

Recommendations to the Wisconsin State Building Commission on Project Delivery

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Building Commission Directive:

“Direct the Department of Administration to work with interested parties to clarify the conditions under which state interests are best served by employing alternative delivery methods as described in WI Stats. 13.49 (19) and recommend statutory language changes.”

Background

In November 2008, the State of Wisconsin Building Commission directed DOA's Division of State Facilities (DSF) to conduct a review of current bidding statutes and make recommendations on statutory changes. Under statute, DSF is required to bid both single and multiple divisions of work (Multiple Prime bidding) for projects with an estimated construction cost greater than \$150,000 and to award contracts to the lowest qualified responsible bidder(s). The Building Commission has the authority to waive the multiple prime bidding requirements when it is in the best interest of the State.

Background

The majority of waivers granted have been to allow projects to bid as single prime, use a design build process, or hire a construction manager. The table below summarizes waiver approvals over the last thirteen years.

Summary of Waivers Granted For Enumerated Projects

Year	Waivers Granted	Single Prime	Design Build	CM	Time & Materials	Bid by Other Entity	Neg. Contract	Neg. w/Exist Contractor	Other
1997	15	6	7					1	1
1998	20	7	5				2	5	1
1999	15	3	6	1			1		4
2000	14	10						1	3
2001	17	7	2	1		1	4		2
2002	23	4	8	1			1		9
2003	8	1		1	2				4
2004	17	2	2	2	3	4			4
2005	10	3	2		1	2			2
2006	12	3	5		3				1
2007	7	5	2						
2008	9	2		2	3	1			1
2009	6	1	1	2		2			
Total	173	54	40	10	12	10	8	7	32
Percent	100.0%	31.2%	23.1%	5.8%	6.9%	5.8%	4.6%	4.0%	18.5%

Since 2003 there has been increasing discussion surrounding the Building Commission's use of its waiver authority, which lead to the requested review. The project delivery objectives of primary stakeholders can be summarized as follows:

Building Commission:

- The selected project delivery method should provide the best overall value for the state and taxpayers
- The selection of project delivery method is based on objective criteria
- The award of construction contracts is objective, competitive and transparent and to the greatest extent practicable relies on sealed bids

Division of State Facilities:

- Project delivery method balances project requirements, owner agency needs and public accountability

- Selection of project delivery method reflects the understanding that if the delivery method is not properly aligned with project requirements, then project may:
 - Take longer to complete,
 - Suffer from poor project coordination and increased design and construction change orders,
 - Cost more;
 - Require increased DSF project manager and field personnel involvement to resolve disputes;
 - Suffer from a more contentious close out process and
 - Result in a lesser quality finished product
- Reduced administrative workload
 - DSF employs 4 contract staff, 46 project managers, 17 field staff to manage 1,810 active projects (934 in design; 45 being bid; 532 in construction and 299 in final completion)
 - multiple prime bidding contributes to the large volume of contracts since multiple prime projects generally have four more contracts than single prime projects

Owner Agencies:

- Project delivery method is chosen to improve project cost and schedule control and overall project quality
- Predictable project delivery method determination process

Contractors:

- Open, transparent and fair bidding process
- Access to state construction work

In response to the Building Commission directive, DSF has held several meetings and fact-finding discussions with stakeholders over the past six months. A summary of findings are as follows:

- The State of Wisconsin is unusual in its reliance on multiple prime contracting for the majority of projects; Wisconsin is one of only four states that rely primarily on multiple prime contracting. Most states use a variety of construction project delivery methods and use Single Prime contracting as their default method.
- State agency and DSF staff prefer Single Prime bidding as the default method and the limited use of other alternative methods when warranted by unique project characteristics.
- There is no consensus among construction industry groups on the best project delivery method, but there is general recognition that delivery methods are evolving and the State needs to balance competing interests – owner agency needs, project quality, schedule control, project cost control and the fairness and transparency of the contracting process – in determining the appropriate project delivery method for a project.

- State policies have not fully adapted to the use of alternative delivery methods. There is need for clearer standards to guide how alternative delivery methods are selected and how contractors are selected if project work is not bid.

