

SCHOOL CONSTRUCTION ABCs

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Topic Outline

1. Defining Scope of Work and Requirements
2. Self-Performed Work by the District (District as Contractor and Annual CID Limited Scope Permits)
3. Project Delivery Options
4. Bids or Requests for Proposals
5. Subcontractor Bid Protections
6. Bonding and Insurance
7. Prevailing Wages
8. Use of Form Contracts (AIA and others) and Contractor Proposals
9. Construction Contract Claims
10. Procurement Code
 - Indefinite Quantity/On Call Construction Contracts
 - Multiple Source Awards
 - Multi-Term Contracts
11. Role of Chief Procurement Officer (CPO) and Delegation of Contracting Authority

Note: PSFA/PSCOC funding and contracting issues not included in this presentation.

Scope of Work – Defining Requirements

- The first step, before any procurement process, is to define the requirements for the project, whether repair/replacement, remodel/rehab, additions and alterations or new construction.
- Know what it is you need and want. Be careful what you ask for.
- For renovation, expansion or alterations, involve staff most knowledgeable about the facility and the school district's needs.
- Develop a basic program outlining needs and identify restrictions and limitations affecting the work.
- Consider involving operations and maintenance staff in design development review.

Scope of Work – Defining Requirements

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- Contractor is only obligated to perform the work described in the plans and specifications or stated in the express terms of the contract.
- The District is responsible to the contractor for deficiencies in the plans and specifications (the concept is referred to in legal terms as an implied warranty of the sufficiency of the plans). If the plans are incomplete, do not reflect the actual on-site conditions, contain internal inconsistencies or there are missing items such as an electrical line to the electric gate, even if the issues are “obvious” when submitting bid, the Contractor may be entitled to increased compensation to address the issues.

Scope of Work – Defining Requirements

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- Strategies to avoid claims:
 - Involve knowledgeable staff in review of plans at all stages of development
 - If it is a large project, consider having a constructability review by an outside consultant (such as a construction manager or contractor who will not be bidding on the project)
 - Require a pre-bid meeting inviting questions/clarifications regarding plans (and follow-up with amendments/clarifications from a design professional)
 - Include contract provisions regarding plan review (as a contractor not design professional) and determination of sufficiency of plans

Self-Performed Work

School District as Contractor

- Construction Work by a school district on its own property is subject to the Construction Industries Licensing Act (“CILA”). There is no exemption for school districts.
- If the work is covered by building codes adopted by the construction industry commission (requires a CID permit), the work must be done by a licensed contractor.
- In order for a school district to self-perform such work on its buildings, the school district must be a licensed contractor or hold an annual permit issued by CID for limited work that is performed by school district staff holding the required license.

Self-Performed Work as Contractor

continued

- Requirements for becoming a licensed contractor.
 - District must apply for a contractor's license, with a district employee holding the required contractor license named as the qualifying party.
 - District must provide to CID (i) a \$10,000 consumer bond, even though the only work the district will be performing is on its property, and (ii) a registration certificate from the New Mexico Taxation and Revenue Department for the District's NM Tax ID.
 - Also, as noted on the application, the district's qualifying employee can no longer be the qualifying party for any other business, including his own.
- Violation of CILA is a misdemeanor criminal offense.
- Complaints made to CID are investigated and can result in charges against the school district.

Self-Performed Work

Annual Permits

- Annual Permits issued by CID NMAC §14.5.2.19(C)
 - Electrical Repair/Maintenance School Permit – ERMS. (limited to repair or maintenance performed on existing 120-volt (277-volt lighting circuits) or less de-energized electrical systems in a school, and is intended to allow for the exchange of like parts or components in an existing electrical system. Excludes life safety systems (except light bulb and battery replacements), new construction, relocation, expansion or alteration of an electrical installation or any portion thereof; work on energized electrical systems of any kind; boilers; or work product or process that is hazardous)
 - Mechanical and Plumbing Repair/Maintenance School Permit – MRMS. (limited to repair or maintenance on existing plumbing or mechanical systems in a school is intended to allow for the exchange of like parts or components in an existing mechanical or plumbing system. Does not include work on life safety systems; all venting; new construction, relocation, expansion or alteration of a mechanical or plumbing installation or any portion thereof; work on gas piping systems (except repair of low-pressure gas leaks down stream of the isolation valve to the appliance, limited to supply tubes or connections to gas valves or fuel train). Does not include repair or replacement of gas valves, regulators or fuel train; boilers; or work product or process that is hazardous. Repair and maintenance as used in the scope of this permit type means work that is necessary to maintain an established, approved mechanical/plumbing installation, which work is required to keep the installation operating in its approved function and configuration)

