



**WRITTEN COMMENTS SUBMITTED REGARDING PROPOSED  
AMENDMENTS TO PURCHASING REGULATIONS  
(February 13, 2008)**

As previously posted on the Division's website, the Public Hearing on proposed amendments to construction management procurement regulations had been rescheduled to Thursday, January 24, 2008.

The Division of Purchases received a total of ten (10) written comments regarding the proposed regulations. These comments were submitted prior to or presented at the public hearing on the proposed rules that started on Monday, January 7, 2008 and concluded on Thursday, January 24, 2008. These written comments consist of the following:

- Letter dated January 3, 2008 from Robert J. Boisselle, Associated Builders and Contractors;
- Letter dated January 4, 2008 from J. Michael Kennedy of Gilbane Building Company;
- Statement on behalf of The Construction Industries of Rhode Island, hand-delivered by Peter McGinn, Esq. on January 7, 2008;
- Letter dated January 21, 2008 from Ronald M. Coia of BuildRI;
- Letter dated January 22, 2008 from Anthony F. Dematteo of DIMEO Construction Company;
- Letter dated January 23, 2008 from J. Michael Kennedy of Gilbane Building Company;
- Statement on behalf of The Construction Industries of Rhode Island by Henry Sherlock, Executive Director, dated January 24, 2008;
- Letter from Robert J. Boisselle of Associated Builders and Contractors, Inc. dated January 24, 2008.
- Letter dated January 24, 2008 from Armand T. Lusi of Lusi Construction; and
- Letter dated December 12, 2007 from the Rhode Island Procurement Technical Assistance Center (PTAC).

Copies of the above documents have been consolidated into a single document totaling thirty-four (34) pages and are attached.

cc: Peter D. 1/2/08



Rhode Island  
Chapter

January 3, 2008

Lorraine Hynes  
Division of Purchases  
Department of Administration  
One Capitol Hill  
Providence, RI 02908

VIA FACSIMILE:

Dear Ms. Hynes:

Associated Builders and Contractors of Rhode Island (ABC/RI), representing over 100 members and thousands of construction workers, wishes to go on record as having a major concern regarding the proposed amendments to the State Procurement Regulations to "clearly define the specific types of construction management contracts available for construction and public works projects."

Specifically, we oppose the re-writing of 8.11.2...not because it defines the criteria to be used by the purchasing agent or purchasing agency in determining which method of management of construction listed in 8.11.1 is to be used for a particular project (that is a good thing); but because it eliminates the section of the original 8.11.2 that was not a problem in the first place. It states: "The generally preferred method of construction contracting management for all projects shall be a general contractor selected as the lowest responsive bidder-based on a lump sum, fixed fee contract type, and projects utilizing this method shall not require individual written determination of such preferences." It is the language that followed this statement in the original 8.11.2 that was the problem. The new 8.11.2 does, indeed, address the problematic language of the original, but it omits the basic, fundamental way in which the State is required to do business...and that is by an open bidding process.

By eliminating the first sentence of the original 8.11.2 completely, the Department is setting up regulations that do not require open and fair bidding, in the first place. This is harmful to taxpayers, unfair to contractors wishing to bid on state projects, and not in keeping with the intent of the Court's decision.

ABC/RI lauds the inclusion of the specific definition of the Construction Contract Management Selection Criteria in the new 8.11.2. But, we respectfully request that the spirit of fair play and a level playing field be reinstated by adding back the first sentence of the original 8.11.2, which encourages open bidding by all qualified contractors and sub-contractors.

Sincerely,  


Robert J. Boisselle  
President  
Associated Builders and Contractors

Cc: The Honorable Donald L. Carcieri, Governor  
Beverly E. Najarian, Director, Department of Administration

RECEIVED  
PURCHASES

08 JAN -8 AM 10:10



January 4, 2008

Ms. Lorraine Hynes  
Rhode Island Department of Administration  
Division of Purchasing  
One Capital Hill  
Providence, RI 02908

Re: Gilbane Building Company's Statement in Support of the Proposed Amendments to State Procurement Regulations

Dear Ms. Hynes:

Gilbane Building Company welcomes and supports the proposed Amendments to the State Procurement Regulations. We believe that these Amendments will significantly improve the process for public construction in Rhode Island. Rhode Island and related agencies have a significant volume of annual construction. By adopting these proposed Amendments, the State will now have the flexibility and discretion to utilize a variety of different construction delivery methods based upon the needs of the project, thereby providing the greatest benefit to the State. Gilbane has reviewed the proposed amendments; we believe that the proposed criteria to consider when selecting a construction contracting method are clearly defined and appropriate.

Clearly there is no one right project delivery method that should be utilized for public sector work. The State should have the discretion and flexibility, based on the type and size of a project, its capabilities to manage the project, time considerations and the likelihood of changes to the scope of the project, among other things, to select the construction delivery method best suited to fit the needs of each individual project.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Michael Kennedy".

