



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of FARA—Design-Build

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A Lawyer's View of FARA's Design-Build Provisions

by

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FARA'S NEW DESIGN-BUILD SELECTION PROCEDURES

The pendulum swing away from competition at any cost continued this year with the enactment of the Federal Acquisition Reform Act (FARA). Several steps towards more meaningful competition are taken by the Act, including the new provision that will allow the Contracting Officer to limit the competitive range on the basis of efficiency. Towards the same end, an entirely new procedure is provided in the construction area with the enactment of formal "design-build" selection procedures.

Background

Traditionally, federal Government construction has been undertaken in two contractual phases—first design and then construction. Under the design phase, a contract was awarded to an architect-engineering (A & E) firm under the Brooks Act procedures. These statutory provisions provide for the selection of the design awardee on a "highest technical" basis, with the contract going to the highest ranked awardee with whom a reasonable cost can be negotiated.

Once the A & E firm had drafted acceptable specifications and drawings, usually after several reviews, the drawings and specifications would be bundled into a procurement for construction of the building or other structure. Historically, this construction procurement was done on a sealed bid basis. In recent years, complex projects have increasingly been solicited on a negotiated basis, with technical proposals and the consideration of past performance rather than just low price.

Design-build procedures developed in the private sector to speed the process of erecting a building. Rather than two contracts with two different firms, with the resulting potential disagreements on the interpretation of contract doc-

uments, "design-build" allows for the award of one contract to a firm, partnership, or joint venture with both design and construction capabilities. While the design is being finalized, the construction team can begin lining up subcontractors, long-lead time materials, and equipment to start the job or, if sufficient confidence in the design status exists, could even start some of the work.

When to Use?

At a conference held by NIST last year on the design-build process, several other agency's representatives indicated that design-build had been used on numerous occasions within the Government, mainly by the General Services Administration, the Postal Service, and the U.S. Army Corps of Engineers. Interestingly, GSA's use of the procedure had vastly decreased over the last few years. The reason appears to be that design-build is not for every project. One of the most serious concerns raised was that changes initiated in the construction phase, as opposed to the design phase, can be extremely expensive. It appeared from their comments that complex buildings or structures likely to be changed extensively during the process are poor candidates, while structures or buildings with more standardized, stable designs were often excellent candidates for design-build.

Procedures—Two Phases

Congress has now created general authority for all agencies to use a design-build procedure. The first step is for the Contracting Officer to execute a determination to the effect that offerors couldn't prepare a cost or price proposal without design work; that such design work would be ex-

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pensive; that three or more offers will be received, and that the Contracting Officer has considered the extent to which the project requirements have been adequately defined, the time constraints for delivery of the project, the capability and experience of potential contractors, the suitability of the project for use of the two-phase selection procedures, the capability of the agency to manage the two-phase selection process and any other criteria established by the agency.

If appropriate, then the agency creates a somewhat generalized statement of work, including a certain minimum amount of information on the Government's requirements such as existing design, budget, and delivery parameters. If the work statement is contracted out, the A&E procedures cited above are used. The solicitation will also contain the evaluation factors for the phase-one evaluation. These factors will include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members of the team) and other appropriate factors other than cost-related or price-related ones. The phase one proposals received in response will have to show the offeror's technical approach and technical qualifications but will not address detailed design information or cost or price information.

Phase Two

The solicitation also will indicate the evaluation factors for phase two and will set the maximum number of offerors who may be considered during phase two. Normally this will be no more than five offerors. The phase two proposals will include a technical proposal containing a design or technical solution and a cost or price proposal. The agency will select an awardee from the phase two competitors based on the evaluation factors.

While Contracting Officers await FAR implementation, they may wish to pursue the statutory provisions set out below.

FARA Statutory Provisions

(b) CIVILIAN AGENCY ACQUISITIONS- (1) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 *et seq.*) is amended by inserting after section 303L the following new section:

SEC. 303M. DESIGN-BUILD SELECTION PROCEDURES.

