

MEMORANDUM

From: The Board Office

Date: December 10, 2014

Re: Alternative Delivery Methods

The Regent institutions have historically constructed projects using the design-bid-build model. This approach serves the institutions well for most construction projects. In recent years, there has been a nationwide shift in how both the public and private sectors deliver projects, with alternative delivery methods (including, construction manager at risk and design-build) being utilized with increased frequency. Alternative delivery methods are valuable construction models because they improve coordination of the design and construction phases, lead to efficiencies through accelerated project timelines, provide for better management of risk on critical projects, and maximize the value of construction investments.

It is believed that increased use of alternative delivery in the private sector has caused many key Iowa firms to favor private sector construction work over bidding Regent projects. To maximize project efficiencies and increase the number of Iowa firms willing to bid Regents projects, the Board of Regents may approve use of alternative delivery methods when appropriate given the nature and scope of the project. Alternative delivery methods are used consistent with the competitive bidding requirements contained in Iowa Code section 262.34, which governs public construction at Regent institutions. While alternative delivery methods are useful tools available to the institutions, the majority of Regent construction projects continue to employ the design-bid-build model.

Iowa Code Does Not Restrict the Board of Regents' Project Delivery Options

Iowa Code Chapter 26 outlines the method by which public construction in Iowa typically must occur. Chapter 26 adopts the traditional design-bid-build model, under which separate design professional and construction contracts are entered into with work being completed in a linear fashion. The Board of Regents and the Iowa Department of Transportation have been specifically exempted from the provisions of this chapter. Iowa Code § 26.2(2). Excerpts of relevant code provisions are reproduced in Appendix A.

Public entities governed by Iowa Code Chapter 26 are required to submit to a design-bid-build competitive bidding model for all projects whose estimated costs are expected to exceed \$100,000 or the competitive bid threshold in § 314.1B (which now exceeds \$100,000). A public entity is required to first engage the services of an architect or engineer to prepare plans and specifications and calculate the estimated total cost of the public improvement. Iowa Code § 26.3(2). The drawings, plans and specifications, collectively referred to as the "contract documents," are then made available to all prospective bidders on the project upon request. The public entity must publish a notice to bidders at least once in a newspaper having general circulation in the geographic area where the project is to be constructed. Iowa Code § 26.3(1). The public entity must award the construction contract to the lowest responsive, responsible bidder. Iowa Code § 26.9. Iowa Code chapter 26 does not provide a definition of the phrase "lowest responsive, responsible bidder." If the public entity determines bids received are unacceptable, it is limited to rejecting all bids, fixing a new date for receiving bids and ordering publication of a new notice to bidders. Iowa Code § 26.10.

Iowa Code section 262.34, which governs Board of Regents construction, is not as prescriptive as Chapter 26. When the estimated cost of a public project under the charge of the Board of Regents exceeds \$100,000 the Board is only required to advertise for bids for the contemplated improvement and let the work to the lowest responsible bidder. Iowa Code § 262.34(1). The Board is required to file and make available to the public all bids received on the plans or specifications, although the timing of this filing is not provided for in Iowa Code. If the Board determines that bids received are not acceptable, it may reject all bids and proceed with the public project by a method as the Board may determine without any requirement to rebid. *Id.* Unlike Chapter 26, which requires that design specifications be prepared in advance of bidding, there is nothing in section 262.34 requiring the Board to separately engage the services of a design professional prior to submitting the project to competitive public bidding.

The Board May Request Proposals Based on Conceptual Plans or Specifications

Iowa Code chapter 26 is clear in its requirement that public entities separately engage the services of an architect or engineer to prepare detailed drawings, plans and specifications to be made available to prospective bidders in advance of competitive bidding. See Iowa Code § 26.3.2. In contrast, Iowa Code section 262.34 is silent as to the process by which a Regent institution engages a firm to develop plans, specifications or other contract documents. Iowa Code 262.34 only requires that the Board make available for public inspection the bids received on the plans or specifications along with the documents themselves. The Board's solicitation of bids for construction services either in conjunction with design services (Design-Build) or early on in the design process (CM At-Risk), is consistent with the requirements of Iowa Code section 262.34.