Self-Performed Work Under CID Permits

continued

- **General Construction Repair/Maintenance School Permit – GRMS.** (limited to repair and maintenance of existing structures in a school; intended to allow for the exchange of like parts or components in an existing structure. The scope of this permit is limited to the maintenance and repair of non-structural facility components: floor surfaces, drywall and ceiling surfaces, cabinetry, countertops, room partitions, wall and door trim, door hardware, molding, and window replacement; patching roof surfaces not to exceed 100 square feet; asphalt, concrete, playground and athletic equipment, landscaping, fencing, gates and site drainage. Excludes new construction of any kind, or work that modifies egress, affects fire resistance or structural integrity of a wall, or any work product or process that is hazardous)
- **Qualified Employee.** School Permits authorized by NMAC §14.5.2.19 (C) may be issued only to a school that employs at least one individual who holds a valid certification or license in the classification covering the work to be permitted.
- **Limited Duration.** Permits are valid for twelve months from the date of issuance and are not renewable. Permits automatically expire on the first day of the thirteenth month following the month of issuance.

Self-Performed Work Under CID Permits

continued

- **Report Log.** All work performed must be recorded by the permit holder in a log that contains, at a minimum, the following information: (i) the location of the work with sufficient specificity that an inspector can locate the work, (ii) date the work was performed; (iii) description of the work performed; (iv) name of the individual(s) who performed the work; and (v) the permit number issued to the school for the work performed.
- **CID Inspection.** All work performed is subject to inspection by CID and must comply with all applicable codes and rules.
- **Emergency Work.** Where equipment replacement or repairs must be performed in an emergency situation, application for the appropriate permit must be made on the next working business day either by computer or in person at one of the CID offices. NMAC §14.5.2.20
- **Connection Of Service Utilities.** Except where work is done under an annual permit, no person shall make connections from a utility, source of energy, fuel or power to any building or system that is regulated by the New Mexico construction codes for which a permit is required, until approved by the appropriate building official or a designated representative. NMAC §14.5.2.21

Project Delivery Options

- **Design-Bid-Build**

- Requires complete plans and specifications used to solicit bids or proposals
- Implied warranty of sufficiency of plans and specifications
 - Inconsistencies, incomplete or missing information can lead to claims
 - Options for plan review
- The “Bid” of Design-Bid-Build can be competitive sealed bids or competitive sealed proposal, as per the Procurement Code

- **Design-Build NMSA §13-1-119.1**

- Minimum MACC of Ten Million Dollars and two-step competitive sealed proposal process required unless covered by Rule for Small Design-Build Project (below):
 - Request for qualifications
 - Minimum of 5 short-listed firms invited to submit detailed proposal including specific design concepts or solutions, costs and scheduling.
 - Unsuccessful firms may be paid a stipend to cover proposal costs (a good option if significant design documents required in proposal)
- Rule for Small Design-Build Project: if MACC is less than \$400,000 AND requirement for services by design professionals and surveyors is limited to site improvements or adaption of pre-engineered building or system, the procurement must be by competitive sealed bids.
- Requirements for a design-build project must be sufficiently complete to obtain the desired results and obtain a firm bid with minimum (or no) change orders or claims of additional work – if this is not possible, better to use Design-Bid-Build
- Design professional services for preparation of requirements is recommended
- Can include in the partial plans (drawings and specifications illustrating requirements, performance specifications) in the RFP or RFB process
- Review of design submittals important; consultant services an option to consider

Project Delivery Options continued

- **Educational Facility Construction Manager at Risk**
NMSA §§13-1-124.1 through 124.5 – offers full range of construction services
- Requires determination that CM at Risk is appropriate and in the best interest of the School District by the governing body (Board of Education or Governing Council for non-PSFA funded projects)
- Mandatory procurement processes:
 - Three member selection committee, one member being an architect or engineer
 - Two-step process if project budget is less than \$500,000: RFQ, then interviews with up to three of the highest ranked
 - Three step if project budget is \$500,000 or more: RFQ, RFP to offerors that meet the minimum qualifications, then evaluation of proposals and interviews with up to three of the highest ranked