J. Michael Kennedy  
Vice President, Regional Manager of Business Development

Opening Statement on Behalf of  
The Construction Industries of Rhode Island

The Construction Industries of Rhode Island is an association comprised of contractors and suppliers engaged in road and bridge construction. It and its members believe that the inclusion of road and bridge construction contracts in the proposed regulation will inevitably run afoul of Rhode Island and United States Statutes requiring that road and bridge contracts be awarded to the lowest responsible bidder.

The Association submits that the reference to road and bridge contracts in the Purpose and Reason for the Proposed Regulation and subparagraph (b) in proposed regulation 8.11.2 be eliminated.

Other than small purchases as defined by R.I.G.L. 37-2-22, Rhode Island statutory law mandates that where practicable, that is where specifications can be prepared, bids be awarded to the lowest bid price or the lowest evaluated bid price. See R.I.G.L. 37-2-18 as amended. In virtually every case, road and bridge construction projects can be designed with reasonably exact specifications.

Moreover such design specifications must be reviewed and approved by Federal regulatory authorities in that the United States provides, in most cases as much as 80%, the funds required to complete such road and bridge projects.

Federal statutory law under 23 U.S.C 112 (b) (1) and regulations promulgated thereunder require that "Contracts for the construction of each project shall be awarded only on the basis of the lowest responsible bid submitted by a bidder meeting established criteria of responsibility." We note that in Chapter 37-2, entitled State Purchases,

prequalification of contractors on road work and prequalification of construction management contractors are treated in different sections. See Sections 37-2-26 and 37-2-27.

The proposed Regulation 8.11.2 eliminates the previous language dealing with construction management contracts which reaffirmed the statutory requirement that the prime consideration in construction contract awarding is that the project be awarded to the lowest responsible bidder. The Lusi decision did not and could not invalidate that statutory requirement.

Where specific design can be prepared and is practicable, which is true in virtually all road and bridge construction projects, the contract must be awarded to the lowest responsible bidder. The proposed regulation when applied to road and bridge contracts creates serious ambiguity and subjectivity and in the Association's opinion would be contrary to State and Federal law and will lead to unnecessary and costly litigation.

We request that road and bridge construction contracts and projects be eliminated from the proposed regulation.



08 JAN 23 PM 12: 22

January 21, 2008

Ms. Lorraine Hynes  
Division of Purchases  
Department of Administration  
One Capitol Hill  
Providence, RI 02908

Re: Proposed Amendments to State Procurement Regulations

Dear Ms. Hynes

BuildRI, a joint labor management organization is, an alliance of the RI Building Trades Council and it's seventeen local unions, The Associated General Contractors of America, RI Chapter Labor Relations Division representing the largest and most prominent construction companies in this area; and the New England Electrical contractors Association. BuildRI has carefully reviewed the proposed amendments as indicated above in section 37-2-39 and Chapter 42-35 of the general laws of the State of Rhode Island as amended. BuildRI respectfully disagrees with the proposed amendments and offers its views as follows as what the amendments should be relative to the selection methods of construction contract management services.

### Amendments

8.11 The generally preferred method of construction contracting management for all projects shall be a general contractor selected as the lowest responsive bidder based on a lump-sum, fixed-fee contract type, and projects utilizing this method shall not require individual written determination of such preference. The use of any other method of construction contracting management as set forth in 8.11.2 besides the generally preferred method of construction contracting management shall be justified in writing to the Purchasing Agent by the requesting agency, stating the reasons why the preferred method may not be used.

#### 8.11.1 Selection Documentation

The purchasing agent or purchasing agency responsible for carrying out the construction project shall set forth in writing to the Chief Purchasing Officer the facts that led to the selection of a particular method of construction contract management pursuant to the criteria set out in 8.11.3 and 8.11.4. The Chief Purchasing Officer shall include in the contract file a

written statement setting forth the facts that led to the selection of a particular method of management of construction in each instance. The Chief Purchasing Officer's written statement may adopt, in whole or in part, any written statements provided by the purchasing agent or purchasing agency as required herein.

### 8.11.2 Alternative Construction Contract Management Methods

(a) Use of Descriptions. The descriptions in (b) through (g) (d) herein are the alternative methods of construction contract management deemed feasible by the Chief Purchasing Officer.

(b) Design-Build. In a design-build project, a person contracts directly with the State to meet the State's requirements as described in a set of design or engineering specifications, bridging documents, or scope of work. Final design responsibility and construction responsibility both rest with the design-build contractor. This method can include instances where the design-build contractor supplies the site as part of the Design-Build Package.

(C) Construction Manager/Program Manager. A construction manager is a person experienced in construction that has the ability to evaluate and to implement drawings and specifications as they affect time, cost, and quality of construction and the ability to coordinate the construction of the project, including the administration of change orders and the selection of a general contractor. The State may contract with the construction manager early in a project to assist in the development of a cost effective design. The construction manager shall provide services as deemed necessary by the State which may include, management services, accounting services, and design services.