Construction Project Delivery Reform

A construction project delivery selection system can be described by three characteristics – the available delivery methods, the criteria used to select among them and the person or body that makes the selection. Using these characteristics the State’s current project delivery selection system can be summarized as follows:

Characteristic	State of Wisconsin Project Delivery Method Selection
What methods are available?	Statutes define Multiple Prime as the standard, but other innovative methods can be employed
What criteria are used to select?	Multiple Prime is specified in statutes as the default method, otherwise an alternative method can be chosen when it is ‘in the best interests of the State’
Who makes the delivery method selection?	For project less than \$500,000 BC Secretary can select Single Prime, all other methods require Building Commission approval

Delivery methods can be further defined by specifying how contractors are chosen once the delivery method is established. For instance, in approving Single Prime bidding the Building Commission regularly requires that bidders submit a list of their major subcontractors along with their bid. Another example of changes in contracting procedures that are used with alternative delivery methods is requiring a Construction Manager to bid out all construction work rather than allowing them to self-perform portions of the construction.

These three characteristics and delivery method specific additional contracting provisions suggest four questions that can be used to define options for the reform of the State’s project delivery selection methodology.

1. Which delivery methods should be available?
2. What selection criteria should guide the selection process?
3. Who should be authorized to select the project delivery method?
4. How should construction contracts be awarded once the project delivery method is determined?

WHICH delivery method options should be available?

Current practice:

- State Statutes require DSF to take single and multiple bids (Multiple Prime), but the Building Commission has authority to waive any and all bidding requirements through a formal action of the body.

- There are no limits on the Building Commission's waiver authority, any 'innovative' method can be selected, alternative methods are not described in statutes.
- Single Prime is identified in Building Commission policy as an option for projects less than \$500,000.

Analysis:

- Wisconsin is an outlier among state governments in its exclusive statutory preference for multiple prime bidding and its reliance on a case-by-case legislative waiver process for the selection of alternative project delivery methods.
- The Building Commission has authorized waivers for alternative delivery methods for approximately 10 – 15% of enumerated projects.
- While it is argued that multiple prime bidding results in lower bids, there is no conclusive evidence to back up or refute the claim.
- Single prime bidding results in the award of a contract to the lowest qualified bidder, and provides a single point of responsibility that reduces DSF administrative costs and improves project coordination and schedule control.
- Design Build has been commonly used by the Building Commission for the construction of less complex structures with budgets less than \$5 million.
- The selection of Design Build firms requires a qualification based selection process that selects a single design and construction team.
- As the complexity of buildings and construction technology has increased, the building industry has developed alternative delivery methods such as CM and CM-at-Risk to enhance project delivery, formalize coordination and control costs.
- These alternative methods have been approved by the Building Commission for specific types of projects.
- CM firms are generally selected through a qualification based selection process, but the CM contract can be written to require public bidding of all construction work.
- Other alternative delivery methods have been approved by the Building Commission on a more limited basis in response to specific circumstances. (e.g. time and material contracts with a local unit of government, lease-purchase, delegation of project delivery to a University foundation).

Reform Options:

- Modify state statutes to prescribe a different standard project delivery method (e.g. single prime or a variation of single prime as described in the section on how contractors are selected below).
- Identify specific delivery methods that can be employed in state statutes (e.g. single prime, multiple prime, design build, CM, CM-at-Risk) and specify the decision-making officer or body.
- Identify specific delivery methods that can be employed in administrative rule (e.g. single prime, multiple prime, design build, CM, CM-at-Risk) and delegate selection to DOA Secretary or designee.

WHICH delivery method options should be available?

Recommendation:

- Identify allowed delivery methods in state statutes (single prime, multiple prime, CM, CM-at-Risk).
- Allow other alternative methods such as Design Build through a waiver process.

WHAT are the selection criteria for specific delivery methods?

Current practice:

- Building Commission with staff input, determines that the use of innovative types of design and construction processes will make better use of the resources and technology available in the building industry” and the action “is in the best interest of the state”.
- Building Commission Secretary can authorize single prime delivery for projects under \$500,000 when warranted by project specific characteristics.

Analysis:

- There is no formal policy outlining alternative delivery method selection criteria, but the Building Commission has followed general guidelines in approving waivers.
- The Building Commission has approved Single Prime contracting under the following circumstances that place a premium on coordination among construction trades:
 - Complex building design,
 - Special reporting requirements such as for LEED certification,
 - Congested construction site that limits material storage and staging areas,
 - Complex project phasing, such as a project that involves renovation and new construction phases

- Compressed schedule.

The Commission has also used single prime contracting in areas of the state such as northwestern Wisconsin where there are limited numbers of contractors that are likely to bid on the MEP (mechanical, electrical, plumbing) bid packages.