The Iowa Supreme Court has consistently held that public bidding statutes seek "to secure by competition among bidders, the best results at the lowest price, and to forestall fraud, favoritism and corruption in the making of contracts." *Elview Constr. Co. v. N. Scott Cmty. Sch. Dist.*, 373 N.W.2d 138, 141 (1985) (quotations omitted). "The paramount purpose of the competitive bidding statute is to protect the public as taxpayers, and that purpose must not be impaired in interpreting the statute." *Master Builders of Iowa, Inc. v. Polk County*, 653 N.W.2d 382, 394 (Iowa 2002). In 1994, the Iowa Attorney General offered an opinion on the legality of employing design-build bidding procedures for the construction of a county hospital. The Attorney General opined that applicable public bidding statutes did not permit this alternative delivery method. The Attorney General referenced early Iowa case law recognizing the critical importance of preparing detailed plans and specifications and making the same available to the public and interested bidders in advance of bidding in support of this position. 1994 Iowa Op. Atty. Gen. 95 (April 05, 1994) (quoting 64 Am. Jur. 2d Public Works and Contracts § 50 at 901-902 (1972).

The Attorney General's rejection of alternative delivery methods for the construction of county buildings is based on an analysis of legal precedent regarding portions of Iowa Code which do not apply to the Board of Regents. The applicable law required the public entity to hold a hearing on "the proposed plans, specifications, and form of contract, and estimated cost for the improvement" prior to filing them for inspection by the general public and interested bidders. ICA § 384.102 (repealed effective 2007 as part of the legislature's efforts to consolidate public construction law within Iowa Code chapter 26). Iowa Code § 262.34 has never required the

Board to separately engage the services of an architect to develop detailed plans and specifications in advance of a public hearing and the solicitation of bids.¹

The Board is not faced with the same statutory restrictions present when the Attorney General opined that the use of alternative delivery for the construction of county buildings is impermissible. The Board may bid a project utilizing preliminary schematic design documents or general project plans and other relevant selection criteria. The Board's use of alternative delivery in this manner is consistent with Iowa Code and satisfies the overarching aims of public bidding laws by providing the best value for the public dollar on select critical projects. The Board and the institutions have developed transparent, competitive bidding process that guard against potential abuses such as fraud or favoritism.

The Board May Consider Qualitative Factors in Determining the Lowest Responsible Bidder.

In determining which firm represents the lowest responsible bidder, the Board is not limited to considering only pecuniary factors, although historically this has been the primary consideration. Rather, the Board may take into consideration qualitative factors in addition to the amount of the bid. The Iowa Supreme Court held, "[r]esponsibility may embrace many factors other than the low dollar figure, including such considerations as the business judgment of the bidder and the bidder's record for reliability in performance." *Menke v. Board of Education*, 211 N.W.2d 601, 607 (Iowa 1973).

There is limited legal authority in Iowa further interpreting what factors a public entity may take into consideration in determining the firm which is the lowest responsible bidder on a public construction project. There is however, guidance interpreting the phrase "lowest responsible bidder" for public purchasing contracts.

In analyzing the State's discretion in awarding purchasing contracts, the Iowa Attorney General opined:

So it has been widely held that public authorities in awarding a public contract may take into consideration the differences or variations in the quality or character of the materials, articles, or work proposed to be furnished by the respective bidders, under a constitutional or legislative provision requiring that the contract be awarded to the 'lowest responsible bidder', the 'lowest and best bidder', or their equivalent, do not mean that the awarding officials are required to let the contract to the lowest money bidder, even though he is financially responsible, but may award the contract to a higher bidder if in their honest judgment the materials, articles, or work which he proposes to furnish are better in quality or more suitable to the intended purpose than the lower bidders.

Mr. W. C. Wellman, 1963 WL 113695 (Iowa A.G.). This opinion focuses on the conduct of the work, rather than the work itself.

Under the traditional design-bid-build method, factors such as quality of materials or work which is proposed to be furnished are typically not a consideration in the award process because the

¹ At one point, provisions in Iowa Code chapter 73A requiring municipalities to hold a hearing on plans and specifications in advance of bidding applied to the Board of Regents. The legislature removed the Board from this chapter in 2005.

owner has provided detailed specifications, including the material specifications, as part of the bidding documents. These factors become highly relevant when awarding a contract using an alternative delivery method, because the owner provides conceptual plans, as opposed to detailed specifications, in advance of bidding with the expectation that bidders will draft a more detailed proposal to meet the owner's needs.

