

ASSOCIATED GENERAL CONTRACTORS OF MINNESOTA
“BEST VALUE” Recommended Practices
June 1, 2011

Best Value Defined and Legislative History



A Best Value procurement is one in which qualifications, design (where applicable) and price or cost are weighted, and the qualifications and total construction cost of the work are applied against the relative weights of each competitor, to identify the designer or constructor whose proposal represents the greatest value to the owner.¹ It differs from a traditional system, in which the lowest bidder is awarded the job. Examples of Best Value procurement include Design-Build, Construction Manager at Risk, and Job Order Contracting.

Design-Build legislation was passed by the Minnesota Legislature in 2002 for the Highway Heavy sector, providing specific guidance for Design-Build projects undertaken by the Minnesota Department of Transportation. In 2005, the Minnesota Legislature authorized Design-Build, Construction Manager at Risk, and Job Order Contracting for Building projects. Like the 2002 legislation, it specifically spells out the process for the application of each method. Agencies governed by this legislation include the University of Minnesota, Minnesota State Colleges and Universities, and the Department of Administration.

In 2007, the Minnesota Legislature passed Best Value legislation that did not clearly define a specific process, as was defined in the 2002 or 2005 legislation. The lack of specificity in this legislation has created ambiguity and has provided for inconsistent application and potential abuse and misuse. Public agencies who wish to use Best Value in a fair and impartial manner should review the statutes passed by the Legislature in 2005 and 2002 for guidance.

Introduction

AGC of Minnesota (AGC) recognizes the emerging alternatives to the traditional Design-Bid-Build (low bid) delivery method, and understands that there is no perfect project delivery or procurement method. However, as the popularity of non-traditional delivery methods increases, the importance of impartiality and fairness becomes ever more paramount. AGC believes that every publicly-funded project should be considered on a case-by-case basis to determine which method is most appropriate based on taxpayer needs and interests, including cost, schedule, safety, and quality. By using an individualized analysis, AGC believes taxpayer dollars will be used in the most efficient and effective manner.

¹ *Project Delivery Systems for Construction*, p. 165. Published by The Associated General Contractors of America, 2004.

Unlike the legislation passed in 2002 and 2005, the legislation passed in 2007 does not give clear direction to public bodies who wish to use Best Value. This lack of clear direction in the 2007 legislation is a concern to AGC. There is a potential for the assessment team to distribute points favoring the *preferred* contractor, rather than the *best* contractor. If the preferred contractor is selected, it's possible that some aspects of the project, such as quality, cost, or schedule, may be compromised at the expense of the taxpayer. This result may also deter other contractors from bidding projects of this nature. This paper offers guidance to public bodies interested in maximizing the best features of the Best Value method to ensure that Minnesota taxpayers are truly receiving the best value.

Best Value Versus Lowest Responsible Responsive Bid Selection

Careful consideration should be taken by the public body when choosing an appropriate contractor selection process for a project. Benefits of the more traditional Lowest Responsible Responsive Bid selection method should not be overlooked. Often, this method will afford the public the best price because all bidders are bidding the same scope of work. If the public entity wants certain features of "value" that can be identified in advance, the entity can specify those features in the plans and specifications and the bidders can compete to provide those features based on the lowest price.

Quality and schedule requirements for the project can be established by the public body with the assistance of its engineer of record and those requirements made part of the bid and contract then awarded to the lowest bidder. However, the lowest price on bid day does not always translate into the lowest cost at the end of the project. In addition, an owner may want to preserve the right to evaluate certain desired qualities or capabilities in a contractor with a greater degree of flexibility and discretion than is possible in merely determining whether a contractor is "responsible" under traditional public bidding procedures.

When the construction project has particular needs not suited to being quantified by price, the public body may consider using the Best Value method for selecting between competing proposals. Examples may include: projects that require the contractor to furnish specialty construction skills or install critical equipment that the public body will use for a long period of time; projects that a public body is authorized by statute to award on a design-build basis; projects where the public body has a legitimate interest in evaluating with some flexibility the degree to which particular contractors possess certain qualities or capabilities; and other uniquely suitable projects. A public body's assessment of whether to use the Best Value method or the traditional low bid method should be publicly debated and the final decision documented in the official minutes of the public body's board meetings.