(D) Construction Manager at Risk. A Construction Manager at Risk is a person experienced in construction that has the ability to evaluate and to implement drawings and specifications as they affect time, cost, and quality of construction and the ability to coordinate the construction of the project, including the administration of change orders. The State may contract with the construction manager at risk early in a project to assist in the development of a cost effective design. The procurement of a construction manager at risk may be based, among other criteria, on proposals for a management fee which is a lump sum amount with a guaranteed maximum cost. The construction manager at risk may provide for any and all services as deemed necessary by the state which may include, but not be limited to, construction services, management services, accounting services, design services and the employment of specialty subcontractors to the construction manager at risk as deemed necessary to successfully complete the project.

### 8.11.3 Construction Contract Management selection Criteria

The criteria to be used by the purchasing agent or purchasing agency in determining which method of management of construction listed in Section 11.2 is to be used for a particular project shall be as follows:

- (a) When the project must be completed or ready for occupancy or use:
- (b) The specific nature of the project, and its specialized needs
- (c) The size, scope, complexity, and economics of the project:

(d) The amount and type of financing available for the project, including whether the budget is fixed and the source of funding. Eg: general or special appropriation, federal assistance moneys, general obligation bonds or revenue bonds:

(e) The availability, qualification, and experience of State personnel to be assigned to the project and how much time the State personnel can devote to the project:

(f) The availability, experience and qualifications of outside consultants and contractors to complete the project under the various methods being considered.

#### 8.11.4 Notice/Comment Period

There will be a notice posted by the Chief Purchasing Officer of the pending alternative method of construction contract management and a 10 day period for public comment. Such notice will set forth the criteria which were used in determining which method of management of construction is to be used for a particular project and a statement setting forth the facts which lead to the selection of a particular method of management of construction contract mg.

#### 8.11.5 Selection of Alternative Methods of Construction Management – Criteria Challenge Process

(a) Contesting any agency decision to utilize an alternative method of construction management decision shall be considered a “contested case: as defined in R.I.G.I., 42-35-1 of the Administrative Procedures Act., and under the jurisdiction of the state of Rhode Island Department of Administration Office of Administrative Hearings administrator of Adjudication.

(b) Any contractor with a valid and current registration or license issued by the State of Rhode Island Contractors’ registration and License Board shall have standing to contest any agency decision to utilize an alternative method of construction contract management.

(c) The contractor contesting the decision shall be afforded all rights and remedies pursuant to the Administrative Procedures Act chapter (RIGI 42-35-1 et seq.).

- The foregoing represents the views of BuildRI on this most important subject matter.
- As an organization whose members work in the construction industry every day we respectfully request our views be given the consideration they deserve.

Respectfully submitted



Ronald M. Coia  
Assistant Executive Director



BOSTON • PROVIDENCE • NEW HAVEN



January 22, 2008

Ms. Lorraine Hynes  
Rhode Island Department of Administration  
Division of Purchases  
One Capital Hill  
Providence, RI 02908

RE: Support for Proposed Amendments to State Procurement Regulations.

Dear Ms. Hynes,

Dimeo Construction Company is in full support of the proposed Amendments to the existing State Procurement Regulations regarding the use of various forms of project delivery.

It is our position that the proposed amendments provide for better alignment of the qualities inherent within various project delivery approaches with the various requirements of the State's construction projects.

We support the proposed amendments as broadening the scope of alternatives available for use while requiring that purchasing and end user agencies put forth their reasoning, consistent with specific criteria, for the selection of a particular method(s) of project delivery.

We are of the belief that by enabling an expanded range of methods of project delivery, the State (and its various agencies and institutions) will realize more effective execution of its construction projects.

Sincerely,

Anthony F. DeMatteo  
Vice President

RECEIVED  
PURCHASES  
08 JAN 23 PM 4: 39



January 23, 2008

Ms. Lorraine Hynes  
Rhode Island Department of Administration  
Division of Purchasing  
One Capital Hill  
Providence, RI 02908

Re: Gilbane Building Company's Statement in Support of the Proposed Amendments to State Procurement Regulations

Dear Ms. Hynes:

On January 4, 2008 Gilbane submitted a letter in support of the Proposed Amendments to the State procurement regulation (copy attached).

Gilbane, has provided construction services in twenty-two (22) states to a wide range of clients including public agencies. Our experience is that Alternative Construction Delivery Methods are commonly used in most areas. We have conducted research on the use of Alternative Construction delivery Methods by other states and the analysis of effectiveness of the different delivery methods by various sources.

We have attached a copy of our findings for your information.

---

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Michael Kennedy". The signature is written in a cursive, flowing style.

J. Michael Kennedy  
Vice President, Regional Manager of Business Development



January 4, 2008

Ms. Lorraine Hynes  
Rhode Island Department of Administration  
Division of Purchasing  
One Capital Hill  
Providence, RI 02908

Re: Gilbane Building Company's Statement in Support of the Proposed Amendments to State Procurement Regulations

Dear Ms. Hynes:

Gilbane Building Company welcomes and supports the proposed Amendments to the State Procurement Regulations. We believe that these Amendments will significantly improve the process for public construction in Rhode Island. Rhode Island and related agencies have a significant volume of annual construction. By adopting these proposed Amendments, the State will now have the flexibility and discretion to utilize a variety of different construction delivery methods based upon the needs of the project, thereby providing the greatest benefit to the State. Gilbane has reviewed the proposed amendments; we believe that the proposed criteria to consider when selecting a construction contracting method are clearly defined and appropriate.