Regent Alternative Delivery and Competitive Bidding

The Board has long recognized the flexibility afforded it under 262.34 and has already adopted policies permitting regent institutions to utilize alternative project delivery methods. Regent Policy Manual chapter 9.07(F) provides:

Commitments on projects shall not be made until approval is given by the Board Office or the Board. If the project will employ alternative delivery methods other than the normal design-bid-build process, the project description and budget shall include a review of the advantages and disadvantages (risk) of this delivery method.

There are three basic alternative delivery methods available to Regent institutions: Construction Manager Agent (CM-Agent), Construction Manager at Risk (CM At-Risk), and Design-Build. Both CM At-Risk and Design-Build utilize a competitive bidding process that takes into account both qualitative and pecuniary factors in determining the lowest responsible bidder. While Board policy is broadly written, for a number of years the only alternative delivery method utilized was CM Agent. In 2012, the University of Iowa became the first Regent university to request permission to proceed with a project utilizing an alternative delivery method other than CM-Agent. Requests to utilize an alternative delivery method are expected to be presented to the Board of Regents in conjunction with a request for permission to proceed with project planning. As part of its request, the university must present sufficient justification of the need to utilize alternative delivery, including any project time constraints and anticipated cost savings if available. Board approval of a request to utilize alternative delivery is not an exercise of the Board's emergency contracting authority², nor is it permission to proceed without competitive bidding.

The universities, in consultation with the Board office, have developed open and competitive bidding processes that fully comply with the requirements of Iowa Code section 262.34. The selection of a firm under either Design-Build or CM At-Risk is typically done utilizing a Request for Proposals (RFP) process conducted in phases. During phase one, the university publicly advertises the project and any interested firm may submit a response to a Request for Qualifications by a date and time certain. Interested firms and the public are notified of relevant project information, including scope and budget, and minimum qualifications. The institutions conduct a series of pre-bid meetings during which questions from prospective bidders are answered and additional project information is provided. During phase two, firms who meet the minimum qualifications are invited to submit a more detailed project proposal and a sealed fee and cost proposal. Project proposals are scored based on predetermined, publicly available criteria. Sealed cost proposals are then factored into final project scores to determine the lowest responsible bidder.

² Under Iowa Code section 262.34.2, when delay in undertaking a public improvement "might cause serious loss or injury" the Board is permitted to institute emergency procedures and proceed without competitive bidding.

Construction Manager at Risk (CM At-Risk)

Construction Manager at Risk is a project delivery method whereby the owner engages the services of a contractor to provide pre-construction services during the design process and then act in the capacity of a general contractor during construction. The contractor is selected using a qualifications-based method and the agreement is separate and distinct from the design professional agreement. The contract for construction includes a guaranteed maximum price, with the contractor incurring risk of overages.

The Board office and the universities have developed a competitive process for soliciting a firm under the CM At-Risk delivery method that takes into account experience, capabilities, capacity, fees, and other critical factors that indicate suitability for the project. The construction manager's professional service fees are typically evaluated as part of the RFP process. Following engagement of the construction manager, and at the appropriate stage of the design process, the parties agree to a Guaranteed Maximum Price (GMP) for the work. This is the maximum price, exclusive of the construction manager's professional fees, that the Owner will pay for the project. The construction manager agrees to assume risk associated with cost and time overruns, and is incentivized to keep the project on schedule and within budget. For Regent projects utilizing CM At-Risk, all savings below the GMP are passed through to the Owner, assuring that Regent universities are receiving the best value for the public funds invested.

As required by Iowa Code section 262.34, bid packages for major components of the work are competitively bid by the Owner, with the construction manager offering assistance as part of its preconstruction professional services. Where the construction manager is interested in self-performing, the construction manager is required to submit a bid under the same competitive process available to any interested firm. To preserve the integrity of the competitive bidding process, the construction manager is prohibited from assisting in the evaluation of bids received for that portion of the work for which it has submitted a bid.

Design-Build

Design-build is a project delivery method for which both design and construction services are provided under one contract. Design-build services may include architecture, engineering, and related design services provided by a design professional required for a given project and the labor, materials, and other construction services for the project.

The Design-Build approach can take on a variety of forms. The preferred method in higher education is the Design-Build Bridging approach, under which the Owner first engages the services of a separate design firm to assist in the initial development of schematic design documents. When the schematic design documents are sufficiently developed, the project is submitted to a competitive bidding process where teams of designers and builders submit detailed proposals based on the initial schematic design documents. Evaluation of proposals occurs in stages, with the Owner first evaluating a team's credentials and quality of design using a point system. A sealed envelope containing the cost proposal is opened and the numbers are inserted into a weighted formula along with the design and qualifications points. Award is given to the firm that optimizes all evaluation criteria.

