

Written Testimony of Pennsylvania Department of Transportation
Cheryl Moon-Sirianni, Executive Deputy Secretary

Pennsylvania House Transportation Committee
Hearing on Emergency Proclamation and Design Build Best Value

August 8, 2023

Chair Neilson, Chair Benninghoff, and members of the House Transportation Committee, on behalf of Secretary Mike Carroll, and the Pennsylvania Department of Transportation (PennDOT), I would like to thank you for your interest and focus on these important topics. As you are aware, during PennDOT's operations, we encounter numerous expected and unexpected challenges. To best meet those challenges, PennDOT employs a diverse set of procurement and contracting tools. Today, I will discuss some of the Department's current tools, as well as another tool that would greatly benefit PennDOT operations—Design Build Best Value.

Emergency Proclamation

PennDOT averages about 30 highway construction emergency procurements per year, ranging from \$100,000 to several million dollars. Events that could trigger an emergency proclamation include bridge strikes (when oversized equipment hits a beam on a bridge), landslides or flooding from rainfall, accelerated pavement and joint deterioration, and sinkholes. Often, these events do not happen during regular business hours.

Pursuant to the provisions of Section 516 of the Commonwealth Procurement Code, Act No. 1998-57, the Secretary "may make, or authorize others to make, an emergency procurement when there exists a threat to public health, welfare, or safety, or circumstances outside the control of the agency create an urgency of need which does not permit the delay involved in using more formal competitive bidding methods."

Many emergencies are life-threatening and require that PennDOT act quickly and efficiently. In those cases, PennDOT will hire a nearby contractor with demonstrated capabilities to perform the work.

PennDOT also works closely with the Federal Highway Administration (FHWA) to obtain emergency contracting approvals to ensure continued eligibility of federal assistance funding. Guidelines for staff to timely and accurately request federal funding from the two sources available for emergency repairs are outlined in PennDOT's Disaster Recovery Manual, Publication 550.

Federal Emergency Management Agency (FEMA) funds are for non-Federal-Aid routes. Under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Public Law 93- 288, as amended and Title 44 of the Code of Federal Regulations, the Public Assistance Program (PA) provides supplemental aid to States and communities to help them recover from

major disasters as quickly as possible. Specifically, the program assists in the removal of debris, the implementation of emergency protective measures, and the restoration of public infrastructure. The program also encourages protection from future damage by assisting with mitigation measures during the recovery process. FEMA money is only available to the Commonwealth after the President issues a major disaster declaration for the affected area, and the Commonwealth has proven that disaster damages meet or exceed the minimum damage thresholds established by FEMA. To be eligible for a federal major disaster declaration the Governor must activate the state emergency operations plan, certify that the incident is of such severity and magnitude that effective response is beyond the capabilities of the Commonwealth, and assume all non-federal share costs associated with the response and recovery.

FHWA Emergency Relief (ER) money is a more typical resource for the Department for Federal-Aid routes. In Title 23, United States Code, Section 125, Congress authorized a special program from the Highway Trust Fund for the repair or reconstruction of Federal-aid highways and roads on Federal lands which have suffered severe damage as a result of (1) natural disasters, or (2) catastrophic failures from an external cause. This program, commonly called the Emergency Relief or ER Program, supplements the commitment of resources by States to help fund hefty expenses resulting from extraordinary conditions. ER money is not intended to fund repairs of preexisting damage or non-disaster related damage, such as inherent deficient conditions. To unlock ER money, either the Governor or the President must declare an emergency, obtain FHWA approval of the disaster and must meet a minimum damage threshold of \$700,000.

In the repairs of both the Fern Hollow Bridge here in Pittsburgh, and I-95 in Philadelphia, the Department utilized the emergency procurement procedures. This resulted in a streamlined process and concerted effort between the contractor and designer to develop and construct the highways and bridges that were damaged or destroyed. The increased flexibility offered by the emergency declarations have been instrumental in repairing these bridges safely and efficiently.

Design Build Best Value

During emergency situations, PennDOT has benefited from close collaboration between the design team and the contractor, which often leads to a team synergy that is conducive to spurring innovation and determining skilled solutions to project challenges. During today's hearing, I would like to share some of the benefits of another method of contracting, Design Build Best Value, or DBBV. PennDOT remains confident that DBBV will be a valuable added tool, even without an emergency situation.

DBBV procurement allows a project owner to obtain services from design build firms and contractors where price is not the only criterion for selection. It is an alternative to traditional "low bid" contracting that considers the quality of the design build team and their technical proposal in addition to price. The benefits of DBBV procurement can include schedule acceleration, innovative design solutions, and better management of risk. And while DBBV

permits the selection of firms based on criterion other than cost, DBBV contracting can lead to long term cost savings (design, initial construction, and potential maintenance costs).

PennDOT previously attempted to utilize DBBV procurement in 2008; however, a challenge was filed in Commonwealth Court which argued that using a two-step procurement process to select a design build team was contrary to Section 512 of the Commonwealth Procurement Code. In this instance, the court issued a preliminary injunction stopping the procurement.

More recently, Representatives Stephens, Hennessey, and Mentzer proposed DBBV legislation during the summer of 2022 (House Bill 2747). I want to thank the Representatives for their interest in this procurement tool for PennDOT. While we had some concerns with HB 2747 as drafted and voiced these concerns along with the Pennsylvania Turnpike Commission (PTC), Associated Pennsylvania Constructors (APC), and American Council of Engineering Companies of Pennsylvania (ACEC/PA) at a House Transportation Committee Hearing on September 1, 2022, we appreciate the interest in pursuing this method of procurement.

Since last September's hearing, PennDOT, along with the PTC, APC, and ACEC/PA, have been working together to reach a consensus on the various elements related to DBBV procurement. In short, the issues that existed in 2022 were discussed, and agreement was reached by all parties on how they should be handled. Ultimately, we collaborated with these stakeholders and agreed upon what we would support in future DBBV legislation.

Those efforts produced an agreement between PennDOT and industry leaders to allow for both a one-step and two-step Design Build Best Value procurement process to be utilized by PennDOT and the PTC, with the ability for stipend payments and confidential Alternative Technical Concepts (commonly referred to as ATCs). We also determined that the use of DBBV should be limited to only a small number of procurements per year and that the Deputy Secretary for Highway Administration should be required to sign off on any use of this procurement tool.

PennDOT would benefit greatly from having DBBV as a tool in our toolbox; and would start using DBBV promptly once appropriate legislation is passed, beginning with the I-83 South Bridge in Harrisburg project.

According to a 2021 State Statute Report by the Design-Build Institute of America, Pennsylvania is one of only five states where design-build remains a limited option. We believe that is because currently, the only type of design-build procurement PennDOT utilizes for highway and bridge construction contracts is low-bid design build. However, design-build project delivery, including design build best value, is a procurement tool that is supported by the FHWA. FHWA established regulations for design-build contracting (23 CFR Part 636) in 2002 and promoted it through their Every Day Counts Innovations in 2011-2012.

Lastly, DBBV would complement PennDOT's existing programs that support the training of contractor's employees, such as our On-the-Job Training Program, which provides training

opportunities for minority, women, and economically disadvantaged individuals to advance them toward journey-level status in highway construction trades.

In conclusion, DBBV would allow PennDOT to advance the same creative and innovative efficiencies with project delivery that have been accomplished during emergency situations on a more regular basis.

Respectfully submitted,

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Pennsylvania Department of Transportation