

How to Complete a Successful Public Works Project in Three Steps

BY HEATHER C. WHITE

Public works construction projects, including roadway, bridge, water, sewer and other horizontal work, are complex endeavors that require careful planning and constant vigilance during construction. It is impossible to predict and control every possible wrinkle during the life of a project. Many headaches can be avoided, however, with a sufficient amount of preparation and diligence as construction proceeds.

A successful project can be achieved in just three simple steps:

1. Prepare a contract with detailed contractual requirements that will provide clear procedures and protections for the municipality when the inevitable issues arise.
2. Award the contract to a bidder who not only offers the lowest price but, after a thorough investigation, is determined to be eligible and responsible.
3. Enforce the contract provisions as construction proceeds.

It might not be easy, but it is that simple.

1. Establish Protective Contractual Requirements

It is advisable for each municipality to develop a standard contract for use in all public works projects. The standard form may be adapted for specific types of

projects, but should include certain key provisions across the board to protect the municipality against issues that inevitably arise during construction. The full contract, including all standard legal terms as well as specifications, should be included in the invitation for bids, along with a condition that, by submitting a bid, each bidder agrees to execute a contract in the form provided.

Having a standard contract template promotes several goals:

- It creates uniform standards, forms and procedures for administration of construction contracts.
- It eliminates confusion created by the use of different contracts from project to project.
- It incorporates clear, specific language to reduce contractor disputes caused or exacerbated by ambiguity.
- It reflects actual practice in the local jurisdiction.
- It provides strong protections for the municipality.

Numerous organizations, such as the Engineers Joint Contract Documents Committee (EJCDC), have developed standard forms for use in public works projects. Additionally, state agencies such as the Division of Capital Asset Management and Maintenance (DCAMM), Massachusetts Water Resources Authority (MWRA), and Massachusetts Department of Transportation (MassDOT) have developed standard contracts that may provide municipalities with sample provisions to

be included in local contracts. Municipalities should take care, however, to familiarize themselves with the provisions of any standard form adopted and to include amendments or supplemental provisions where necessary to protect the public interest. Given that the legal requirements contained in contracts and associated plans and specifications are often technical or difficult to understand, it's a good idea to consult with municipal counsel or counsel experienced in public contracting when preparing or reviewing contract forms and specifications.

In most cases, municipalities hire outside engineering consultants to design public works contracts, and the consultants are responsible for supplying the contract documents, including both the legal language and specifications. It is strongly recommended, however, that the municipality conduct an internal review, in consultation with its legal counsel, of the contract documents provided by the consultant.

Even if standard forms such as EJCDC contracts are provided, it is not uncommon for consultants to prepare specifications that alter the standard legal provisions in the "front end" of the contract. The municipality should review the consultant-supplied specifications in detail to spot any "legalese" that may affect the municipality's rights vis-à-vis the consultant and contractor established in other sections of the contract documents. Additionally, the EJCDC forms have been revised and reissued numerous times over the years, and it is important that an awarding authority familiarize

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itself with the provisions of the specific version being used and include supplementary conditions to alter any unfavorable language so that the contract is sufficiently protective. It is also important to note that the EJCDC forms are not tailored to Massachusetts law and require certain supplementary provisions to be included to meet state requirements.

The following are examples of topics that should be addressed by way of supplement to any standard forms prepared by a third party:

Order of Precedence: It is essential to include an order of precedence clause establishing at the outset the hierarchy of various sections of the contract. This will protect the owner against issues arising from provisions contained in specifications or other sections of the contract that purport to vary or change the contractual relationships and allocation of risks between the parties.

Claims: Contractor claims drive up the costs of a project and should be kept to a minimum. It is essential to have clear claims procedures requiring timely notice and documentation. Claims are frequently based upon alleged delays and differing subsurface conditions. Chapter 30 of the General Laws requires certain language to be included in public works contracts relative to these issues, but municipalities are free to supplement the statutory requirements with additional procedures and requirements. No-damages-for-delay clauses are enforceable in Massachusetts, unless the owner exercises bad faith or gross negligence, and should be included to protect the owner from claims of additional costs resulting from delays. Likewise, municipalities may and should supplement the statutory language with additional procedures relating to claims based upon differing subsurface conditions, including a requirement of strict adherence to notice and documentation procedures.

Indemnification: A broad, general indemnification clause should be included to require the contractor to indemnify and hold harmless the municipality from all claims and should not be limited to the contractor's negligence.

Payment: The contract should clearly state that the contractor must submit all required documentation with payment requests, including certified payroll records, lien waivers, previous payment affidavits, and other reasonably required documentation.

Substantial Completion: Chapter 30, Section 39G, establishes procedures for certification of substantial completion. Supplementary provisions should be included in the contract to require the consulting engineer to perform a timely review of any request for certification of substantial completion and to advise the owner of satisfaction of the criteria for substantial completion. Since substantial completion takes effect automatically if the owner fails to respond in a timely manner, it is critical to require the engineer to review a request and advise the owner accordingly within a short time-frame in order to avoid automatic imposition of substantial completion.