Clearly there is no one right project delivery method that should be utilized for public sector work. The State should have the discretion and flexibility, based on the type and size of a project, its capabilities to manage the project, time considerations and the likelihood of changes to the scope of the project, among other things, to select the construction delivery method best suited to fit the needs of each individual project.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Michael Kennedy". The signature is stylized and cursive.

J. Michael Kennedy  
Vice President, Regional Manager of Business Development

**A “WHITE PAPER” REGARDING RHODE ISLAND STATE  
PROCUREMENT REGULATIONS AMENDMENT  
“CONSTRUCTION CONTRACT MANAGEMENT METHODS”  
January 22, 2008**

**D) INTRODUCTION**

**Intention of Study:**

The intension of this study is to present facts and statistics from various organizations which represent the status of the use of Alternative Construction Delivery Methods (ACDM) at various governmental levels. The study does not try to make the argument that one construction delivery method is always better than another. Far from it. What the statistics included here show is that around the country public and private projects are built with all the different available delivery methods. One system does not fit all the applications. It is clear that public and private agencies have begun to regularly take advantage of alternatives which best suit the project at hand.

**Terms:**

The Revisions to the State Regulations refer to “Single Prime Contractor” and “Multiple Prime Contractors”. More commonly in the Industry, the term “Design-Bid-Build” or “DBB” is used for these two systems. Where the Owner chooses to hire a “Construction Manger” as defined in the proposed regulations, the industry uses the term “Agency CM”. The Term “Construction Manager at Risk” or “CMAR”, is consistent with the terms used in this study. Through out this study we use the industry terms for clarity.

**Industry Conclusions and Recommendations:**

During the development of the Study, we found a number of conclusions and recommendations by various authorities, agencies, and associations. These include:

In a 1997 report by the Construction Industry Institute (CII) it studied Design-Bid-Build, CM at Risk, and Design-Build. It’s conclusion was that every project has special needs and considerations which would affect which delivery method should be used to the advantage of the Owner and the project. No one system fits all projects. (Executive Summary, “CII Project Delivery Systems: CM at Risk, Design Build, Design-Bid-Build”, December 1997)

The 2006 CMAA / CII Owner Survey found that the Contracting and Pricing Method Statistics are changing: More and more public and private projects are using ACDM. The survey in 2006 also seems to indicate that Owner’s are looking for the most efficient process for their projects. Lack of collaboration leading to inefficiencies, cost over runs, schedule issues, were seen as issues that needed to be addressed, more than general inflationary issues. Owners surveyed

felt that having a CM or GC involved in the design phase assisted in overcoming those issues. ("FMI/CMAA Sixth Annual Survey of Owners", October 2005, Pg 1-2)

The number of States using DBB as the sole delivery method is declining. In 2005 the percentage of surveyed Owners using DBB was 66%. In 2006 it dropped to 54%. ("FMI/CMAA Eighth Annual Survey of Owners – The Perfect Storm – Construction Style", Fall 2006 pg. 4). However, in the 2005 survey, it was found that only 23% felt they received the best value using this delivery system. In the 2005 survey, CM at Risk and Design Bid were found to have the highest satisfaction ratings. ("FMI/CMAA Sixth Annual Survey of Owners", October 2005, Pg 3-5)

The American Institute of Architects in 2008 did a report on Alternative Delivery methods. In this report, the AIA says "...The AIA urges state legislators to support alternative delivery methods such as construction management at-risk..."

The Associated General Contractors of America stated in its "CM/GC Guidelines for Public Owners" 2003, pg. 1, that "...both the AGC and the NSAFSA emphasize that there is no single best delivery system. Each Project is unique; a separate, project specific decision should be made about the which delivery system is most appropriate....".

## II) STATISTICS

### State Laws:

Laws vary on a state by state basis. Attached is a matrix of laws around the country which shows which groups allow ACDM above and beyond Design-Bid-Build (DBB):

### PROCUREMENT POLICY ON STATE PROJECTS

"Y" INDICATES ALLOWABLE "C" INDICATED CONDITIONALLY OR LIMITED  
 "NP" INDICATED NOT PROHIBITED "X" INDICATED NOT ALLOWED

STATE	DBB	CM	DB	COMMENTS
Alabama	Y	NP	NP	
Alaska	Y	Y	Y	
Arizona	Y	Y	Y	
Arkansas	Y	Y	Y	
California	Y	Y	C	
Colorado	Y	C	Y	For DOT
Connecticut	Y	Y	Y	
Delaware	Y	Y	C	For DOT
Florida	Y	Y	Y	
Georgia	Y	Y	Y	

