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June 6, 1996

Rudy Serino
Director
Arizona Department of Administration
1700 West Washington, Room 210
Phoenix, Arizona 85007

Re: 196-007 (R96-020)

Dear Director Serino:

You have asked whether the Arizona Department of Administration ("ADOA") has authority to procure design-build construction services through the use of competitive sealed proposals for the selection of a contractor/architect team under emergency procurement conditions. Although Arizona law normally requires that architectural and construction services be procured separately and prohibits the use of the competitive sealed proposal method when awarding construction contracts, we conclude that ADOA does have authority to award a combined design-build construction services contract using competitive sealed proposals in a true emergency situation involving an unexpected and unforeseen event that, among other things, threatens public health, welfare, or safety, or that renders the proper procurement process impracticable, unnecessary, or contrary to the public's interest. We then use your example of the proposed construction of an 800-bed prison facility for the Arizona Department of Corrections ("ADOC") at the Yuma Dakota Prison to review some of the factors that must be weighed in determining whether an actual emergency exists.

Background

You indicated that, in order to meet ADOC's prison construction schedule, it may be necessary for ADOA to contract for the construction of an 800-bed prison facility at the Yuma Dakota Prison using a combined design-build construction contract with a single entity rather than using separate contracts for an architect to design the prison and a contractor to build the prison. You estimated that four to six months may be saved in the construction schedule by using the design-build process.

You also indicated that design-build construction differs from more traditional methods, because the contract jointly binds a construction company and an architect as the one entity responsible for the entire construction project. Under a design-build construction contract, the architect provides services directly to the contractor rather than to the owner of the facility being built. Another difference you noted is that the design-build team is paid on a cost plus fixed fee basis, and not on a firm fixed price basis. The construction costs could be limited by a fixed ceiling, possibly with incentives for cost reductions and early completion. You further indicated that ADOA believes that certain benefits may result from using the design-build method of construction, including faster construction and a reduction in construction costs.

Analysis

A. Arizona's Procurement Code Normally Requires That Contracts for Architectural and Construction Services Be Awarded Separately, Using Two Distinctly Different Processes.

In 1984, the Legislature enacted the Arizona Procurement Code, A.R.S. §§ 41-2501 to -2662. 1984 Ariz. Sess. Laws, Ch. 251. The Legislature identified eight reasons for enacting the Procurement Code, including to "[e]nsure the fair and equitable treatment of all persons who deal with the procurement system of this state," "maximize to the fullest extent practicable the purchasing value of public monies of this state," "[f]oster effective broad-based competition within the free enterprise system," and "[p]rovide safeguards for the maintenance of a procurement system of quality and integrity." *Id.* § 1.

To accomplish these purposes, the Legislature has required that "all state contracts shall be awarded by competitive sealed bidding as provided in § 41-2533," unless otherwise specifically authorized by another statute. A.R.S. § 41-2532. One such alternative statute is A.R.S. § 41-2534, which allows competitive sealed proposals to be used in certain circumstances. However, A.R.S. § 41-2534(A) provides that "the competitive sealed proposal method may not be used for construction contracts." (Emphasis added.)

Another alternative statute relevant to your inquiry is A.R.S. § 41-2578, which requires that "[a]rchitect [and] engineer . . . services shall be procured as provided in this section except as authorized by §§ 41-2535 [procurements under \$25,000], 41-2536 [sole source procurements] and 41-2537 [emergency procurements]." Section 41-2578 then sets forth the procedures for awarding professional services contracts to architects, engineers, and other designated professionals. The process in § 41-2578 involves consideration of items other than price alone, such as the professional firm's "demonstrated competence and qualifications for the types of services required," which shall be reviewed by "an appropriately qualified

selection committee for each contract" that will conduct discussions with at least three professional firms regarding the contract. A.R.S. §§ 41-2578(B), (C).

Therefore, the Arizona Legislature has determined through the Procurement Code that construction contracts normally will be awarded to the lowest bidder in a competitive sealed bidding process governed by A.R.S. § 41-2533, whereas an architectural services contract normally will be awarded to the "highest qualified firm" through the competitive process set forth in A.R.S. § 41-2578.

