

Testimony of the Associated Pennsylvania Constructors

**Bryon Breese, P.E. DBIA
Vice President
Trumbull Corporation**

Before

**House Transportation Committee
Public Hearing on Emergency Procurement and Design Build Best Value Procurement**

Tuesday, August 8, 2023

**Allegheny County Courthouse
436 Grant St, Pittsburgh, PA 15219**

Chairman Neilson, Chairman Benninghoff, and members of House Transportation Committee, thank you for the opportunity to testify and comment on methods aimed at streamlining the Commonwealth's procurement process for design and construction of transportation projects.

My name is Bryon Breese, vice president, Trumbull Corporation located at 225 North Shore Drive, Pittsburgh, PA 15212. I am representing the Associated Pennsylvania Constructors.

The Associated Pennsylvania Constructors (APC) is a trade association that unites more than 400 members including prime and subcontractors, consulting engineers, material suppliers, manufacturers, and others with an interest in Pennsylvania's road and bridge construction industry. The association has been serving the industry for nearly 100 years and represents the majority of actively bidding contractors in the Commonwealth's \$3 billion highway industry.

APC believes that, on a limited basis, an alternate method of bidding road and bridge construction work other than by low bid be permitted by statute. The association gathered experts from companies working in other states to suggest the best way to enable combining design and construction into one contract to give PennDOT and the PA Turnpike Commission another procurement tool. This would augment, not replace the current low bid system.

Currently, all contract construction work performed for PennDOT and the PA Turnpike Commission must be contracted solely by the low bid procurement method. This is established as the result of the 2011 Commonwealth Court decision in *Brayman v Commonwealth of PA*. (See Legal Note at the end of this testimony).

In certain instances, it is desirable for both the Commonwealth and the design and construction industry to combine procurement into what is known as Design Build- Best Value Procurement (DBBV). This procurement method allows certain qualifications to be considered when selecting a design and construction team to jointly complete a construction project. Some the potential benefits of this approach include:

Potential Benefits of Design Build Best Value Procurement

- Overall project timeline can be typically shorter.
- True concurrent activities may result in streamlined, cost effective projects.
- More collaboration between design and construction is achieved.
- Effective for complex projects.
- Less demand on owner resources.
- Risk sharing is greater between owner and contractor.
- Fewer work orders and often reduced claims and claims litigation.

Therefore, we believe legislation is necessary to permit the limited use of alternate procurement methods including what is known as Design Build- Best Value Procurement (DBBV).

APC Position on Design Build Best Value Legislation:

1. Legislation must place limits on the use of Design Build Best Value procurement.
2. DBBV projects should be of limited use for complex jobs which require innovation and benefit from alternative technical concepts.
3. A two-step process is strongly preferred because it both limits the costs and efforts in the upfront process, and then requires that a stipend be paid to the short-listed proposers to pay for at least some of the design costs necessary for a true DBBV project.
4. Use of one-step DBBV must be very limited in number of projects.
5. With the two-step process, interested proposers should get a chance to submit a technical and cost proposal even if not short-listed, with the understanding that the Statement of Qualification (SOQ) score may be utilized and that they may not receive a stipend.
6. Legislation should require Department/Owner to maintain a staff and have scoring committees familiar with DBBV processes.
7. There must be sufficient time from the date the project is advertised to allow teams to be assembled, and that those with inside knowledge do not have a material advantage,
8. If ATC's are to be considered, they must be kept confidential.
9. There must be a clear process through which the bid protest process contemplated by the Procurement Code can be utilized.
10. There must be some limitations on the total amount of the score that the qualifications and/or technical proposals can constitute.
11. There must be a sunset provision.
12. There must be an opportunity for ongoing industry input.

APC supports the proposed legislation as presented by the Department of Transportation. The association does not support any changes to this draft.

Drafting of this legislation included involvement from both design and construction firms who have successfully performed design-build projects throughout the nation in cooperation with the

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Department of Transportation and the Pennsylvania Turnpike Commission. Processes prescribed in the legislation are considered industry best practices from many different states Departments of Transportation. The legislation is limited to transportation design/construction procurement by PennDOT and the Pennsylvania Turnpike Commission.

We thank you for your consideration of this legislation.

LEGAL NOTE: *Brayman Construction v Commonwealth of PA*

In 2008, PennDOT decided to rebuild two bridges, one eastbound and one westbound, carrying Interstate 90 over Six Mile Creek in Erie County (the “Erie County Project”).

Rather than use the traditional method of hiring a design engineer and then bidding the project to prequalified construction contractors, PennDOT chose to procure the project using a Design Build Best Value selection process (DBBV).

In mid–August 2008, PennDOT short-listed three design-build teams based upon weighted criteria. Brayman Construction Corporation, together with the design firm of Drewberry–Goodkind, Inc., submitted a timely statement of interest to PennDOT for consideration but, ultimately, was not one of the short-listed teams.

Brayman Construction, filed in the Commonwealth Court a petition for review in the nature of a complaint and alleged that PennDOT's actions in using a two-step DBBV process to select a contractor for the Erie County Project was contrary to the Commonwealth Procurement Code. Brayman contended that the Code sets forth the system of competitive bidding required for all public construction jobs in the Commonwealth, and that it does not authorize PennDOT to use DBBV procurement for such undertakings.

Specifically, Brayman contended that Section 512 of the Code, 62 Pa.C.S. § 512, requires competitive sealed bidding except as otherwise provided in Section 511, which in turn refers to Section 513, which does not authorize a “best value” approach. Brayman stated, in this respect, that PennDOT's utilization of that approach results in an over-expenditure of public funds, as compared to the competitive sealed-bid process that the Code directs PennDOT to utilize.

In 2011, Commonwealth Court sided with Brayman, and the decision was upheld by the PA Supreme Court. As a result, PennDOT currently has an injunction against it based on the Brayman decision which permanently prohibits PennDOT from using a two-step design bid best value process, shortlisting, or any other innovative contracting method.

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