(a) AUTHORIZATION- Unless the traditional acquisition approach of design-bid-build established under the Brooks Architect-Engineers Act (title IX of this Act) is used or another acquisition procedure authorized by law is used, the head of an executive agency shall use the two-phase selection procedures authorized in this section for entering into a contract for the design and construction of a public building, facility, or work when a determination is made under subsection (b) that the procedures are appropriate for use.

(b) CRITERIA FOR USE- A contracting officer shall make a determination whether two-phase selection procedures are appropriate for use for entering into a contract for the design and construction of a public building, facility, or work when the contracting officer anticipates that three or more offers will be received for such contract, design work must be performed before an offeror can develop a price or cost proposal for such contract, the offeror will incur a substantial amount of expense in preparing the offer, and the contracting officer has considered information such as the following:

- (1) The extent to which the project requirements have been adequately defined.
- (2) The time constraints for delivery of the project.
- (3) The capability and experience of potential contractors.
- (4) The suitability of the project for use of the two-phase selection procedures.
- (5) The capability of the agency to manage the two-phase selection process.
- (6) Other criteria established by the agency.

(c) PROCEDURES DESCRIBED- Two-phase selection procedures consist of the following:

- (1) The agency develops, either in-house or by contract, a scope of work statement for inclusion in the solicitation that defines the project and provides prospective offerors with sufficient information regarding the Government's re-



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quirements(which may include criteria and preliminary design, budget parameters, and schedule or delivery requirements) to enable the offerors to submit proposals which meet the Government's needs. If the agency contracts for development of the scope of work statement, the agency shall contract for architectural and engineering services as defined by and in accordance with the Brooks Architect-Engineers Act (40 U.S.C. 541 *et seq.*).

(2) The contracting officer solicits phase-one proposals that--

(A) include information on the offeror's--

(i) technical approach; and

(ii) technical qualifications; and

(B) do not include--

(i) detailed design information; or

(ii) cost or price information.

(3) The evaluation factors to be used in evaluating phase-one proposals are stated in the solicitation and include specialized experience and technical competence, capability to perform, past performance of the offeror's team (including the architect-engineer and construction members of the team) and other appropriate factors, except that cost-related or price-related evaluation factors are not permitted. Each solicitation establishes the relative importance assigned to the evaluation factors and subfactors that must be considered in the evaluation of phase-one proposals. The agency evaluates phase-one proposals on the basis of the phase-one evaluation factors set forth in the solicitation.

(4) The contracting officer selects as the most highly qualified the number of offerors specified in the solicitation to provide the property or services under the contract and requests the selected offerors to submit phase-two competitive proposals that include technical proposals and cost or price information. Each solicitation establishes with respect to phase two--

(A) the technical submission for the proposal, including design concepts or proposed solutions to requirements addressed within the scope of work (or both), and

(B) the evaluation factors and subfactors, including cost or price, that must be considered in the evaluations of proposals in accordance with subsections (b), (c),and (d) of section 303A.

The contracting officer separately evaluates the submissions described in subparagraphs (A) and (B).

(5) The agency awards the contract in accordance with section 303B of this title.

(d) SOLICITATION TO STATE NUMBER OF OFFERORS TO BE SELECTED FOR

PHASE TWO REQUESTS FOR COMPETITIVE PROPOSALS- A solicitation issued pursuant to the procedures described in subsection (c) shall state the maximum number of offerors that are to be selected to submit competitive proposals pursuant to subsection (c)(4). The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to an individual solicitation that a specified number greater than 5 is in the Government's interest and is consistent with the purposes and objectives of the two-phase selection process.

(e) REQUIREMENT FOR GUIDANCE AND REGULATIONS- The Federal Acquisition Regulation shall include guidance--

(1) regarding the factors that may be considered in determining whether the two-phase contracting procedures authorized by subsection (a) are appropriate for use in individual contracting situations;

(2) regarding the factors that may be used in selecting contractors; and

(3) providing for a uniform approach to be used Government-wide.

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