Composition, Independence, and Conduct of the Evaluation Panel

Before using the Best Value method, the public body should ensure that all persons participating in the solicitation and review of proposals are sufficiently trained in Best Value procedures. Properly trained administrators will be able to clearly articulate the evaluation criteria to prospective bidders and qualified evaluators will lessen the possibility of erratic, uninformed, or arbitrary scoring.

During bidding, contractors should be allowed to address any evaluation criteria in the solicitation they feel could result in one contractor being unreasonably awarded over another. Post award, both evaluators and bidders should be encouraged to provide constructive feedback on the evaluation process so it continually evolves into a more transparent selection method.

A Best Value evaluation panel should have a sufficient number of members to avoid favoritism and ensure neutral results. All members of the Best Value evaluation panel should disclose all conflicts of interest or past experience with proposing contractors. All members of the evaluation panel should be subject to dismissal and replacement if any disclosures indicate any appearance of, or potential for, bias or favoritism.

The right of the members of a Best Value evaluation panel to score proposals independently, neutrally, and without influence from others is essential to the integrity of the Best Value method and must be protected and not infringed. Members of an evaluation panel with supervisory authority or similar influence over other members of an evaluation panel should not be permitted to directly or indirectly prejudice the subordinate members' right to score proposals independently. All scoring of proposals should be performed privately, outside the presence of other panel members and others not on the panel. Evaluation panel members must not be permitted to change their scores after they have made them known to others. Additionally, private consultants owing contract administration duties to the public body for the particular project should not be permitted to serve on the evaluation panel, unduly influence the panel, or make recommendations to the panel regarding the scoring of proposals.

Transparency and Maintaining Equality

The solicitation for proposals should clearly indicate that proposals will be evaluated on a Best Value basis. All evaluation criteria and sub-criteria should be listed clearly and unambiguously. The relative numeric weight of each criteria and sub-criteria must be assigned and listed clearly in the solicitation. The maximum number of points that can be earned for each criteria and sub-criteria and the scoring formula also must be listed clearly and stated unambiguously.

All competitors who receive the same evaluation should be given the same score. For example, all bids deemed "excellent" in a particular criterion should receive the same

number of points for that criterion. Scoring must be based only on the listed criteria and not undisclosed factors. Score sheets should be maintained and made available for inspection after awards are made to ensure transparency and public confidence. Scores should be normalized to prevent one evaluator's erratic scoring from having a disproportionate impact on the result of the procurement.

If interviews of competing proposers are contemplated, the public body should ask the proposers the same questions to ensure that competitors are being evaluated by the same criteria. All interviews should be recorded and available for inspection after awards are made to ensure transparency and public confidence in the process.

To encourage and improve future competitions, the public body should provide appropriate feedback to all proposers.

Evaluation Criteria

Careful selection of evaluation criteria is critical to ensure that subjective or biased factors do not control the results. The evaluation panel should keep and maintain a record stating the reasons why each particular evaluation criterion was included in the proposal. This record should be available for inspection after award is made to promote transparency. Criteria or their relative weights should not be borrowed from one project to the next as each Best Value project will likely have different needs and desired features. Borrowing criteria from one project to the next increases the opportunity for favoritism and for arbitrary review of proposals.

Appropriate Criteria

The following may be appropriate for inclusion in Best Value criteria:

- **Price:** Because all aspects of a project, including safety, quality, and schedule, have an associated cost, the overall price of the bid should be considered critical criteria in any Best Value procurement. Public owners owe a duty to safeguard and wisely spend tax dollars.
- **Risk Mitigation Plans:** The public has a keen interest in having construction work performed in a safe and environmentally friendly manner that reduces project risks, such as potential schedule delays and potential cost overruns. It is appropriate to compare bidders' proposals for reducing such risks.
- **Value Added:** Public bodies and their consultants are not always aware of available technologies, alternative products, sustainable construction methods, or other value added options available to them. Bidders should be encouraged to propose value added alternates and be given points for these suggestions.
- **Cost Savings:** Often, public owners unnecessarily increase the cost of their projects by including onerous specifications, and contract terms (e.g., non-

standard warranties) which drive up project costs disproportionately to the corresponding benefit received. Contractors should be permitted to propose alternate contract terms, identify the cost savings associated with them, and have their Best Value proposals evaluated on that basis.

