

PUBLIC VS PRIVATE PROJECTS

Business Retooling

diversify to thrive in times of uncertainty

By Danielle Waltz and Alexis Hailpern

Although deemed an “essential business” by many states, the construction industry is evolving in conjunction with a pandemic and increased market volatility leaving construction companies wondering what is next or where business will take them. Now is the time for those in the construction industry to abandon a specialization in strictly private projects or strictly public projects. The shift from private projects to public works can be intimidating; nevertheless, most public works projects considered essential during the pandemic will continue whereas private projects are at a greater risk to shut down.

Damage to the construction industry during the first half of 2020 was unmistakable. Overall, the industry plunged 22 percent below the first half of 2019, yet public bidding opportunities remain available in abundance. In early June, Dodge Data and Analytics found that there were more than 500 public bidding opportunities in California, Texas, Florida, Illinois, Ohio, Pennsylvania, and New York alone.

Diversifying your ability to bid on both public and private projects ensures that your business is open to every opportunity. This article examines the

differences between public and private projects to assist those considering expanding their reach across the public-private lines. The article will also examine certain relevant preferences that may assist in obtaining public projects.

BIDDING PROCESS & PROTESTS

Private bidding is a quality-driven procurement while public bidding is far more competitive, often driven by cost dictated by governments with budget deficits. In a private project, the owner, on the advice of its design professionals, selects who it wants to work with based on factors that which the owner deems as a priority. A private project owner also has the prerogative to bid-shop and negotiate with its contractor.

Public bidding is regulated to ensure fair competition. Most states have enacted statutes on competitive bidding. Colorado calls on government employees to adhere to the “highest standards of ethical behavior” relative to procurement. Likewise, West Virginia implements personal liability for those state employees who violate procurement procedures.

FINANCIAL IMPLICATIONS

Profit margins are generally higher on private projects. Because public projects

generally award to the lowest bidder, the private-project bidder can include a higher profit margin into its bids without the risk of price disqualification. On the other hand, there is more confidence in getting paid when procuring a public contract. The government pays, just not always timely.

Bonding requirements add cost to a project. The Miller Act, applicable to federal public jobs, requires contractors to post several different bonds. Before a contract of \$100,000.00 or more is awarded, a construction company must furnish a performance bond and a payment bond. The bonds must provide coverage for taxes.

CONTRACT NEGOTIATIONS

Under principles of contract law, private contracts are negotiable. Public contracts are often non-negotiable. If the terms of a public contract are unsettling, nothing typically can be done about it. For example, in most instances, states have a boilerplate contract that must be signed when performing work on highway projects. Regardless, it is important to have an attorney review a public contract to make sure that the terms can be adhered to and that the contract is as fair as possible. Public contract term negotiations can be

initiated, but a realistic understanding of the outcome is important.

PREFERENTIAL DESIGNATIONS

To bring diversity and inclusion to the construction industry, states and the federal government offer advantageous bidding consideration to those businesses with certain designations and certifications. Obtaining designations and certifications avails a construction company to greater opportunities, including preference in bid selection. Some companies, simply because of ownership and demographic, will not qualify for certain designations, but doing business with companies that have designations will help those unqualified businesses “score” better when applying for grants and contracts.

In 1983, Congress enacted the Disadvantaged Business Enterprise (DBE) Program. DBE requires the U.S. Department of Transportation to award at least 10 percent of federal funds designated for transit projects to DBE qualified businesses. To be certified as a DBE, a business must have at least 51 percent ownership and control by a woman, minority, disabled person, or veteran who physically resides in the United States and can prove economic disadvantages.

The Minority Business Enterprise (MBE) certification also requires that a business be owned and controlled at least 51 percent by a member of an identified minority group who is a U.S. citizen. MBE is similar to the DBE, but a business does not have to be certified by the government to receive the designation. The National Minority Supplier Development Council, for example, is one of the largest MBE certifiers in the United States. The programs differ in that MBE requires citizenship while DBE requires residency.

The Women-Owned Small Business (WOSB) program was established by the Small Business Administration. The program calls for the federal government and its agencies to award at least 5 percent of all industry dollars to businesses designated

Diversifying your ability to bid on both public and private projects ensures that your business is open to every opportunity.

as WOSB. To be eligible for the WOSB, a business must be a small business, but at least 51 percent must be owned and controlled by a woman who is U.S. citizen and manages the day-to-day operations of the business while possessing long-term decision making power.

CLOSING THOUGHT

As things change in an unprecedented world, construction businesses may need to make changes as well to maintain revenue stream. Diversifying the abilities of your team and your projects can open doors in both the private and public sector. Although crossing the private-public lines may appear intimidating, your business will have an ability to thrive even in difficult times. Now

may be the time to at least transition of portion of your business to public projects. ■

about the authors

Danielle Waltz is a commercial and construction litigator and government relations specialist in Jackson Kelly PLLC's Charleston, West Virginia, office, where she is a member. She represents a variety of construction clients. She is a member of the International Association of Defense Counsel (IADC) and is active in its Construction Law and Litigation Group. She can be contacted, via e-mail at dwaltz@jacksonkelly.com. Alexis Hailpern is a commercial attorney in Jackson Kelly's Denver Office. She represents a variety of construction professionals. She can be contacted via email at alexis.hailpern@jacksonkelly.com.

Poseidon Barge offers a complete line of 7ft tall barges and accessories.



RAKE



P2-7
SECTIONAL BARGE



HOPPER

Patented Heavy Duty Roll Form, HSLA Steel Deck Construction with 20,000 psf Concentrated Load Capacity

Basic Stability Analysis included with quote! Call today: 866-992-2743

Visit www.poseidonbarge.com for stock locations and other information