

# **Testimony of the Associated Pennsylvania Constructors**

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**Before**

**House Transportation Committee  
Public Hearing on HB 2747 Amending Title 62 - Procurement**

**Room G50 – Irvis Office Building  
Harrisburg, PA**

**September 1, 2022**

Chairman Hennessey, Chairman Carroll, and members of House Transportation Committee, thank you for the opportunity to testify and comment on HB 2747 aimed at streamlining the Commonwealth's procurement process for design and construction of transportation projects.

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 over 90 years and represents the majority of actively bidding contractors in the Commonwealth's \$2 billion highway industry.

The Associated Pennsylvania Constructors has been advocating for some time that, on a limited basis, an alternate method of bidding road and bridge construction work other than by low bid be permitted by statute. We have 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*. 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).

## **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.

### **Transportation Quality Initiative (TQI) Procurement Process Team**

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. The proposed legislation would under limited circumstances allow PennDOT and the Turnpike Commission to procure construction under this method of procurement.

In 2018, the Associated PA Constructors, along with PennDOT, PA Turnpike Commission, and ACEC-PA agreed to stand up a Total Quality Initiative (TQI) Procurement Process Team effort to explore Alternative Procurement Options for Pennsylvania. In 2019, as part of the TQI Procurement Process Team effort to explore Alternative Procurement Options for Pennsylvania, the team considered a potential framework for qualification-based selection and project delivery in the Pennsylvania transportation market that could potentially be acceptable to the agencies and the design and construction industry.

That effort has yet to come to fruition. However, components of HB 2747 were included in the TQI Team discussion and are drawn from best practices from many different states Departments of Transportation including Virginia, Maryland, North Carolina, Florida, Colorado, Ohio and other states.

The legislation is limited to transportation design/construction procurement by PennDOT and the Pennsylvania Turnpike Commission.

## **Overview of HB 2747**

The biggest concern of constructors when moving towards more “subjective” means of bidder evaluation is that the integrity of the bid process may be questioned. Smaller contractors would also argue that the more subjective factors used in evaluating bids will effectively shut them out of the market.

However, we believe that the bill, as drafted addresses these concerns and would enable greater efficiency and expertise to be considered for complex road and bridge projects. We believe this is positive for the taxpaying public and the design and construction industry.

## **Components of HB 2747**

“Limitations on Use” The Design Build Best Value method of procurement provided for in this subchapter shall be limited to a project or projects whose cumulative annual expenditures during the projects’ durations shall not exceed more than fifteen percent (15%) of the agency’s annual capital program.

“Complex Project” shall mean a stand-alone construction project with an estimated construction value of greater than fifteen million dollars (\$15,000,000) that includes unique characteristics that foster innovation, alternatives or a need for accelerated completion such as to make the use of Design Build Best Value contracting more advantageous to the Commonwealth than Competitive Sealed Bids.

“Innovative Contracting Division” – DBBV delivery and administration from the Department should be done by a dedicated staff a new Innovative Contracting Division reporting to the engineering leadership within Central Office to provide consistency between Districts.

Two Step Process: 1) Request for Qualifications and 2) Request for Proposals

In scoring any Statement of Qualifications submitted in response to a Request for Qualifications, the scoring committee for the agency shall consider the following criteria at a minimum: (1) similar projects designed by the design firm(s) included as part of the design build team (2) similar construction projects constructed by the contractor firm(s) of the design build team and (3) qualifications of the individuals that the design build team intends to assign to the project. The legislation establishes other qualification evaluation procedures. Based on those evaluations, the agency would then short-list the bidders to a lesser number.

For any offeror who submitted a Statement of Qualifications under the Request for Qualifications process but was not shortlisted by the Commonwealth agency, all such firms will not receive the stipend, but all such firms are eligible to submit proposals as part of the Second Step – Request for Proposals process. This is a key component of the bill because it overcomes the objections filed by the plaintiff in the *Brayman* case.

Following the shortlisting of offerors under this section, to the extent the Department or Commission is satisfied with the number of offerors who responded to the Request for Qualifications and the content of the Statements of Qualifications, the agency shall issue a formal Request for Proposals to all Design-Build Teams that submitted a Statement of

Qualifications in response to the agency's Request for Qualifications. The legislation establishes evaluation procedures for evaluating proposals from shortlisted offerors (bidders).

For each project, the Department or Commission shall develop a methodology for scoring Technical Proposals and Price Proposals, which methodology must be published in the Request for Proposal documents and may not be changed following receipt of RFP Responses. The criteria which may be considered by the agency in reviewing a Technical Proposal include: (1) compliance with applicable technical specifications and required design parameters, (2) ability to achieve project goals, ((3) innovative solutions, (4) design and construction Approach, (5) work plan, (6) project management including quality, safety, mobility, and environmental (6) other unique factors relevant to the project.

Price Proposals shall constitute no less than 50% of the score. (2) the Technical Proposal shall constitute the remainder of the score. In calculating the technical score, the owner shall consider the criteria listed above, and the owner shall also utilize the scores from the RFQ process. The scores from the RFQ process shall constitute between ten to twenty percent of the Technical Score.

“Design Build Advisory Committee” The legislation requires the General Assembly to establish a Design Build Advisory Committee to provide guidance and oversight. The Advisory Committee shall consist of members from owner agencies and industry associations representing construction and engineering companies operating in Pennsylvania.

The purpose of the Committee is to provide open communication between agencies and industry with respect to their mutual interest in improving and enhancing Design Build procurement in Pennsylvania. The Council shall provide an annual report to the General Assembly.

### **Potential benefits of Design Build Best Value Procurement**

Again, 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:

- 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

Again, drafting of this legislation included involvement from both design and construction firms who have successfully performed design-build projects throughout the nation. Processes prescribed in the legislation are considered industry best practices from many different states Departments of Transportation. We thank you for your consideration of this legislation.