B. The Procurement Code Recognizes the Need for Limited Flexibility
in True Emergency Situations.

Because A.R.S. § 41-2534 prohibits ADOA from using competitive sealed proposals for construction and A.R.S. § 41-2578 provides specific requirements for the selection of architects, under normal circumstances Arizona law prohibits the selection of a design-build construction team through the use of competitive sealed proposals.¹ However, as noted earlier, A.R.S. § 41-2578, which controls the award of architectural services contracts, expressly permits the use of alternative procedures under emergency conditions. Section 41-2537, A.R.S., excuses ADOA from complying with A.R.S. § 41-2534 under the following circumstances:

Notwithstanding any other provision of this chapter, the director [of ADOA] may make or authorize others to make emergency procurements if there exists a threat to public health, welfare, or safety or if a situation exists which makes compliance with § 41-2533 or 41-2534 impracticable, unnecessary or contrary to the public interest as defined in regulations promulgated by the director, except that such emergency procurements shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the

¹ Our conclusion that the Procurement Code does not authorize ADOA to use the design-build construction method is supported by the Legislature's recent failure to pass HB 2404, which would have granted ADOA such authority. See HB 2404, Second Regular Session (1996) of the Arizona Legislature. In contrast, the Legislature granted the Arizona Department of Transportation ("ADOT") the authority to procure design-build construction of transportation facilities under emergency circumstances, authorized ADOT to use design-build in two pilot projects not involving emergencies, allowed certain counties to use design-build construction on a one-time pilot program, and established a Joint Legislative Study Committee on Design-Build Contracting. 1996 Ariz. Sess. Laws, Chap. 146. The provisions relating to pilot programs for ADOT and the counties set forth a two-step competitive process for awarding such contracts.

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particular contractor shall be included in the contract file.

In implementing A.R.S. § 41-2537, ADOA has promulgated a rule, A.A.C. R2-7-339, which provides:

A. An emergency condition may arise from, but is not limited to, floods, epidemics, riots, or equipment failures. An emergency condition creates an immediate and serious need for materials, services, or construction that cannot be met through normal procurement methods and that seriously threatens the functioning of state government, the preservation or protection of property or the health or safety of any person.

B. An emergency procurement shall be limited to those materials, services, or construction necessary to satisfy the emergency need.

If the prerequisites of the statute and rule are satisfied, ADOA could invoke the emergency procurement provisions to bid a construction project without following the requirements of A.R.S. §§ 41-2534 and -2578.

Although ADOA has discretion to dispense with the requirements of A.R.S. §§ 41-2534 and -2578 in true emergency conditions, that discretion is severely circumscribed. The statute, A.R.S. § 41-2537, requires the existence of a "threat to public health, welfare, or safety" before ADOA may invoke emergency procurement procedures. ADOA may invoke the rule, A.A.C. R2-7-339, to dispense with certain procurement requirements only when their application would be "impracticable, unnecessary or contrary to the public interest." A.R.S. § 41-2537. By way of example, the rule then specifies certain situations in which an emergency may arise, including floods, epidemics, riots, or equipment failures. In citing those examples, the rule effectively emphasizes that emergencies involve sudden and unforeseen events for which advance planning is difficult if not impossible.

The Procurement Code and related rules do not define the term "emergency." However, Arizona case law has defined "emergency." In *LeFebvre v. Callaghan*, 33 Ariz. 197, 205, 263 P. 589, 592 (1928), the Arizona Supreme Court found "emergency" to include two factors: (1) being unexpected and (2) requiring immediate action. In *LeFebvre*, the court distinguished situations in which a bridge is washed out again because of seasonal torrential rains from situations in which damage is caused by disastrous floods, the magnitude of which could not reasonably have been anticipated. The former, according to the supreme court, does not constitute a true emergency. Almost twenty years later, in *Garvey v. Trew*, 64 Ariz. 342,

354, 170 P.2d 845, 853 (1946), the court reaffirmed this view when it observed that “[t]he word emergency has a well understood meaning. It is defined and understood as: ‘An unforeseen combination of circumstances which calls for immediate action.’” *See also Hunt v. Norton*, 68 Ariz. 1, 11, 198 P.2d 124, 130 (1948) (The term “emergency” means “‘a sudden, unexpected, and unforeseen condition or occurrence in municipal affairs of such public gravity and exigency as to require *forthwith* municipal action. . . .’ ‘Emergency’ does not mean expediency, convenience, or best interests.”) (emphasis in original).