STATE	DBB	CM	DB	COMMENTS
Hawaii	Y	N	Y	
Idaho	Y	Y	Y	
Illinois	Y	Y	Y	
Indiana	Y	N	Y	
Iowa	Y	NP	NP	
Kansas	Y	C	Y	Except for some civil projects
Kentucky	Y	Y	Y	
Louisiana	Y	N	N	Except for some DOT or emergency projects
Maine	Y	Y	Y	
Maryland	Y	Y	Y	
Massachusetts	Y	Y	Y	
Michigan	Y	N	NP	
Minnesota	Y	Y	Y	
Mississippi	Y	Y	Y	
Missouri	Y	N	C	
Montana	Y	Y	Y	
Nebraska	Y	C	Y	Allowed on Schools
Nevada	Y	Y	Y	
NH	Y	Y	Y	
New Jersey	Y	C	Y	
New Mexico	Y	Y	Y	
New York	Y	Y	Y	
North Carolina	Y	Y	Y	
North Dakota	Y	Y	NP	
Ohio	Y	Y	Y	
Oklahoma	Y	C	Y	
Oregon	Y	Y	Y	
Pennsylvania	Y	Y	Y	
Rhode Island	Y	Y	Y	
South Carolina	Y	Y	Y	
South Dakota	Y	Y	Y	
Tennessee	Y	C	Y	
Texas	Y	Y	Y	

STATE	DBB	CM	DB	COMMENTS
Utah	Y	Y	Y	
Vermont	Y	Y	Y	For Schools
Virginia	Y	Y	Y	
Washington	Y	Y	C	
West Virginia	Y	N	Y	
Wisconsin	Y	Y	C	
Wyoming	Y	Y	N	
WashingtonDC	Y	NP	Y	

(Source for State information: "AGC State Law Matrix" data base, 2007)

From this State data we calculate that:

- a) 100% allow Design-Bid-Build
- b) 70% Expressly allow Construction Management
  - (i) 88% Allow CM with conditions or have no stated limitations
- c) 78% Expressly Allow Design Build
  - (i) 96% Allow DB with conditions or have no stated limitations

We also know from our work in Rhode Island that for over 25 years the State and a wide variety of Municipalities have allowed or currently use ACDMs.

Federal Agencies:

We also have found that several Federal agencies also utilize ACDM. These include the GSA, Center for Disease Control, Army Corps of Engineers, The Veterans Administration, NASA, the Smithsonian, and the Navy

Studies of ACDM Use:

The FMI and the Construction Management Association of America jointly prepare annual surveys of the industry's use of ACDM. They analyze what delivery methods are used across the country by both public and private owners. The following table is from their 2005 "FMI/CMAA Sixth Annual Survey of Owners":

As a function of Construction dollars spent, this table shows what percentage of the dollars were delivered by what delivery method:

**SYSTEM USED ON MAJORITY OF PROJECTS**

Owner Type	DBB	CMAR	DB	Other	Turnkey
All Owners Surveyed	34	34	21	10	
Private / closely held firms	30	42	13	15	0
Public Companies	42	27	9	14	0
Quasi public agencies	69	20	0	11	0
Municipalities	78	9	5	8	0

States	69	23	8	0	(
Federal agencies	78	11	11	0	(

Statistics from "FMI/CMAA Sixth Annual Survey of Owners", Pg. 3

### III) WHY DO OWNERS USE ALTERNATIVE CONSTRUCTION DELIVERY METHODS?

Public agencies are recognizing that not all projects are the same. They have seen these systems used successfully by the private market place, other States, and some Federal agencies. They sought to adopt systems that let them have the best opportunities to achieve their goals regarding quality, cost, and schedule.

Other influencing research came from FMI / CMAA Studies. These show:

- a) Cost grow less with DB or CM than with DBB
- b) Scheduled increases are typically less and buildings are delivered sooner with DB and CM than with DBB
- c) Quality of the buildings is perceived as higher with DB and CM than with DBB
- d) Systems performance is judged to be better with DB or CM than DBB

The Construction Industry Institute prepares statistics on performance of ACDM. The 2002 study showed:

Attribute	CMAR vs. DBB	DB vs. DBB
Unit Cost	1.6% lower	6.1% lower
Construction Speed	5.8% faster	12% faster
Delivery Speed	13.3% faster	33.5% faster

(Source: "Construction Industry Institute Newsletter Update", Fall 2002)

From these studies it can be concluded that CMAR and DB are usually:

- a) less costly than DBB
- b) faster to build than DBB
- c) and turned over sooner than DBB

#### Perceptions of Best Value:

The FMI/CMAA studies show that Owners feel they can get the best value from projects delivered through a CM or DB process, when appropriate for the project. What is interesting is that privately held and publicly held companies feel that CM gives them the best value in their projects. Not being constrained by state rules and regulations, they readily utilize alternative systems. The statistics on use show that they do not abandon fixed price contracts. Owners use what ever system is judged best for that particular project.