- The Building Commission has approved the Design Build process for structures such as storage and maintenance buildings that are simple in design and familiar in the building industry.
- The Building Commission has approved CM for large, complex, specialized buildings where the involvement of the CM in the design process can compress the project schedule, help maintain budget control by providing cost estimates during the design process and reduce design conflicts that would otherwise result in change orders during the construction phase.
- DOA administrative rule ADM 21 defines the steps in the construction contract bidding process; the rule could be expanded to specify criteria for the selection of alternative project delivery methods.
- The rule making process would provide for Legislative and public input in setting the criteria through public hearings and review by standing committees in both house of the Legislature.

Reform Options:

- Define criteria for project delivery selection in administrative rule.
- Set criteria for project delivery selection in a Building Commission or DSF policy document.

WHAT are the selection criteria for specific delivery methods?

Recommendation:

- Require in the statutes that DOA develop administrative rules specifying criteria for the selection of project delivery methods.
- Criteria would be set for all delivery methods except any default delivery method identified in the statutes.

WHO determines the project delivery method?

Current practice:

- Statutes require taking single and multiple bids (Multiple Prime).
- The Building Commission has authority to waive Multiple Prime bidding and to use an alternative delivery method.
- Governor has authority to waive bidding requirements in emergency situations.

- The Building Commission Secretary has authority to authorize Single Prime bidding for projects less than \$500,000.

Analysis:

- Private sector owners choose a project delivery method based on the characteristics of the project and their staff capabilities.
- Selecting the appropriate project delivery method for a State construction project requires an in-depth understanding of construction practices, project requirements and state staffing resources and capabilities.
- Project characteristics and owner needs such as project complexity, facility type, site constraints, schedule constraints and the project budget provide objective criteria for the selection of an appropriate project delivery method.
- The Building Commission Secretary / DSF Administrator can collect information from DSF professional staff and owner agency personnel to assist in the review of project characteristics and assess the availability of State resources which are used to determine the appropriate delivery method.
- DSF, through ADM 20, selects AEs (architects/engineers) through a qualification based selection process based on the recommendation of a selection committee.
- The selection committee is comprised of seven civil servants; since 2005 their selection decision has been final. Prior to that date the committee made a recommendation to the DOA Secretary who made the final selection.
- The selection committee, perhaps with a modified membership, could be used to provide a recommendation to use alternative delivery methods that require a qualification based selection process (CM, CM at Risk, Design Build).

Reform Options:

- Expand Building Commission Secretary's authority to select project delivery methods.
- Designate the DSF ADM 20 Selection Committee or a subset of the body to select alternative delivery methods.

WHO determines the project delivery method?

Recommendation:

- Retain the Building Commission's waiver authority to accommodate unique situations and projects.
- Increase the authority of the Building Commission Secretary to select the appropriate project delivery method from among the methods identified in statute.
- Require the Secretary to base his decision on selection criteria as specified in administrative rule and the professional guidance of civil servants.

HOW are contractors selected?

Current practice:

- State statutes require construction contracts to be awarded to the lowest qualified responsible bidder.
- DSF executes a contract with contractors that submit low bids; generally these 'prime' contractors contract with one or more subcontractors to complete the work they bid on.
- DSF is statutorily prohibited from requesting that contractors submit a list of subcontractors along with their bid, but a list of subcontractors must be provided within 7 days of award of the bid.
- Statutes and administrative rule are silent on selection of Design Build and CM firms and place no controls on CM selection of contractors.

Analysis:

- The State's current standard delivery method, Multiple Prime contracting, awards construction contracts based on low bids and has the benefit of protecting mechanical, electrical and plumbing (MEP) contractors from bid shopping.
- However, Multiple Prime contracting also results in four to five or more contracts per project than when DSF contracts with a Single Prime contractor.
- While one of the prime contractors is designated as the lead contractor, they have limited authority over other prime contractors.
- This increases DSF's administrative workload and the tasks that must be managed by DSF's assigned project manager and construction field staff.
- Requiring single prime bidders to submit a list of their proposed subcontractors along with their bid can reduce bid shopping.
- Other protections can be provided to subcontractors by adding contract language that requires prompt payment of subcontractors and pay out of retainage upon completion of a sub's work.
- The Building Commission has on occasion directed DSF to enforce these subcontractor protections as a condition of approving Single Prime project delivery.
- A second alternative to provide protections to MEP contractors would be to conduct a two-staged bidding process.
 - In the first stage MEP work would be bid and the results posted.
 - One week later, general contractors (GCs) would be invited to bid on the entire scope of work. They would be required to select MEP subcontractors from the list of MEPs that bid the previous week.
 - The low GC bidder would receive the contract and would be required to contract with the MEPs that were included in the firm's submittal at the cost the MEP bid.