Bonds and Insurance: For contracts above a certain dollar threshold, such as \$100,000 or higher, it is advisable to require both performance and payment bonds in the full amount of the contract despite the fact that Chapter 30, Section 39M, does not require them for all projects. The municipality should prepare its own standard bond forms and include them in the bid documents so that bidders will be required to provide bonds in the prescribed forms, thereby avoiding problematic escape-clause and precondition language provided by sureties on their standard forms. Similarly, it is essential to require proper insurance and to review the actual insurance policy provisions and endorsements to ensure that the required coverage is in fact provided.

While these and other standard legal provisions will provide protections for the municipality, specific projects may require the contract to be tailored. For example, projects costing more than \$50,000 and using any amount of Chapter 90 funds require contractors to be prequalified by MassDOT. MassDOT also requires certain price adjustment clauses to be included in such contracts to reflect fluctuations in the price of materials that have an impact on the cost of construction. Although each project may require certain adjustments to be made to the standard form, having a comprehensive form in place will allow each project to commence and progress more smoothly.

2. Award Contract to Responsible and Eligible Contractor

The Supreme Judicial Court issued an important decision last year supporting

an awarding authority's right to conduct an investigation to determine bidder responsibility and to consider all information obtained in evaluating responsibility [Barr Incorporated v. Town of Holliston, 462 Mass. 112 (2012)]. While the project at issue in the case was a public building construction project pursuant to Chapter 149, the court's analysis can be applied to other areas of public bidding, including public works projects pursuant to Chapter 30, Section 39M, as both statutes require a contract to be awarded to "the lowest eligible and responsible bidder" and include similar definitions of responsibility that require bidders to "demonstrably possess the skill, ability and integrity necessary to faithfully perform the work."

At issue in the Barr case was an awarding authority's investigation of a bidder's performance on projects that were not included in the materials compiled by DCAMM as part of its contractor certification process for public building projects. Barr argued that the statute constrains the awarding authority's review to the contents of the DCAMM file and that Barr should have been deemed automatically responsible by virtue of its DCAMM certification. The court disagreed with the contractor, holding that an awarding authority may consider information bearing on a bidder's responsibility outside of the information contained in DCAMM's file.

Although there is no provision for DCAMM certification of public works contractors, this case is highly instructive in the public works contracting arena in that it unequivocally affirms an awarding authority's authority to consider a wide sample of information regarding contractor performance when making awards. The public bidding laws do not require public entities to award contracts to low bidders who have demonstrated themselves to be irresponsible. The awarding authority is given significant discretion to determine whether a low bidder is in fact legally "responsible" and therefore may be awarded the contract, so long as the awarding authority conducts its review in good faith and uses consistent metrics.

Best practices require an awarding authority to conduct a thorough review of contractor performance prior to awarding contracts and to look beyond the face of the bid in conducting such review. While awarding authorities should obtain information from the references provided

by the bidder, it is advisable to adopt a standard practice of contacting awarding authorities that have recent experience with the bidder and that were not included in the bidder's self-selected list of references. This practice should provide the awarding authority with additional assurance of the objectivity of information regarding the bidder's past performance.

The awarding authority should also consider granting a bidder an opportunity to review and rebut any negative information received during the investigation. While the Supreme Judicial Court in *Barr* did not impose an affirmative requirement to invite such a response from the bidder, the decision does caution that an awarding authority's decision to deny a bidder an opportunity to respond to the results of an independent investigation should be justifiable on the record. This warning suggests that the safest course may be to invite a response in fairness to the bidder and in order to avoid due process claims. Conducting a fair and thorough review of contractor responsibility before the award of a contract should reduce the municipality's exposure to issues during construction.

3. Enforce Contract Provisions During Construction

Once construction begins, the parties' focus shifts away from the words on paper to the action on the ground. It is important to remember that the contract continues to govern the construction activity, and all municipal employees involved should revisit the contractual language frequently and remain familiar with its requirements as the work progresses. The owner must be careful to avoid actions that could support a contractor's claim for additional compensation on the basis that the owner waived a contractual requirement.

The owner should not rely solely on the engineering consultant to oversee the contractor's actions and enforce the contract provisions. The owner is in the best position to protect its own interests. While Chapter 30, Section 39M, does not require public owners to retain an owner's project manager for horizontal public works projects, a public owner is well advised to hire capable in-house project managers or staff to work collaboratively with the engineering

consultant to protect the public interest. Contractors should be strictly held to contractual notice requirements, and the engineer should be required to review all change order requests and claims to check for compliance with such requirements.

Owners should be aware, however, of the dual role of the engineer during construction. The engineer is both the owner's representative and an arbiter of disputes between the owner and the contractor. Owners should require consulting engineers to provide recommendations with sufficient detail to allow the owner to make informed decisions regarding claims and other matters, but should respect the engineer's role as an impartial adjudicator of claims and not try to improperly influence the engineer's exercise of authority in its claims adjudication role.

Public works construction projects can be daunting experiences, but following these three steps will help to ensure that they are completed more smoothly and efficiently. 🌟