Project Delivery Options

continued

Educational Facility Construction Manager at Risk - continued

- Evaluations and rankings based on criteria in NMSA §13-1-124.1(H): offeror's experience with similar projects; qualifications and experience of personnel and consultants and the roles of each; plan for management of the project, including safety; experience with construction manager at risk method of project delivery; other criteria stated in the RFQ and RFP
- Recommendation made for selection of offeror that will be the most advantageous to the governing board
- If the governing board is unable to negotiate with the highest ranked offeror recommended for selection, it can proceed to negotiate with the second, then third ranked offeror
- After a contract is awarded, names of offerors, rankings and evaluation scores shall be public information. Offerors interviewed, but not selected, are notified in writing within 15 days after award
- PSFA has a CM at risk form of contract that can be adapted for use by a district for projects that are not funded by PSCOC

Bids or Proposals

- **Competitive Sealed Bids NMSA §§13-1-102 through 110**
 - Among responsible and responsive bids, price is the determining factor (Base bids and alternates)
 - Bids are public information once opened
 - Objections can precede award decision (e.g., licensing, non-responsive bid)
- **Competitive Sealed Proposals NMSA §§13-1-111,112**
 - Authorized for contracts for construction and for facility maintenance and repairs. Criteria for evaluation in the RFP, which include more than price, e.g., price, experience, project management plan, key personnel qualifications, etc.)
 - Design-build projects (except for projects subject to the special rules application to projects not exceeding \$400,000 and with limited requirements for design services, which must be bid)
 - Construction Manager at Risk
- **Notice and Advertising Requirements for Both**
- **Include form of contract in RFB or RFP**

Subcontractor Bid Protections

Subcontractor Fair Practices Act. NMSA §§13-4-31 through 42

- Contracts for streets, highways, bridges and underground utilities are exempt.
- Subcontractor Listing. All solicitations must include listing threshold for listing subcontractors of \$5,000 or .5% of the estimated project cost, whichever is greater.
- Substitutions of listed subcontractors limited, consent to substitution may be granted by the school district under the following circumstances: (1) after reasonable opportunity a listed subcontractor refused to sign a subcontract, (2) listed subcontractor becomes bankrupt or insolvent, (3) if the bidding documents reserved the school district the right to approve subcontractors, the district refuses to approve the subcontractor, (4) listed subcontractor fails or refuses to perform its subcontract, (5) contractor demonstrates that the listing was a clerical error, (6) a bid alternative accepted by the district causes the listed subcontractor bid to not be low, (7) contractor substantiates that the listed subcontractor's bid was incomplete, (8) listed subcontractor fails or refuses to meet the bond requirements of the contractor, (9) listed subcontractor does not have required license, and (10) listed subcontractor was not registered with Work Force Solutions when the contractor conditionally accepted its bid.
- Failure to list subcontractor in excess of listing threshold is a violation of the Act (and basis for rejecting the bid) unless the contractor states (i) no bid was received or only one bid was received and (ii) contractor is qualified and licensed to do the subject portion of the work himself and he will perform that work. If after award, the contractor subcontracts that work, it is a violation of the Act.

Bonding

- Performance and payment bonds required on all contracts in excess of \$25,000 by State law. NMSA §13-4-18
 - Bid/proposal must be rejected if the required bonds are not provided.
 - Surety issuing the bonds must be authorized to do business in New Mexico and approved on Federal Circular 570 (or approved by State Board of Finance or Board of Education).
 - Penal sum on bonds equal to contract price, except CPO may reduce the amount prior to solicitation to not less than 50% of the contract price if the CPO determines that it is in the best interest of the school district to do so based on an evaluation of (i) the value and number of subcontracts and (ii) the value of the contract.
- Local requirements for payment and performance bonds on contracts of \$25,000 or less are at the discretion of the school district. Requirements should be included in district policies adopted by the Board of Education.