- The variation of Single Prime contracting described above could be defined in administrative code and required above a dollar threshold, e.g. \$5 million.
- DSF selects AEs (architects/engineers) through a qualification based selection process based on the recommendation of a selection committee.
- The selection committee has also been used to select Design Build, CM and CM-at-Risk firms, but there are no provisions in ADM 20 governing the selection process.
- Unlike the AE selection process, the selection of Design Build, CM and CM-at-Risk firms includes a review of cost proposals along with firm qualifications.
- In the private sector some CM firms do not bid out all construction work, but self-perform portions of the project.
- In some instances, the Building Commission has directed DSF to require that CM firms publically bid all construction work rather than self-perform some of the work.

Reform Options:

- Modify statutes to allow DSF to request sub contractor lists from prime contractors.
- Amend Administrative Code and standard DSF contract language to provide additional protections to subcontractors including prompt payment and retainage protections.
- Specify in Administrative Code the selection process for the Design Build, CM and CM-at-Risk firms.
- Direct DSF to develop a standard CM contract and seek Building Commission approval of its contractor selection provisions.

HOW are contractors selected?

Recommendation:

- Modify State statutes to allow DSF to allow the submission of subcontractor lists at the time bids are submitted.
- Create Administrative Code provisions providing additional protections to subcontractors and defining the selection process for Design Build, CM and CM-at-Risk firms.
- Direct DSF to develop standard alternative project delivery contracts (e.g. CM, CMAR, and Design Build) that address bidding of construction work to ensure open public bidding.

Recommendation:

What methods are available?	- Multiple Prime, Single Prime, CM and CMAR identified in statutes, other innovative methods can be used if approved by Building Commission waiver
What criteria are used to select?	- Define criteria for selecting all available delivery methods (Multiple, Single, CM and CMAR) in administrative rule (see sample criteria below)
Who makes the delivery method selection?	- Building Commission Secretary can select from any of the named methods based on DSF and Owner Agency staff recommendation, - Formal Building Commission action required to use other innovative methods
Additional contracting provisions	- Include specific protections in Single Prime contracts to prevent bid shopping and ensure prompt payment for subcontractors (see sample protections below), - Define the CM and CMAR firm selection process in administrative rule - Require CM to bid all work

- Gives equal weight in statutes to the four primary delivery methods.
- Maintains the Building Commission’s waiver authority to address non-standard project delivery requests.
- Specifies and standardizes subcontractor protections enforced under Single Prime contracts in administrative rule.
- Provides specific criteria in administrative rule to guide Building Commission Secretary’s use of the available delivery methods.
- For CM and CMAR the rules will include the scoring methodology that will be used for selection.
- Solicits recommendations on project delivery from nonpartisan, professional civil servants.
- Defines in administrative rule the CM / CMAR firm selection process, modeling it on the ADM 20 architect / engineer selection process.
- Administrative rule process allows for public and Legislative input.

Potential Single Prime Subcontractor Protections:

- Require bidders to submit a list of the major subcontractors along with their bid
- Require prime contractor to submit pay requests within a specified time frame and pay subcontractors promptly
- Provide primary subcontractors access to WisBuild to monitor project workflow and change orders
- Require prime contractor to pay out subcontractor retainage when sub work is completed to satisfaction of DSF construction rep

Potential Alternative Project Delivery Selection Criteria:

Construction Manager / Construction Manager at Risk:

- technically complex projects
- projects where multiple sequenced bid packages are required
- projects where the additional value provided by a CM in schedule compression, constructability reviews and value engineering can offset the added cost of this delivery method
- projects with budgets in excess of \$40 million

Selection Committee Members

Selection committee will be made up of non-partisan, non-political professional civil servants such as the state's Chief Architect and Chief Engineer. The Committee will also consist of two professionals from client agencies.

TIMELINE:

August 2009: Building Commission presentation

September 2009: Building Commission review of draft statutory language

October November 2009: Introduction of Legislation

December 2009 – July 2010: Rule making process