



## Bidding on Public Projects: Big Changes Underway

Over the past several years, many public bodies have begun to **move away from the traditional multiple prime contractor arrangement** in which the **contract is awarded to the lowest bidder in favor of alternative approaches**. The competitive sealed proposal method (referred to by some as “Best Value”), which was put on hold a few years ago, is now being used with greater frequency. Also, the **legislature recently enacted Act 41, a law which authorizes the use of Design-Build procurement** (as opposed to plan and spec) on large prison projects in Pennsylvania. Also, the state has recently decided to require project labor agreements on some public projects. A project labor agreement, or PLA, is a project-specific labor agreement providing for uniform terms and conditions of employment for all workers, whether union or non-union, covering such matters as working hours, shift times, scheduling, holidays, overtime and premium pay. It also requires that **all contractors hire workers through union hiring calls and contribute to union-sponsored pension and benefit funds**.

The propriety of PLAs on public projects is a subject of heated debate, both in Pennsylvania and across the country. This article is not intended to advocate any particular position, but rather to **inform members that the use of PLAs on public projects recently withstood a legal challenge** and, as a result, PLAs may be used on more projects in the near future. The Pennsylvania Commonwealth Court recently upheld a PLA requirement imposed on a DGS prison project requiring all contractors working on the project to sign a PLA. The case involved a project to expand the Graterford Prison in Montgomery County. A legal challenge to the PLA requirement was filed in 2009. Opponents argued that a PLA requirement on a public project is unlawful because they claim it restricts competition by effectively denying non-union contractors the opportunity to work on the project.

On December 1, 2009, the **Commonwealth Court disagreed and ruled that the PLA requirement is permissible and is not discriminatory**. This **decision is currently on appeal to the Supreme Court and it remains to be seen whether the decision will stand**. For the time being, the decision gives DGS broad discretion to determine when the use of a PLA is in the public’s best interest. Some believe it is likely that DGS will require PLAs on large and complex projects in the future. It is also likely that other public owners, such as **school districts, authorities, municipalities, etc. will follow suit and require PLAs on some projects**.

**Contractors should also be aware of the increasing popularity of the competitive sealed proposal method**, or so-called “Best Value” method. With this method of procurement, **contracts are not necessarily awarded to the lowest cost bidder, but rather to the bidder whom the owner believes represents the best overall value**. Considerable weight is given to factors other than price, including the size and location of the company, its experience, expertise and past performance. The non-price factors are usually set forth in the technical proposal submitted by the bidder. Value-based contracting has its detractors who argue that it promotes favoritism and is biased in favor of larger contractors with long track records of public projects. Whether you favor or oppose this method, **all members are well-advised to carefully prepare the technical proposal** as it will be thoroughly evaluated by the body awarding the contract.

Design-Build procurement is also on the rise in the public sector, as reflected in Act 41 which applies to prison projects. **Design-Build does not lend itself to the “apples to apples” comparison typical of traditional competitive bidding**. Design-Build procurements will likely identify parameters of the project, and the public body will evaluate the relative skills of the bidders. Again, **price will be a factor, but will not be controlling**.

In summary, when it comes to construction, **Pennsylvania government is changing the way it does business**. To avoid being caught off guard, **contractors should be aware of the new procurement methods** on the rise, including PLAs, Design-Build and competitive sealed proposals. This awareness places the **informed contractor in a position to take advantage of the new methods of construction service procurement**.