



CEA forum: Issues and answers

# Public project delivery in Ohio

Big changes in this area are affecting all segments of the A/E/C community. Here are insights from three leading members of that community.



## The Owner's POV

*Noticeable benefits in lower costs, reduced time needed, and fewer claims*

BY TOM EUCLIDE

After more than 100 years the State of Ohio has expanded the construction delivery options available to colleges and universities. The new options—design/build, construction manager at risk, and single prime—will provide noticeable benefits to taxpayers, owners, contractors and designers, primarily by lowering construction costs, reducing the time needed during construction and minimizing the potential for construction-related claims. I am sure there will also be disadvantages which we have yet to understand but I will concentrate on how I foresee Kent State will use the new construction delivery tools added to the toolbox.

### Among the tools

Multi-prime contracting remains a tool within the toolbox and will continue to be used on a selective basis. Many projects have specialty areas, that if bid under a single prime or as part of a construction manager at risk project, would jeopardize the owner's ability to insure the best results.

Single prime contracting will likely be the most common delivery method utilized. The most common project on a campus today involves addressing deferred maintenance issues such as the replacement of failing equipment, replacement of windows and roofs or the renovation of a single room or office suite. On projects of this nature, design build and construction manager at risk might actually increase the cost or time associated with construction. The prominent trade will be targeted as the bidding prime with all supporting trades acting as subcontractors. For example, in the case of a cooling tower replacement, the mechanical contractor would act as the single prime, subcontracting the electrical work along with the other typical mechanically related subtrades.

Design/build has great advantages, allowing the owner to react quickly to changing needs of the campus. The renovation of specialty facilities, for example a parking deck or a livestock barn, are obvious examples where design build would likely be employed. I also anticipate this tool would be used on larger projects such as a new academic building or even an athletic stadium.

At Kent State University, construction manager at risk will typically be reserved for the larger, more complex projects. New structures or complete rehabilitation of an existing building are obvious examples for projects where this tool will be utilized. The facilities departments at each college or university are staffed uniquely. Therefore, where Kent State might be choose to use single prime contracting for a majority of their projects, other institutions may find

construction manager at risk is the optimum. The decision on which method to use is dependent upon the institution, the project complexity and the schedule.

#### A new tool added

One commonly overlooked tool added to the construction delivery toolbox is the increased bid threshold. Colleges and universities will now be able to be more selective with contracts up to a \$200,000 threshold, providing more opportunities for colleges and universities to help smaller contractors gain the experience needed to be competitive when bidding on the larger, more complex work.

How best to use the new tools within the construction delivery toolbox is yet to be fully understood by institutions which have been straddled with only one choice for more than a century. Hopefully we will have opportunities to fine tune the process maximizing the benefits to all stakeholders while minimizing the disadvantages. Time will tell. **BXM**

*Tom Euclide has worked for Kent State University for nearly 25 years and currently holds the position of Associate Vice President for Facilities Planning and Operations. He has previously worked as the university's mechanical engineer, as director of the University Architects Office, and currently chairs the State Universities Facilities Directors group which helps Ohio colleges and universities to collaborate on issues associated with design, construction and facilities management.*

## Contractors' POV

*Construction reform means cultural change*

BY DOMINIC OZANNE

The changes to the Ohio Revised Code governing design and construction services, the implementation of the BIM protocol by the Ohio Department of Administrative Services, the increase in the state's Davis Bacon threshold, and the increased use of job order contracting by Ohio agencies collectively represent a complete transformation in the way architecture, engineering and construction services will be procured in Ohio's private and public sector. This is construction reform.

Construction reform presents an opportunity to allow a broader group of people to participate in these industries using technology as the vehicle for increased collaboration. Conversely, it runs the risk of allowing project teams to become isolated. This will be the result if only a handful of a/e/c firms have the relationships and resources required to take advantage of these changes.

The key to the success or failure of construction reform is the attitude and desire of those in leadership positions in private and public sector a/e/c industries (and their friends in higher education) to make the benefits of these new systems and the associated technologies available to small, medium, and large firms, diverse firms, students, apprentices, tradesmen and

women. Construction reform for the few should also be reform for the many.

At long last, we have the opportunity to move beyond the conflicts and inefficiencies inherent in design-bid-build, multi prime design and construction. We can begin to educate high school and college students in the use of building information modeling and the many cost, schedule, coordination, and other benefits that result from the use of technology. The design and engineering of components to build using 3D models is fun and can attract younger, technically proficient people to the process once the collaboration effort includes suppliers, vendors, and manufacturers throughout the supply chain.

Ohio's private and public owners should embrace design build and the other new delivery methods. They can incentivize a/e/c firms to be economically, environmentally, and socially sustainable as they form their teams. Smaller firms can get involved through job order contracting. Thanks to these legislative and technological innovations we have the opportunity to change the a/e/c culture from one that is divided along contractual lines to one that works together, collaboratively, to provide best value for owners in a sustainable, socially responsible way. Let's hope we can achieve this through construction reform. **BXM**

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## Legal POV

*Changes are ahead, but legal ramifications need to be worked out*

BY ANDREW NATALE

The design and construction community may be in for a rude awakening when Ohio's new public works procurement statutes and regulations take effect this June. HB 153 represents the most sweeping revisions in more than a century to Ohio's laws governing procurement of public works construction projects. It not only affects the procurement process for nearly all public construction improvements where the value of the work exceeds \$200,000, but it also impacts the individuals and companies who perform that work and service the industry, including architects, engineers, construction managers, owners' representatives, general contractors, specialty trade contractors, sureties, and others.