Contractor Insurance Requirements

Contractor should be required to provide the following insurance:

- Commercial general liability insurance with coverage not less than \$_____ per occurrence and \$_____ in the annual aggregate (using ISO Form GC ISO CG 00 01 04 13 or equivalent approved by the district) with the State of New Mexico, the _____ School District, the Board of Education of _____ and their respective agents and employees named as additional insureds by endorsement as to both on-going and completed operations, using endorsements ISO CG 20 10 04 13 and ISO CG 20 37 04 13, or equivalent approved by the district. A general requirement to be named additional insured is not sufficient. The policy shall be endorsed to provide that the coverage afforded the additional insureds is primary and non-contributory by endorsement ISO CG 20 01 04 13 or equivalent approved by the District. If actual policy limits are higher than required, additional insurance coverage will be limited to the amount required by the contract.
- Worker's Compensation insurance meeting statutory requirement and Employer Liability Insurance in the amount of \$_____ combined single limit.
- Business or Commercial Automobile Insurance in the amount of \$_____.
- Coverage amounts should be developed as a matter of district policy, in consultation with insurance advisors and may vary by project scope and contract price. Acceptable for coverage requirements to be met with a combination of primary and excess liability insurance.

Contractor Insurance Requirements

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- If the contract is design-build or contains a requirement that certain portions of the work are provided on a design-build basis such as the fire suppression system or retaining walls, require that the contractor maintain Errors and Omissions Liability Insurance (design liability is excluded from coverage under a CGL policy). District cannot be named as additional insured under an E & O policy.
- Require proof of insurance in the form of certificates of insurance WITH copies of the declaration page from each policy and required endorsements, or actual copies of policies. A certificate of insurance is not proof of the existence and terms of liability insurance.
- Be aware of outdated insurance requirements in contract form such as “comprehensive liability insurance” or “public liability insurance” or separate limits for personal injury and property damage.
- Do not include any limitation of liability or waiver of consequential damages clauses in the construction contract. Such clauses limit recovery from the contractor and its insurers and limit coverage under any indemnity of the district by the contractor, which may be in the contract.
- There are special insurance requirements applicable to work performed within 50 feet of railroad tracks (and coverage for such work is excluded from coverage under standard commercial general liability insurance policies). Call an expert if this comes up on any of your projects.

Public Works Minimum Wage Act

NMSA §13-4-11 through 17

- Every construction contract in excess of \$60,000 shall require state minimum wages and benefits to be paid to various classes of laborers and mechanics (construction workers).
- Wage determination from Work Force Solutions. (District must request wage determinations not less than three (3) weeks before advertising the RFB or RFP.)
- Wage determination is included in RFP or RFB and contract, and posted at the job site.
- In order to submit a bid or proposal on a public works construction contract greater than \$60,000, as a prime or subcontractor, the contractor must be registered with Work Force Solutions.
- Solicitation documents and contract must include the requirement that the contractor submit certified weekly payrolls to the school district bi-weekly in accordance with NMAC §11.1.2.9.
- Contractors and all contracting tiers (subs) on projects must file a statement of intent to pay prevailing wages (intent), and an affidavit of wages paid (affidavit). The intent form must be filed with the contracting agency within three (3) business days of the award of each respective contract. Payments cannot be made to a non-compliant contractor until an intent form is filed. NMAC §11.1.2.9(C)

USE OF FORM CONTRACTS OR CONTRACTOR PROPOSALS

- There are a number of form contracts available, but none are adequate for use by a school district without modifications to comply with applicable law and may contains provisions that are contrary to New Mexico law:
 - Indemnification by the district
 - Warranties made by the district
 - Payment of advances or “down-payments”, in violation of the Procurement Code
 - Payment terms that do not comply with the Procurement Code §13-1-158 NMSA(Certification for payment by Central Purchasing Office, not architect, within 15 days unless otherwise agreed, payment within 30 days of the certification)
 - No or insufficient bonding requirements
 - No provisions governing prevailing wages/certified payrolls

USE OF FORM CONTRACTS OR CONTRACTOR PROPOSALS

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- Lacking provisions that protect the district as owner:
 - No damages for delay clauses (of PSFA modified version) that prevent the contractor from claiming additional compensation for delay in completion not caused by the owner's interference
 - Liquidated damages for delay payable to the District in the event that the project is not completed on time
 - No enforceable schedule for completion (contractor not in default until it fails to achieve completion on the indicated date even if months behind for a long period of time)
 - Inadequate provisions regarding default and termination (for cause and without)
 - Alternative dispute resolution provision that may not be acceptable or may be too expensive
 - No provision to recover attorneys' fees and costs in the event of arbitration or litigation