CONCLUSION

Alternative delivery methods, including design-build and construction manager at risk, are legally consistent with the requirements of Iowa Code chapter 262.34. Iowa Code only requires that, when the cost of a project exceeds \$100,000, the Board advertise for bids and let the work

to the lowest responsible bidder. The Board office and the regent institutions have established open and transparent competitive bidding process for alternative delivery that satisfy both the purpose and legal requirements of Iowa Code. Alternative delivery may be considered for certain critical projects when they can be reasonably expected to result in increased efficiencies and provide the best value for the public dollar. The majority of Regent construction projects continue to be served well by the traditional design-bid-build model.

APPENDIX A: IOWA CODE PROVISIONS

Iowa Code Section 262.34

1. When the estimated cost of construction, repairs, or improvement of buildings or grounds under charge of the state board of regents exceeds one hundred thousand dollars, the board shall advertise for bids for the contemplated improvement or construction and shall let the work to the lowest responsible bidder. However, if in the judgment of the board bids received are not acceptable, the board may reject all bids and proceed with the construction, repair, or improvement by a method as the board may determine. All plans and specifications for repairs or construction, together with bids on the plans or specifications, shall be filed by the board and be open for public inspection. All bids submitted under this section shall be accompanied by a deposit of money, a certified check, or a credit union certified share draft in an amount as the board may prescribe.

2. Notwithstanding subsection 1, when a delay in undertaking a repair, restoration, or reconstruction of a public improvement might cause serious loss or injury at an institution under the control of the state board of regents, the executive director of the board, or the board, shall make a finding of the need to institute emergency procedures under this subsection. The board by separate action shall approve the emergency procedures to be employed.

Iowa Code Chapter 26

26.2.2 - "Governmental entity" means the state, political subdivisions of the state, public school corporations, and all officers, boards, or commissions empowered by law to enter into contracts for the construction of public improvements, excluding the state board of regents and the state department of transportation

26.3 –

1. If the estimated total cost of a public improvement exceeds the competitive bid threshold of one hundred thousand dollars, or the adjusted competitive bid threshold established in section 314.1B, the governmental entity shall advertise for sealed bids for the proposed public improvement by publishing a notice to bidders. The notice to bidders shall be published at least once, not less than four and not more than forty-five days before the date for filing bids, in a newspaper published at least once weekly and having general circulation in the geographic area served by the governmental entity. Additionally, the governmental entity may publish a notice in a relevant contractor organization publication and a relevant contractor plan room service with statewide circulation, provided that a notice is posted on an internet site sponsored by either a governmental entity or a statewide association that represents the governmental entity.

2. A governmental entity shall have an engineer licensed under chapter 542B, a landscape architect licensed under chapter 544B, or an architect registered under chapter 544A prepare plans and specifications, and calculate the estimated total cost of a proposed public improvement. A governmental entity shall ensure that a sufficient number of paper copies of the project's contract documents, including all drawings, plans, specifications, and estimated total costs of the proposed public improvement are made available for distribution at no charge to

prospective bidders, subcontractor bidders, suppliers, and contractor plan room services. If a deposit is required as part of a paper contract documents distribution policy by the public owner, the deposit shall not exceed two hundred fifty dollars per set which shall be refunded upon return of the contract documents within fourteen days after award of the project. If the contract documents are not returned in a timely manner and in a reusable condition, the deposit shall be forfeited. The governmental entity shall reimburse the landscape architect, architect, or professional engineer for the actual costs of preparation and distribution of plans and specifications.

26.12 - If the estimated total cost of a public improvement exceeds the competitive bid threshold in section 26.3, or as adjusted in section 314.1B, the governmental entity shall not enter into a contract for the public improvement until the governmental entity has held a public hearing and has approved the proposed plans, specifications, and form of contract, and estimated total cost of the public improvement. Notice of the hearing must be published as provided in section 362.3. At the hearing, any interested person may appear and file objections to the proposed plans, specifications, contract, or estimated cost of the public improvement. After hearing objections, the governmental entity shall by resolution enter its decision on the plans, specifications, contract, and estimated cost. This section does not apply to the state