

From: Jerry Valencia [bridgewaycontracting@yahoo.com]

Sent: Saturday, October 29, 2011 12:02 PM

To: SWANK Bob J

Cc: KLOEPEL George W; HOLVEY PAUL (LCOG List); Doug Whitsett Oregon Senate; HANNA Bruce (OR); STEWART Faye H; TORREY Jim (SMTP); David Steves Register Guard; Shaun Hyland; HANDY Rob M; LANCASTER Dianne * SSD SPO; Nord Tim Asst. A.G.; SORENSON Pete; LEIKEN Sid W; BOZIEVICH Jay K

Subject: Fw: Fwd: Written Input for Public Construction Contracting Work Group
To Robert Swank as Associate to the Director of LCOG,

I have notice for the Register Guard on Saturday, Oct. 29, 2011 on the public notice section that your asking for input on an exemption of ORS 279 public contracting laws to use the CM/GC process.

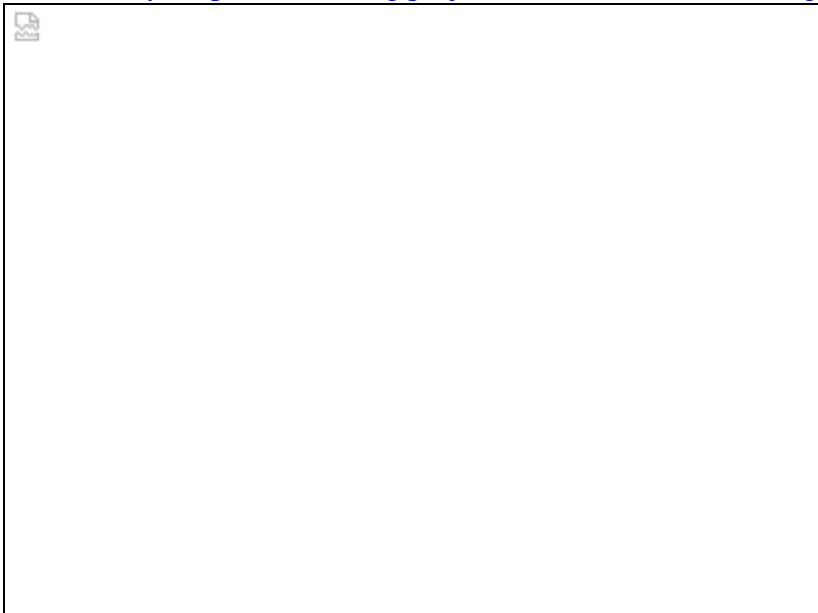
I would strongly suggest before you jump into a gray area of public contracting law. Please let the new state's commission finish its finding on issues of the exemption first. There was a great deal of back lash in Salem this year on the CM/GC issue! Your office will find on the commission's forum web page there is a ton of studies, research and case findings that caused the State of Oregon and DOJ to try and get a handle on this very subject...As you can note from below on the email that I forward to you, there is a lot of stakeholders involved in this touchy issue.

Just because LCC and the city of Eugene have fallen in love with the CM/GC...did not mean that as a public agency, they were following the intent of associated laws from the Oregon Dept. of Justice and Law makers in Salem.

Please Note these comments in your records from Dr. Gerry Williams who researched the issue:

- The current CM/GC approval process has not been handled in strict compliance with the original authorizing legislation, specifically:
 - The original ORS 279.103 required certain findings by the Contract Review Boards (CRB), then within a certain time following the completion of the project, a report submitted to DAS on the project's performance relative to those original findings.
 - The Department of Corrections, in my research, generally complied with the law; few if any other agencies did, at least back before 2003.
 - Most CRB's or their staff, simply parroted the wording in the statute, that they found there "would be significant savings" without any analysis or even notation of what those savings were and how they would be achieved. (A report from Central Oregon Community College was among the worse in this category.)
 - One University official told me that she used CM/GC because it allowed her to pick her contractor and it allowed her to eliminate contractors she didn't want to work with.
 - During my research, I contacted the Director of DAS, who was supposed to receive the 103 Post Hoc reports; at the time, she was unaware of the reports, the requirement that they be submitted to her department, if any had been submitted, or where I would find them. She directed me to the State Architect's office (which is under DAS). As a consequence, there was no central collection of the Post Hoc reports and no way to determine if the system being used was in compliance with the law.