**SYSTEM BELIEVED TO PROVIDE THE "BEST VALUE" (as a percentage)**

<b>Owner Type</b>	<b>CMAR</b>	<b>DBB</b>	<b>DB</b>	<b>Other</b>	<b>Turnkey</b>
All Owners Surveyed	37	21	30	7	5
Private / closely held firms	46	13	13	28	0
Public Companies	37	17	23	19	4
Quasi public agencies	59	12	29	0	0
Municipalities	26	35	30	9	0
States	41	47	12	0	0
Federal Agencies	22	30	41	7	0

Source: "FMI/CMAA Sixth Annual Survey of Owners", 2005. Pg. 3

**IV HOW TO CHOOSE WHICH DELIVERY METHOD?**

As Agencies determine what ACDM to use on their projects, in addition to the guidelines in the proposed regulations, there are several resources available. These include:

- 1 AGC Publications
  - a) "Client Advisor" 3<sup>rd</sup> Edition September 2000
  - b) "CM/GC Guidelines for Public Owners" 2003
- 2 CMAA Publication: "An Owner's Guide to Construction Management", 2007
- 3 Project Delivery Institute (PDI) "Selecting Project Delivery Systems", 2<sup>nd</sup> edition, 2005

**V STATEMENT OF SUPPORT**

The research reflected in this report supports the intention of the change in the regulations proposed in Rhode Island. We reiterate our support of the change as proposed, and supported in GILBANE'S letter to Ms. Lorraine Hynes dated January 7, 2008:

"We believe that these Amendments will significantly improve the process for public construction in Rhode Island. Rhode Island and its related agencies have a significant volume of annual construction. By adopting these proposed Amendments, the State will now have the flexibility and discretion to utilize a variety of different construction delivery methods based upon the needs of the project, thereby providing the greatest benefit to the State. Gilbane has reviewed the proposed amendments. We believe that the proposed criteria to consider when selecting a construction contracting method are clearly defined and appropriate.

Clearly there is no one right project delivery method that should be utilized for public sector work. The State should have the discretion and flexibility, based on the type and size of a project, its capabilities to manage the project, time considerations and the likelihood of changes to the scope of the project, among other things, to select the construction delivery method best suited to fit the needs of each individual project."

## **SOURCES**

1. "FMI/CMAA EIGHTH ANNUAL SURVEY OF OWNERS – The Perfect Storm – Construction Style", Fall 2006
2. "Construction Industry Institute, Project Delivery Systems: CM at Risk, Design-Build, Design-Bid-Build", December 1997.
3. "FMI/CMAA SIXTH ANNUAL SURVEY OF OWNERS", October 2005
4. US Army Corps of Engineers Pamphlet, "Construction Contracts: How to Obtain Construction Contracts with the US Army Corps of Engineers", 1 Nov. 1997
5. Construction Industry Institute Update Newsletter, "Project Delivery for the Private Owner", Fall 2002
6. "CM/GC Guide for Public Owners", 2003, by the Association of General Contractors and the National Association of State Facilities Administrators

## **WEB SITES:**

CMAA: [www.cmaanet.org](http://www.cmaanet.org)

AGC: [www.agc.org](http://www.agc.org)

GSA: [www.gsa.gov](http://www.gsa.gov)

Construction Industry Institute: [www.construction-institute.org](http://www.construction-institute.org)

*Additional Statement by  
Construction Industries of Rhode Island  
Pertaining to Non-Legal Consequences of Proposed  
Emergency Procurement Regulations*

In addition to the legal problem presented by CIRI's legal counsel, the Association desires to point out some non-legal issues of importance in consideration of the proposed new procurement regulation.

First of all, it is certainly worthy of note that there is no question concerning the integrity and adequacy of the open competitive bidding process traditionally utilized for projects consisting primarily of road and bridge work. It is in keeping with Rhode Island General Law 37-2-18 that requires award of contracts to the lowest responsible bidder. So as the saying goes, if it's not broke, why fix it? If it is not possible to comply with 37-2-18, then other contracting methods can legally be employed without new regulations.

Award of contracts to the lowest responsible bidder is the preferred method of contracting spelled out in Federal statutes and regulations as well as in our sister states. Connecticut without exception uses the very same method as Rhode Island for road and bridge projects. Massachusetts has done the same with one exception. That exception was for a project called "The Big Dig." Not exactly something Rhode Island should be seeking to emulate.

As written, the proposed regulation opens opportunities for selection of contractors on the basis of subjective judgments not necessarily related to merit or price, and does not guarantee the openness and fairness of the current system for bidding on road and bridge projects.

For all of the above reasons, we urge you to delete references to road and bridge projects in the proposed new regulations.

*Henry G. Stenhouse*  
Exec. Director  
1/24/08



TO: Beverly E. Najarian, Director, Department of Administration  
FROM: Robert J. Boisselle, President, Associated Builders & Contractors  
DATE: January 24, 2008  
RE: Proposed Changes to State Procurement Regulations

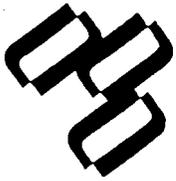
As a result of a civil action captioned as A.F Lusi Construction, Inc. v. Rhode Island Department of Administration and Gilbane Building Company, C.A. No PB 07-1104, on May 7, 2007, the Superior Court (Judge Silverstein) issued a decision which invalidated Purchasing Regulation 8.11.2.