- **Means, Methods and Technical Capability:** Construction means and methods vary and some achieve better quality results than others. It is appropriate to score bidders on their planned means and methods in the context of ensuring that those methods will yield results meeting or exceeding specified standards. It is also appropriate to score bidders on their technical capability and likelihood of achieving project requirements based on their technical capabilities, means and methods.
- **Past Performance:** Analysis of a contractor's past performance on other jobs should be limited to reviewing up to five reference letters from past owners. If the contractor has performed previous services for the procuring public body, the procuring public body could consider the contractor's past performance for that public body. Evaluation panels should not conduct interviews of owners for whom the proposer has worked in the past as such interviews are too subjective and unreliable. Past performance tends to deter new companies from submitting competitive proposals, which can be counterproductive to economic growth.
- **Delays on Prior Projects:** Construction delays occur for many reasons beyond the control of a contractor, including inclement weather, design changes, labor strikes, and other similar causes. Analysis of a bidder's schedule performance on prior projects must be limited to instances where the contractor was indisputably and inexcusably late.
- **Quality of Prior Projects:** Oftentimes, for budgetary reasons, a public owner will design a project with low quality materials that fail in a short amount of time. Therefore, any analysis of the quality of a contractor's prior work should carefully distinguish between quality issues resulting from the design and those resulting from the contractor's work.

Inappropriate Criteria

- **Union or Nonunion Status:** A contractor's union or nonunion status should be of no consequence in a Best Value procurement.
- **Change Order History:** The fact that a contractor has initiated or received change orders on prior projects should be of no consequence in a Best Value procurement. Change orders are commonly directed by the owner to add scope to a project, to install improvements to the project, to correct design mistakes made by the owner's engineer, or deal with other conditions beyond a contractor's control. Change orders are agreed to by both the owner and the contractor, and the contractor should not be penalized for receiving an agreed

upon modification to the contract. By statute, a contractor cannot be penalized for exercising its legal rights and contractors in the vast majority of instances have a legal right to make a claim for a change order (see below).

- **Assertion of legal or contract rights:** A contractor's assertion of legal or contract rights, such as commencing lawsuits or asserting claims, cannot be considered when evaluating proposers in a Best Value procurement. See Minn. Stat. § 16C.02, subd. 4a.
- **Customer Satisfaction:** Customer satisfaction is too variable to reliably be used to score contractors. An owner's dissatisfaction may result from the owner's specification of inexpensive materials or poor design. Where a contractor performs the work in accordance with the requirements of the contractor's contract, it is irrelevant whether the owner is satisfied because the contractor has discharged its obligations as required by law.
- **Geographic Benefit:** Proposers should not receive additional points for being located near the project site.
- **Public Relations:** Public relations are never an acceptable factor to be used in Best Value procurements. It is not the role of a contractor to prepare favorable press releases for the benefit of the officials comprising the public body. Notices required by law or as part of a risk mitigation plan can be evaluated as part of a risk mitigation plan, but not as public relations.
- **Contractor's Inventory of Construction Equipment.** Whether a contractor owns certain construction equipment is irrelevant in a Best Value procurement. Equipment may be rented as well as owned and prices are comparable.
- **Experience in "Similar" Construction Projects:** To maximize competition, any criteria which emphasize a contractor's experience in "similar" projects should be avoided. For example, a contractor who has built hotels has the requisite experience to build public dormitories. Analysis of what projects are "similar" is often too subjective to be useful in comparing Best Value proposals.

Conclusion

When implemented fairly and objectively, the Best Value method can yield exceptional benefits to the taxpaying public. It is, however, not appropriate for every project.

Public bodies must carefully consider whether or not to use the Best Value method on a project-by-project basis, and must be diligent and thorough in the implementation process. To do otherwise places the taxpaying public at high risk of excessive public works costs and increases the chance of public disenfranchisement with the bidding process and the public officials involved.