- With fifty or more CRB's, there is currently no standardization for review and approval of alternative contracting methods in Oregon.
 - As I noted above, the Department of Corrections made both in-depth studies and findings are required by the statute, and prepared extensive and complete Post Hoc reports, noting efficiencies gained and areas for improvement. Virtually no other public agency met that standard. (I would note that the DOC's attention to detail came after Sen. Derfler's response to a staff report that the DOC had used CM/GC on a number of projects and "they have all come in under budget and ahead of schedule." Sen. Derfler noted: perhaps we're giving them too much time complete the work and the budgets are too generous (not an exact quote, but close).)
 - Most CRB's have made up their own criteria and review and approval processes, within the broad context of the authorizing statute. A lot of those agencies simply parrot the required findings in the statute without any analysis.
 - The current statute does not require any kind of analysis to be presented or recorded.
- As originally contemplated, the alternative contracting methods approval process was to be the exception, not the rule. It is now the rule. Virtually no public building project over \$10 million in Oregon since 1995 has been openly publically bid, to General Contractors.



- The figure above depicts the rise in CM/GC and the fall of Design Bid Build (DBB) jobs from 1986 to 2002.
- Most of the "work" however, is competitively bid – the trade work, such as: earthwork, concrete, masonry, steel fabrication and erection, wood framing, siding, roofing, drywall, plumbing, mechanical and electrical work. My research (Chapter 5 of my Dissertation) and that of Golblatt Septelka (reviewed in Section 5.2 of my Dissertation) showed that Owners and CM/GC's were highly satisfied with the CM/GC process, however subcontractors and to some extent design professionals were less satisfied (in some cases very dissatisfied). I concluded that owners who get to choose their CM/GC's and CM/GC's that are chosen by owners though a subjective process, are more satisfied with the CM/GC process than the subcontractors that obtain their work through the wholly objective open public competitive bidding process. (Subcontractor and Design Professional criticisms, as well as complimentary remarks, are found in Section 5 of my Dissertation).
- CM/GC has become the Project Delivery System (PDS) of Choice for most large public Building projects in Oregon. CM/GC or some

other form of negotiated contract form, has been and continues to be the most common PDS used in the Private Sector. The question is, why? My own opinion is as follows:

§ Following the last “Great Recession” of the early to mid 1980’s, construction slumped (as it is in a slump today) and design professionals, starving for work started competing on the basis of “price.” However, design professionals were not willing to take a commensurate cut in income, so the reduction in cost had to come out of “program” – meaning completeness of the design documents.

§ Price competition among construction contractors also lead to much lower margins and forced contractors to seek compensation for “holes,” “contradictory information,” and just plain “mistakes” in the contract documents caused by the design professional’s reducing program to meet allowable costs.

§ The combination of incomplete designs and lower margins resulted in an explosion of construction disputes in the 1980’s and 1990’s. And the proposed fix was ORS 279.015, alternative contracting methods. Public agencies reasoned that if the Private Sector is not experiencing the level of construction litigation that the Public Sector experiences, then we, the Public Sector must be doing something wrong, and we should adopt whatever the Private Sector is doing as a remedy.

○ CM/GC certainly has its place in the public contracting, PDS market, but it has become over used and used in situations that the original statute did not contemplate (such as to “pick” the contractor I want).

· CM/GC and Design-Build (as currently used on some ODOT contracts) have their place as PDS’s and should be authorized and used when the project fits the benefits of those PDS’s. But:

○ Research shows that CM/GC projects do no better than DBB projects in terms of controlling costs or maintain schedule performance.

○ Research and anecdotal evidence shows that CM/GC is unlikely to offer the public (taxpayers) the lowest “first cost” or “original contract price” for any project, but may result in the lowest “final” cost on a given project (by avoiding litigation, for example).

○ CM/GC and DB projects can be fast-tracked, whereas DBB projects generally cannot, therefore CM/GC and DB PDS’s are more efficient when “time” is the major consideration.