This is the invalidated section: **“The generally preferred method of construction contracting management for all projects shall be a general contractor selected as the lowest responsive bidder based on a lump sum, fixed fee contract type, and projects utilizing this method shall not require individual written determination of such preference. The use of any other method must be justified in writing to the Purchasing Agent by the requesting agency, stating the reasons why the preferred method may not be used, and the Purchasing Agent may approve or reject such requests at his discretion.”**

The Administration, Department of Office of Purchasing is proposing new regulations to replace those invalidated by the Court. What was needed were written criteria to be used by the purchasing agent or purchasing agency in determining which method of management of construction is to be used for a particular project. In essence, the problem was with the second sentence of the original Regulation 8.11.2. Eight criteria were written as part of the new, proposed Purchasing Regulation 8.11.2.

HOWEVER...in rewriting 8.11.2 to add the criteria, the first sentence, which states **the generally preferred method of construction contracting management for all projects shall be a general contractor selected as the lowest responsive bidder...**has been omitted. This, in effect, would eliminate the need for competitive bids as is required by State Statute 37-2-18, which requires sealed competitive bids for construction contracts exceeding \$10,000 unless it is determined in writing that this method is not practicable.

In addition, the proposed criteria, some unclear, is merely a list with no specific method of management of construction to which they may point.



# LusiConstruction

PO Box 701 | Greenville RI 02828 | T 401.232.1010 | F 401.232.1480 | www.LusiConstruction.com

January 24, 2008

In Hand

*received 1/24 4:00*

Mr. Peter Dennehy, Esq.  
Department of Administration  
Division of Legal Services  
One Capitol Hill  
Providence, RI 02908

Re: Written Submission of Testimony and Other Items Submitted to Record

Dear Mr. Dennehy:

Please find enclosed a written copy of my testimony that was read into the record this morning. I have also taken the liberty of enclosing a Providence Journal editorial dated May 31, 2007 imploring that the State of Rhode Island and its agencies adopt guidelines to prevent cost overruns and "take greater care and do a better job of predicting the cost of future projects". We believe that the only way to do this is through competitive sealed bidding.

Very truly yours,  
A.F. Lusi Construction, Inc.

*Armand T. Lusi*  
Armand T. Lusi  
President  
/atl



## **Testimony of Armand T. Lusi as read at public hearing January 24, 2008 on proposed purchasing regulations**

Good morning, I am Armand T. Lusi, President of A. F. Lusi Construction, Inc. in Smithfield, Rhode Island. A. F. Lusi was formed more than 57 years ago as a family-owned small business and since the early 70's has specialized in public building construction, completing dozens of federal, state and municipal public building projects.

As everyone is now painfully aware, we, the taxpayers of Rhode Island, find ourselves in difficult financial times. But that doesn't mean we can stop investing in our public infrastructure. On the contrary, we need to regularly, but prudently, invest in the future of our state by building and maintaining schools, hospitals, roads, bridges, even arenas. What the current economic environment demands is that we construct public buildings in the most cost effective and politically transparent manner

possible. It is the contention of our firm this would be through a competitive sealed bidding process for a general contractor at a lump-sum price. We believe this is the best delivery method by which to construct public buildings and should be deviated from only under emergency conditions.

I also come before you today as the newly elected President of the RI Chapter of the Associated General Contractors. Unfortunately, I cannot offer an opinion on the proposed amendments from that body as consensus has not been reached. Some of our members think these proposed changes to be seriously flawed and are in conflict with existing statutes. They contend that these proposed amendments would replace a clear, unambiguous process with seven debatable definitions of construction contract management methods and eight selection criteria with no objective link to one another. Some would go so far as to say that this is not good government.

Other members believe these new regulations would be an improvement to the state purchasing regulations, offering better organization, transparency and competitiveness. As President, I can take no position on this matter but as a member I couldn't disagree more.

Let's look at a recent and still ongoing use of an Alternative delivery system, Construction Manager at Risk, in a Rhode Island project.

The Dunkin Dounuts Center Renovations did not go out for a competitive sealed bid, which is typically referred to as the design-bid-build method, for a general contractor and the taxpayers of the state are now paying the price. The Authority sought a better way and hired firms, who through their participation in the Center's feasibility study, had a clear conflict of interest in the project. A. F. Lusi Construction, Inc. maintained that this "better way to handle the complex, two-year

renovations” (as it was described by Convention Center Executive Director Jim McCarville) was so fraught with conflicts and financial peril as to undermine confidence in the public procurement process.

Mr. McCarville was quoted, “We feel that’s a better way of going rather than going out for one bid and finding out what the bids are.” A brief history of this ill-fated project’s timeline and price line will demonstrate how wrong that decision was.

In June of 2005, just a few short months after House Finance was told it would cost far less, the Authority revealed the price tag for its purchase and renovations of the Dunk- \$28.5mm to buy it, \$62mm to overhaul it and \$2mm to issue the bonds. At that time, Authority Board Chair David Duffy was quoted, “We have to stick to the ... budget, there isn’t anymore.”

By December of 2005, the construction budget was set at \$48 million, but the Authority was approved to borrow \$62 million. They were confident that \$62 million "will be enough to finish it." The extra \$14 million was a cushion, "What we do in any case- we allow for some contingencies," said the Project Manager for the architect. The Authority's Executive Director had "hopes construction prices will drop -- like gas prices have."