USE OF FORM CONTRACTS OR CONTRACTOR PROPOSALS

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- Contractor proposals usually inadequate even as description of the scope of work
 - “Short-hand” descriptions can lead to disputes; better to have the proposal terms “translated” by a knowledgeable staff person or consultant who can flesh out all of the necessary descriptions and specifications
 - Adverse terms often included:
 - Confusion of the contractor’s warranty and correction obligations; the obligation to correct defective work should be for a period of one (1) year or more; the contractor’s warranty that the work will conform to the contract documents (plans and specifications) is not time limited, and can be enforced within the applicable statute of limitations period.
 - Provisions limiting the time period in which a claim may be made, shorter than the statute of limitations period
 - Waivers of claims

Construction Contract Claims

- Most common claims are:
 - Claims for extension of time and to delay damages
 - Owner's or architect's interference with the progress of the work (or the contractor's right to complete the work early)
 - Claims for compensation for additional work
 - Interest and other damages related to late payment (Prompt Pay Act)
- Mitigation of claims:
 - No damages for delay clause (or PSFA modified version)
 - Require review of plans prior to pre-bid conference and consider an affidavit that the contractor has reviewed the plans and determined, as a general contractor and not as a design process, that they are sufficient for construction of project except for any matters covered by RFI's submitted at the pre-bid conference.
 - Have a detailed schedule for completion of the work (e.g., Gantt chart) with a clear delineation of critical path items. Consider interim completion dates.
 - Require that a claim for additional time be supported by proof that the contractor was prevented from completing critical path items due to a force majeure event.
 - Invest in project management and on-site oversight.
 - Avoid unmodified AIA, AGC (Consensus docs) or other form contracts. Modifications are required to protect the district and to delete provisions prohibited under NM law.
 - Be mindful of purchases through cooperative procurements, e.g., address warranties.
- Mediation, Arbitration or Litigation of Claims – the good and bad.

Indefinite Quantity Construction Contracts (Price Agreements – On Call Construction Services)

- Requires sufficient standards and specifications for items of construction services to be procured
- RFB (Competitive Sealed Bids §13-1-110); RFP (Competitive Sealed Proposals §13-1-111(B))
- Competitive Sealed Proposals – negotiations; best and final offer §13-1-115)
- An RFP and a Proposal may make a pricing agreement, but do not make a construction contract
 - Specific scope of work/plans for quantity of services ordered required
 - General Requirements:
 - Performance bonds (contractor and major subcontractors (\$25,000 or more)
 - Prevailing wages/certified payrolls
 - Proof of current insurance
 - Schedule/completion date(s)

MULTIPLE SOURCE AWARDS

- Multiple Source Awards
 - Shall not be made when a single award will meet the school district's needs without sacrifice of economy or service
 - Require a determination that multiple source awards are necessary for adequate delivery or service, including a written determination stating the reasons for the multiple source award. NMSA §§13-1-153, 154
 - Multiple source awards must be based on the lowest responsible bid or proposal in each geographical area
 - Only state agencies may enter into multiple source indefinite quantity construction contracts for multiple projects. School districts are not given this authority under the Procurement Code. NMSA §13-1-154.1

Multi-Term Construction Contract

§13-1-150 NMSA

- Limitations would be applicable to Indefinite/On Call Construction Contracts
- Contract must include term, and conditions of renewal or extension must be included in the specifications
- Maximum Terms for Construction
 - 4 years for contracts in an amount less than \$25,000 (initial term plus 3 renewals)
 - 8 years for contracts of \$25,000 or more (initial term plus 7 renewals), except for guaranteed utility savings contracts made pursuant to Public Facility Energy Efficiency and Water Conservations Act, which have a maximum term of 25 years)
- Requires determination that requirements are reasonably firm and continuing and contract will serve best interests of the school district
- Contract must include a non-appropriation clause affecting renewal terms in subsequent fiscal years

Delegation of Contracting Authority

- Which statute governs?
- NMSA §22-5-4 (A local school board shall have the following powers or duties ... except for expenditures for salaries, contract for the expenditure of money according to the provisions of the Procurement Code)
- NMSA §13-1-95.2 (On and after July 1, 2015, only certified chief procurement officers may do the following (1) make determinations, including determinations regarding exemptions, pursuant to the Procurement Code; (2) issue purchase orders and authorize small purchases pursuant to the Procurement Code; and (3) approve procurement pursuant to the Procurement Code)
- How far can a CPO go without delegated contracting authority?
- How best to document lines of authority (Board and Central Purchasing Office policies)