

April 15, 2010

MEMORANDUM

TO: Innovative Contracting Advisory Committee (ICAC)

FROM: Kathryn E. Young
Senior Assistant Attorney General
Litigation

RE: Summary of Colorado Statutory Law

Per the request of ICAC, I have summarized below all of the pertinent Colorado statutes that govern the selection of construction contractors for public construction projects and analyze what innovative contracting methods are allowed under the current statutory scheme. Any opinions contained in this memo are informal opinions of the author only and not formal opinions of the Colorado Attorney General.

Colorado Statutory Law –

The general rule for public construction projects in Colorado is that they must be awarded through competitive sealed bidding. *See* CRS § 24-92-103(1) (attached hereto).

Currently there are only two statutory exceptions to this general rule. The first exception is the design-build statute, CRS § 43-1-1401, *et seq.* (attached). The second statutory exception is the Integrated Delivery Method for Public Projects Act which is codified at CRS § 29-93-101, *et seq.* A copy of the Act, as codified, is attached, but the key provisions are as follows:

- “Integrated project delivery” or “IPD” is defined to mean a project delivery method in which there is a contractual agreement between an agency and a single participating entity for the design, construction, alternation, operation, repair, improvement, demolition, maintenance, or financing, or any combination of these services, for a public project. 24-93-103(4)
- “Participating entity” means a partnership, corporation, joint venture, unincorporated association, or other legal entity that provides appropriately licensed planning, architectural, engineering, development, construction, operating, or maintenance services as needed in connection with an IPD contract. 24-93-103(6).
- Requests for proposals for IPD contracts shall, at a minimum, include the following evaluation factors and subfactors that shall be used to evaluate the proposals and capabilities of participating entities:
 - Price;
 - Design and technical approach to the project;
 - Past performance and experience;

- Project management capabilities, including financial resources, equipment, management personnel, project schedule, and management plan; and
 - Craft labor capabilities, including adequacy of craft labor supply and access to federal or state-approved apprenticeship programs, if available. 24-93-106(1).
- The agency selects the participating entity whose proposal is most advantageous and represents the best overall value to the state. 24-93-106(2).
 - The executive director of the department of transportation may establish supplemental provisions relating to bridge and highway construction contract procurement practices, including, notwithstanding any other provisions of this article, provisions governing debarment of participating agencies. 24-93-107.
 - Subject to the requirements of this section, any agency making use of the provisions of this article may award any type of contract that will promote the best interests of the agency except that the use of a cost-plus-a-percentage-of-cost contract under this article is prohibited. 24-93-108.

There are three other statutes that should be mentioned. Copies of these statutes are not attached. The first is the “Public-Private Initiatives Program,” codified at CRS §§ 43-1-1201 through 1209. This program allows CDOT to enter into an agreement with a public or private entity to accomplish a specific goal as allowed by the program. The two road construction items allowed by the program are the design, financing, construction, operation, maintenance, and improvement of toll roads or high occupancy toll lanes. *See* § 43-1-1202(1)(a)(X) and (1)(a)(XIII). CDOT must solicit these proposals a competitive sealed proposals pursuant to CRS § 24-103-203 (this statute allows the proposal that is determined in writing to be the most advantageous to the state be selected, taking into consideration the price and the evaluations factors set forth in the request for proposals).

The second and third are the recently created Statewide Bridge Enterprise, codified at CRS § 43-4-805 and the High-performance Transportation Enterprise, codified at CRS § 43-4-806. The majority of these statutes concerns financing issues and neither expand on the methods by which public construction projects may be awarded. The Statewide Bridge Enterprise statute does expand on the area allowed for public-private initiatives to now included the following: (1) an agreement pursuant to which the bridge enterprise or the enterprise on behalf of the department operates, maintains, or provides services or property in connection with a designated bridge project; and (2) an agreement pursuant to which a private entity designs, develops, constructs, reconstructs, repairs, operates, or maintains all or any portion of a designated bridge project on behalf of the bridge enterprise. *See* CRS § 43-4-805(5)(h).

Specific Innovative Contracting Methods¹

1. **Design-Build** – this method is specially allowed pursuant to CRS § 43-1-1401, *et seq.* Any variation of a design-build contract will be allowed as long as it complies with the requirements

¹ For definitions, please refer to paper prepared by ICAC co-chair Nabil Haddad entitled “Alternative Project Delivery Methods”

of CRS § 43-1-1401, *et seq.* “Design-build contract” is defined as “the procurement of both the design and the construction of a transportation project in a single contract with a single design-build firm or a combination of such firms that are capable of providing the necessary design and construction services.” CRS § 43-1-1402(3). If the project does not fit into the definition of a “design-build contract,” CRS § 24-92-103(1) most likely will need to be followed and the contract awarded through competitive sealed bidding.

