives are not listed either.) However, construction managers, duties and manner of selection *are* listed in the Government Code.

Government Code section 4526 states that a construction manager should be selected on the basis of: (1) demonstrated competence; (2) professional qualifications necessary for the satisfactory performance of the services required; and (3) at a fee that is fair and reasonable. No one of these factors is listed as controlling. Construction managers are to be judged on their expertise in the following areas of project administration:

1. Project design review and evaluation.
2. Construction mobilization and supervision.
3. Bid evaluation.
4. Project scheduling.

5. Cost benefit analysis.
6. Claims review and negotiations.
7. General management and administration of a construction project.

State law does not state the manner in which construction manager candidates are to be solicited. There is language that states that maximum participation for small businesses should be assured, but a close review of the text and a referenced statute indicates this requirement only to state procurement, not local agencies.

Therefore, and strictly speaking, there is no requirement in Government Code section 4526 that the process can be competitive, so long as the other goals of the statute are met.

Application of the Construction Manager-at-Risk Process Here

The Construction-Manager-At -Risk process here would pose relatively little risk to the District's goals of quality construction at a competitive price. It will have not had any significant design or planning activities (since the drawings and specifications have already been completed) and we suspect will concentrate mostly on construction administration. Even this task will be lessened by the presence of Swinerton as a supervising agent.

The contractors under consideration here have considerable expertise in overseeing projects as both construction managers and construction managers at-risk. Competitive principles will be almost fully realized by the fact that the underlying subcontracts, comprising some 80% of the underlying value of the Project, will be competitively bid, as has been pointed out above. There is little evidence that the granting of a CM At-Risk contract here would dilute or challenge competitive principles of the District.

The District has previously adopted the Uniform Construction Cost Accounting system, which has allowed contracts to be awarded in some instance on an informal basis and without the formalities of public bidding. This system along with the more competitive processes for higher value projects, has not resulted in undue cost or concentration of work to select contractors. This can be seen in the contractors and vendors on the adjoining two sites of Building 500, with two different general contractors and two different architects. The two contractors here under consideration, have previously shown price competitiveness, given their presence on the construction project just discussed.