The Legislature recently expressed its understanding of what constitutes a true “emergency” in the design-build context when it enacted A.R.S. § 28-1811:

In this article, unless the context otherwise requires, ‘Emergency’ means an immediate threat to public health, welfare or safety caused by flood, earthquake, hurricane, tornado, explosion, fire or other catastrophe such that compliance with normal bidding procedures for repair or reconstruction of transportation facilities would be impracticable or contrary to public interest.

1996 Ariz. Sess. Laws, ch. 146, § 1 (emphasis added).² Finally, WEBSTER’S THIRD INTERNATIONAL DICTIONARY 741 (1993) defines “emergency” as “an unforeseen combination of circumstances or the resulting state that calls for immediate action.” *See also* BLACK’S LAW DICTIONARY 522-23 (6th ed. 1990) (“Emergency. A sudden unexpected happening; an unforeseen occurrence or condition; perplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity. Emergency is an unforeseen combination of circumstances that call for immediate action without time for full deliberation.”).

The existence of an emergency situation, however, does not necessarily justify dispensing with the formal procurement process. Under the emergency condition rule, the procurement officer must also find that the emergency creates “an immediate and serious need for materials, services or construction” and that a delay would threaten “the functioning of state government, the preservation or protection of property or the health or safety of any person.” A.A.C. R2-7-339(A). Procurements under A.R.S. § 41-2537 are limited to those services, materials, or construction needed to address the emergency conditions and for only

²This definition, which appears in the Transportation Code and begins with the limiting statement that it applies “[i]n this article,” does not control the emergency procurement statute in the Procurement Code, A.R.S. § 41-2537, which begins with the qualifier “Notwithstanding any other provision of this chapter. . . .” However, the definition in the new § 28-1811 does provide some guidance, including the Legislature’s view that an emergency procurement can be used for “repair or reconstruction” but not initial construction.

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as long as justified under the circumstances. A.A.C. R2-7-339. In addition, "such competition as is practicable" still must be used in the emergency procurement situation. A.R.S. § 41-2537.

C. Sampling of Factors to Consider in Deciding Whether a True Emergency Exists.

You did not request an opinion on whether a true emergency exists with respect to the proposed construction of the 800-bed prison facility at the Yuma Dakota Prison, and it would be inappropriate for a formal opinion to be issued on such a fact-intensive situation. Nevertheless, we believe using the situation you posed in your letter as an example might provide useful guidance to other procurement officials by reviewing the types of factors that should be considered in determining whether a true emergency situation exists that would justify invoking A.R.S. § 41-2537. We trust that procurement officials will meet with their assigned assistant attorneys general before invoking the emergency procedures, because the consequences can be substantial if the procedures are used improperly. For example, unless an actual emergency exists, a design-build procurement would be vulnerable to legal challenge that could delay construction much longer than the few months the procurement official is trying to avoid.

In assessing whether the design-build method may be utilized to construct the Yuma correctional facility, ADOA must assess whether an actual emergency exists. The issues that should be considered include whether the need for the additional beds was reasonably foreseeable or suddenly manifested itself. For example, consideration must be given to when the Legislature appropriated funds for building the facility and how quickly the appropriate agencies mobilized to expend those funds. Similarly, if the demand for prison space has been a chronic problem and not the result of unforeseen circumstances, such as the loss of an existing facility through fire or vandalism, it may be difficult to justify an emergency procurement. *Cf. LeFebvre*, 33 Ariz. at 203, 263 P. at 540. Also, the procurement officer must be able to prove that a delay of four to six months would jeopardize the public's health, welfare, or safety (and, that design-build would eliminate that four-to-six-month delay). Of course, other factors must be considered depending on the specifics of the given circumstances. Again, consultation with the assigned attorney could help develop other practical considerations (*e.g.*, how the Legislature will react to an agency using design-build for initial construction just after the Legislature refused to grant that agency such authority and just after the Legislature authorized another agency to use design-build in "catastrophic" conditions, and then only to repair or reconstruct rather than for initial construction).

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Conclusion

In summary, Arizona's Procurement Code permits ADOA's Director to dispense with the strict requirements of A.R.S. §§ 41-2534 and -2578, but only under emergency conditions that involve a sudden, unexpected, and unforeseen event that jeopardizes the public's health, welfare, or safety and under circumstances that make the formal procurement process impracticable, unnecessary, or contrary to the public interest.

Sincerely,



Grant Woods
Attorney General