2. Construction Manager at Risk or CM/GC – After much contemplation on this issue and consultation with my supervisor, it is my informal opinion that CDOT could contract for the Construction Manager/General Contractor portion of this type of innovative method pursuant to the Integrated Delivery Method for Public Projects Act and select the participating entity whose proposal is most advantageous and represents the best overall value to the state. The language of the Act is vague enough to allow for the CM/GC approach. Because the Act states that “Integrated project delivery” or “IPD” is defined to mean a project delivery method in which there is a contractual agreement between an agency and a **single** participating entity, CDOT should select the design consultant on a CM/GC project through its normal consultant selection methods (CRS § 24-30-1401, *et seq.*) and, through the procurement and contract, inform both the designer and general contractor that they are to work together on the project.

3. Indefinite Delivery/Indefinite Quantity (ID/IQ) -

Based on the definition in Mr. Haddad’s paper, this type of contract is not centered on how the general contractor is selected, but instead concerns bid items. An ID/IQ contract could be awarded under competitive sealed bidding or could be procured under the Integrated Delivery Method for Public Projects Act. However, in order for a contract to be signed by the Colorado State Controller, fiscal rules require a contract to have specific measurables and a maximum payable amount. An ID/IQ contract may not meet Colorado fiscal rules.

4. Agency-CM – Based on the definition in Mr. Haddad’s paper, this method appears to concern scope of work, not how a consultant is selected. This contract would be allowed as long as statutory and state fiscal requirements are met.

5. Public Private Partnerships (PPP) - The Public-Private Initiatives Program, coupled with the Statewide Bridge Enterprise, allow for CDOT to solicit for proposals for toll roads, high occupancy toll lanes, and bridge projects. *See* § 43-1-1202(1)(a)(X) and (1)(a)(XIII) and 43-4-805. The Public-Private Initiatives Program also specifically allows CDOT to accept a private contribution to a transportation project. *See* CRS § 43-1-1202(1)(e). With regard to whether the private entity is compensated under the terms of a public-private initiative agreement is case specific but the understanding is that the private entity is receiving some benefit for entering into the agreement with CDOT.

6. Lump Sum Bidding – Per Mr. Haddad’s definition, this method appears to concern bid items and prices, and not how a consultant is selected. This contract would be allowed as long as statutory and state fiscal requirements are met.

7. Cost-Plus-Time Bidding (A+B) – Per Mr. Haddad’s definition, is method selects the contract through a low bid selection method. Thus this method would be allowed under the competitive sealed bidding statute, CRS § 24-92-103(1).

8. Multi-Parameter Bidding (A+B+C+. . .) – Per Mr. Haddad’s definition, this type of innovative method evaluates several factors in determining contractor selection. Pursuant to the

Integrated Delivery Method for Public Projects Act, it is my opinion that CDOT could utilize this contracting method and select the participating entity whose proposal is most advantageous and represents the best overall value to the state. The language of the Act is vague enough to allow for the multi-parameter bidding method.

9. Alternative-Multiple Bid/Schedule/Additive – Per Mr. Haddad’s definition, this method appears to concern bid items and prices, and not how a consultant is selected. This contract would be allowed as long a statutory and state fiscal requirements are met.

10. Best Value - Per Mr. Haddad’s definition and other research I have conducted on this selection method, this type of innovative method evaluates several factors in determining contractor selection. Pursuant to the Integrated Delivery Method for Public Projects Act, it is my opinion that CDOT could utilize this contracting method and select the participating entity whose proposal is most advantageous and represents the best overall value to the state. The language of the Act allows for the best value selection method as long as the following criteria, at a minimum, are analyzed:

- Price;
- Design and technical approach to the project;
- Past performance and experience;
- Project management capabilities, including financial resources, equipment, management personnel, project schedule, and management plan; and
- Craft labor capabilities, including adequacy of craft labor supply and access to federal or state-approved apprenticeship programs, if available.

11. Qualifications Based Selection – As discussed above, the Integrated Delivery Method for Public Project Act allows for past performance and experience to be one factor in selecting the proposal that is most advantageous and represents the overall value to the state. However, the Act does not allow only qualifications to be considered in selection.

12. Time-Based Methods – Per Mr. Haddad’s definitions, these methods address how contractors will be paid and not how they are initially selected. As long as the contractor is selected under a valid statutory method, time-based methods are allowed under Colorado law as long as the contracts comply with state fiscal rules.

13. Quality/Performance-Based Methods – I am unclear on exactly how the contractor is selected using this method. This method is most likely allowed under the Integrated Delivery Method for Public Projects Act as long as criteria delineated in Act are used to select the contractor.