○ Only one set of projects, two Beaverton School District schools, provide us with a means to compare CM/GC and DBB directly, since both were designed by the same architect, using the same prototype design (Findley and Scholls Elementary Schools). Findley, the CM/GC project was awarded in 1998 at a first price of \$6.9 million and experienced cost growth of \$483,000 for a final cost of \$7,388,000, and required about 17 months to build. Scholls, the DBB project was bid in 1999 at a first price of \$6.4 million and experienced cost growth of \$192,150, for a total cost of \$6,597,150. Scholls required about 24 months or about 40% more time to complete. We have to conclude from these results that the District paid a premium to get the first school, Findley, on line and in operation on a shorter time frame than Scholls. The Audit Division of the Secretary of State’s office did also Audit these two projects.

· In conclusion I would like to say that I support your current legislative attempts to curb and standardize the alternative contracting methods process used in Oregon, and I offer the following reasons:

○ As currently practiced (at least as of the last time I was actively involved in researching the topic) the system is not being practiced in strict compliance with the authorizing statutes.

○ There needs to be a standardization of the process, projects shouldn’t be rubber stamped by CRB’s on the basis of staff reports that simply parrot the statutory requirements for “findings.”

○ There has to be some standardization and enforcement of the Post Hoc (279.103) reports.

○ Alternative project deliver methods should be the exception not the rule.

· However, I also offer the following comments:

o There has to be an “opt out” provision for “emergencies” such as natural disasters. To safeguard against everything becoming an “emergency” a state of emergency must be declared by the Governor (if he/she survives the disaster); or the Director of OEM (if he/she survives the disaster); or the Secretary of State (if he/she survives the disaster); or finally the CRB. Lack of planning cannot be the cause of an “emergency.”

o You must deal with OUS’s current legislation that essentially frees it from ORS 279 altogether. If OUS and its member institutions are not subject to this legislation you will simply be creating two systems – one for all other public agencies and one for OUS. This has problems because:

§ Subcontractors bidding OUS projects aren’t going to know or understand the exemptions granted to OUS under the current exclusionary statute (such as the “pay when paid clause”).

§ Some of the biggest abuses I found in my research involved OUS institutions – on the other hand, some of the best practices were also followed by OUS institutions.

§ OHSU has similar issues.

§ While state funding of OUS and OHSU has dropped significantly over the past two decades, Oregon taxpayers paid for, or financed (as in the case of the Knight Arena) the vast majority of the educational infrastructure at all OUS institutions and OHSU.

I believe again, the State of Oregon and Rep. Paul Holvey will have a handle on this issue soon. I ask you to shelf your exemption request until there are laws in place by all of the stakeholder involved. I believe there is still time for your office to become involved as a stakeholder on the issue as well...Please give Jan Nordland call to be involved in the process.

Respectfully,
Jerry Valencia

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----- Forwarded Message -----

From: Jerry Valencia <bridgewaycontracting@yahoo.com>

To: Bridgeway Email <bridgewaycontracting@yahoo.com>

Sent: Tuesday, September 6, 2011 6:31 AM

Subject: Fwd: Written Input for Public Construction Contracting Work Group

Sent from my iPhone

Begin forwarded message:

From: "Nordlund Jan" <jan.nordlund@state.or.us>

Date: September 1, 2011 1:37:16 PM PDT

To: "Andrea Henderson" <andrea@occa17.com>, "Annette Price" <annette.price@portofportland.com>, "Blake Underwood" <blake.underwood@state.or.us>, "Brenda Wilson" <brenda.wilson@ci.eugene.or.us>, "Brian Krieg" <brian@focuspointcom.com>, "Jerry Valencia" <bridgewaycontracting@yahoo.com>, "Bill Seider" <bseider@pivotarchitecture.com>, "Cheryl Meyers" <cheryl.l.meyers@state.or.us>, "HAMMOND CHRISTIE.N" <christie.n.hammond@state.or.us>, "SAIKI Clyde K" <clyde.k.saiki@state.or.us>, "Marshall Coba" <cobaco@aol.com>, "Darrell Fuller" <darrell@orphcc.com>, "David Barenberg" <david.barenberg@portlandoregon.gov>, "Dan Bates" <dbates@thornrun.com>, "Dave Guadagni" <dguadagni@robertsonsherwood.com>, "Drew Hagedorn" <drew.hagedorn@tonkon.com>, "Paul Dustrud" <dustrud@dustrudarchitecture.com>, "Eric Gunderson" <egunderson@pivotarchitecture.com>, "Frank Wall" <fwall@pmcaoregon.com>, "Jacob Mckay" <jacob-mckay@hoffmancorp.com>, "Jan Nordlund" <jan.nordlund@state.or.us>, "Jody Heady" <jheady@hacsa.us>, "Jerry Henderson" <jhenderson@smacna-columbia.org>, "John Lawless" <jlawless@tbg-arch.com>, "John Littel" <jlittel@nwcarpenters.org>, "Jim McKune" <jmckune@emerick.com>, "Joanna Robert" <joanna.d.robert@odot.state.or.us>, "John Gambatese" <john.gambatese@oregonstate.edu>, "John Rakowitz" <johnr@agc-oregon.org>, "Jeremy Vermilyea" <jvermilyea@schwabe.com>, "John Wycoff" <jwykoff@occa17.com>, "NEWHALL Kate" <kate.newhall@state.or.us>, "Kean Rager" <keanr@fortisconstruct.com>, "Ken Dalke" <ken@dalkeconstruction.com>, "Larry Sitz" <larry@emerick.com>, "Larry Gescher" <larryg@slayden.com>, "Lori Sattenspiel" <lsattenspiel@osba.org>, "Ken Maheu" <maheuk@hswconstructors.com>, "Morgan Allen" <mallen@osba.org>, "Marjorie Taylor" <marjorie.taylor@state.or.us>, "Marjorie Bruemmer" <marjorie@rgpi.net>, "STONE Marscy D * SSD SPO" <marscy.d.stone@state.or.us>, "Mike Eliason" <meliason@aocweb.org>, "Melvin Oden-Orr" <melvin@oden-orrlaw.com>, "Mark Landauer" <mlandauer@sdao.com>, "Brennan Patrick H" <patrick.h.brennan@state.or.us>, "Dan Pelissier" <pelissierd@hswc.com>, "Rep Whisnant" <rep.genewhisnant@state.or.us>, "Rep Smith J" <rep.jeffersonsmith@state.or.us>, "Rep Johnson" <rep.markjohnson@state.or.us>, "Rep Wand" <rep.mattwand@state.or.us>, "Rep Sheehan" <rep.patricksheehan@state.or.us>, "Rep Holvey" <rep.paulholvey@state.or.us>, "Richard Shugar" <richard@2-form.com>, "Rick Thomas" <rick@quinnthomas.com>, "Robin Freeman" <robin.freeman@odot.state.or.us>, "Brennan Sean" <sean.brennan@state.or.us>, "Sean Dickey" <sean@forbesplumbing.com>, "Sen Starr B" <sen.brucestarr@state.or.us>, "Sen Shields" <sen.chipshields@state.or.us>, "Sen Beyer" <sen.leebeyer@state.or.us>, "Shaun Hyland" <shaun@jhconst.com>, "Shawn Miller" <shawn@millerpublicaffairs.com>, "Stephanie Smythe" <stephanie.smythe@state.or.us>, "SIMMS Steve" <steve.simms@state.or.us>, "Scott Winkels" <swinkels@orcities.org>, "Tom Gerding" <tgerding@tgerding.com>, "Todd Glenz" <tglenz@mckenziecommercial.com>, "Tim Hendrix" <timh@wildish.com>, "Tim Sissel" <tims@fortisconstruct.com>, "Ryan Tribbett" <tribbett@pacwestcom.com>, "Wynnette Gentemann" <wynnette.gentemann@odot.state.or.us>, "Cindy Roberts" <zrgroup@aol.com>

Subject: Written Input for Public Construction Contracting Work Group

To stakeholders of the Public Construction Contracting Work Group:

Please send to me your written suggestions for issues to be addressed by the work group by September 8. This 30-day comment period was discussed at the August 9th meeting and a reminder was sent in an earlier memo. Rep Holvey had asked everyone with issues to submit them in writing, even if they attended the meeting. As of today, I have received a total of one (!) response. We will post the responses on the committees' webpages.

We have posted background documents on the webpages for Senate Committee on Business, Transportation and Economic Development and the House Committee on General Government and Consumer Protection (<http://www.leg.state.or.us/committees/>)

Please let me know if you have any questions or concerns.

Thank you,

Jan Nordlund
Committee Administrator
Oregon State Legislature
503-986-1557