HB 153 welcomes a new era of project delivery methods that public owners generally were not able to use before. Specifically, it permits: (i) retention of a general contractor based on sealed bid solicitations, (ii) design-build contracting based on requests for proposals and "best value" selection processes; and (iii) "at risk" construction manager procurements based on requests for proposals and "best value" selection processes where the basis of compensation is the cost of the work with a guaranteed maximum price. Overall, the changes are long past due, but the public and industry may be ill prepared for

a global transformation of the age-old process. Prepare for some bumps (if not craters) in the road ahead.

HB 153 crucifies the multi-prime contracting process that many criticized as cumbersome and antiquated. Public authorities are no longer required to prepare complete project plans and specifications and award contracts under separate bid packages to parallel prime contractors. Unfortunately, present competitive bidding rules and procedures remain based on that old system of procurement. Courts and interested parties will need to adopt and amend existing legal requirements to match the new processes.

In the public works arena, agency construction managers and trade contractors may soon be obsolete. Indeed, groups who historically have held a guaranteed place at the table at nearly every public procurement may now find themselves groping for new food sources come bid day. Those who typically enjoyed "prime contractor" status on larger public procurements likely will need to compete for work as subcontractors on projects of similar size and scope under the new system.

HB 153 gained favor with claims that it permits and promotes transparency and efficiency in the construction procurement process. However, the familiar days of the sealed, firm price bid and public openings are gone. So too are the processes that permitted "apples-to-apples" bid comparisons to determine



Photo Courtesy: Chris McCreary, Pictorials

true and meaningful competition among bidders. The new trends rapidly will give way to "best value" selection processes, which necessarily involve closed door meetings and private negotiations with "short listed" proposers.

This new process limits access to available information and potentially limits the ability of competitors to meaningfully challenge a public works award. To be successful, procurement challenges and protests will need to focus primarily on material deviations from published rules and procedures in the "best value" selection process.

The rulemaking requirements of H.B. 153 also change the landscape by mandating forms of contracts, subcontract terms, and surety requirements. The rules remain ambiguous and will require significant adjustment as the

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## CEA holds Lunch and Learns on important topics

**CLEVELAND**—The Construction Employers Association is holding its series of The Contractor Success Series on the following topics:

- **March 7** – Marketing & Presentations: client development, responding to RFPs, preparing presentations with a punch, how job staff can assist in marketing, developing strategic marketing plans, successful audience development strategies, trends, tools etc. Presenters are Marilee MacAskill, Dale Carnegie Training, Jeff Dentzer, Donley's Inc., and John Moore, Skoda Minotti

- **April 4** – Human Resources and Management: wage & benefit insights, recruitment, staffing guidelines, management tips and best practices for difficult employee situations. Presenters are Marilee MacAskill, Dale Carnegie Training, and Mary Reid, Donley's Inc.

- **April 11** – Banking & Bonding: requirements, relationships, invalidation issues, credit, etc. The presenter is Mark Rader, Oswald Companies.

- **April 25** – Safety: safety & risk management programs. The presenter is Ron Lucki, CareWorks

Plus, the Building Information Modeling Education Program will be held on the following:

- **March 1** – BIM 101
- **March 29 - 30** – BIM Technology
- **April 20** – BIM Contract Negotiation and Risk Allocation
- **May 10** – BIM Adaption and Implementation
- **May 18** – Certificate Management – BIM Exam

The courses will be held at the Construction Employers Association, 950 Keynote Circle, Suite 10, Cleveland. Go to [www.ceacisp.org](http://www.ceacisp.org) for more, and to sign up. **BXM**

processes roll out. For example, public authorities now mandate minimum requirements for every subcontract on a governed project, and they prohibit using additional terms that contradict their mandatory terms. It remains unclear—and it certainly will be the subject of controversy—if a subcontract includes terms that supplement provisions where the government has set mandatory language. This includes terms affecting indemnity obligations, insurance requirements, retainage rights, and warranty risks, among other things.

Ultimately, the rules have created fertile ground for controversy between prime contractors and subcontractors regarding what can or cannot be enforced in subcontract forms. One thing is clear; there will be no easy answers, and contractors are well advised to

carefully review their subcontract terms and conditions for compliance on H.B. 153 projects.

On a more positive note, H.B. 153 certainly will lead to measured efficiency increases in public construction, including truncated procurement processes and design and construction schedules. However, much remains to be learned and understood about the process and its risks. Industry players must realize that the law will be in flux, that the right to challenge awards will differ considerably from what many have come to accept and understand, and that owners will need a significant period of adjustment to understand and manage the process. **BXM**

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