Later that month, a Construction Manager at Risk was chosen to carry out the renovations at Dunk. The firm was picked over the only other proposer in what was said to be a close decision. Board member Dave Gavitt said, "There was really almost nothing to separate the two bids".

A cursory inspection of the two bids might have brought to one's attention one significant difference; the winning proposer's fee was some 125% higher. The Providence Journal reported as a condition of the contract "the construction manager must negotiate purchases as

the project progresses and cannot exceed a specific budget. " Clearly, the latter was never the case.

As recently as September of 2006, the Project was described to the Board and the public as "moving right along" with renovations to the Dunk proceeding on schedule. But costs had grown by 24 %, fueled by increases in the cost of materials, as well as errors in design, planning and cost estimates.

By last spring Jim McCarville said, "We are out of options. We are going to need more money. Either that, or we won't finish." A \$42 million Construction Manager at Risk project had become a \$77 million watered-down, value-engineered fiasco. The Money Pit, as trade workers on the project refer to it, has been likened to an archeological site by the Authorities' own Project Manager. The project was a mess. The Authority came back to House Finance hat in hand for more money.

As to the errors, the architect's spokesman declined to comment, while the Construction Manager's Project Manager would say only that "There were issues and I wouldn't feel comfortable talking about it."

Mr. McCarville's explanation, "We didn't overspend, we underestimated!" The Authority went on record as saying that it would not seek any reimbursements from consultants or subcontractors.

Later, a board member said they would look into the possibility of seeking reimbursements from the architect. Throughout this process, there has been no accountability. Moreover, the only risk was to the taxpayers of the state of Rhode Island. That comes as no surprise to those of us who said at the outset that this was a bad deal for the taxpayer's of Rhode Island. There were no improvements to the project's organization, transparency or competitiveness by using a Construction Manager at Risk method.

Alternative delivery systems are used extensively in the private sector where sophisticated owners with their own capital at risk employ

trained construction professionals to vigilantly monitor costs and schedules. This is rarely the case in public construction. These proposed changes will not lower public construction costs or ensure better performance or faster delivery of construction projects. What they will do, however, is take a process that needs to be objective, the selection of public contractors, and turn it into a subjective process, in effect rendering it a beauty contest where only the biggest and best connected firms will get contracts. We need to do better. We do need to build buildings a better way. As Harvard's Carl Sapers, a leading expert in construction law has written, the Design-Bid-Build method of construction "creates a better product than any other form of organization yet devised." And that just happens to be the only legal method. There is no need to change that here today.

Thank you

of food-borne illnesses. Early this month to address mounting concerns, the FDA named a food safety czar, Dr. David Acheson. But Dr. Acheson will not get far without significant new funding and expanded agency powers. Recently passed Senate legislation would give the FDA authority to set food labeling standards. It would also develop a system for

ly told The New York Times. Mr. Hubbard, a former associate commissioner, spent 27 years at the agency and quit in 2005. It is just time for the FDA food safety program to be revamped, and allocated resources comparable to those received by the Agriculture Department. Otherwise we can expect outbreaks with far more illnesses and deaths.

Trying to through trad Unfortunatel for trading p are so big, an tions so enor proposed in unenforceabl million Amie need to be if lion factories ment abuses ington do a l bor and en than it curre intellectual pro

## Dunkin' for dollars

We can understand the anger exhibited by members of the Rhode Island House Finance Committee the other week over a cost overrun of 22 percent in the renovation of the state's civic arena called the Dunkin' Donuts Center.

Here in Rhode Island, already confronting massive deficits, only to see the outlook made even bleaker by the latest cost estimates revealed by the Rhode Island Construction Authority.

The project is now set to cost at least \$134 million, \$13.4 million more than estimated.

What happened does not seem to be related to any corruption. As many public land-revenue-repair projects, the initial estimate

did not take into account the rapidly changing price of the materials used.

Construction manager Gilbane Inc. contended that the price of construction materials being used at the Dunkin' usually rises about 3 percent a year. But during the two years after the feasibility study was completed, prices boomed 18 percent, thanks to pressures on the world market for construction materials bought by China and other rapidly developing countries.

The state's draconian new fire code also added millions of dollars to the cost.

What to do?

It seems that the project cannot be scaled back by anything close to \$13.4 million without leaving out a number of necessities, including new seats. And having come this far in construction, an effort to make it a much shabbier project, less fitting as a showpiece for Rhode Island, might end being penny-wise, pound-foolish. A bright new civic center will obviously add much to the growing excitement and fun of downtown Providence.

If there are some guidelines that the state and its agencies can be forced to follow so that they take greater care and do a better job of predicting the cost of future projects, then the legislature should by all means insist on such reform. But, barring that, it doesn't seem there is much Rhode Island can do here but swallow the \$1.1 million a year in additional debt service for 30 years. It's a bad-tasting sandwich, and taxpayers are all going to have to take a bite.

More imp package says U.S. trade p flows they ha ly endanger future and t global trading

The bigge the pervasive barriers used ments to dist terns and tra expense of and workers decision to l low income dicted to exp The later helped boost ready dang pushing the ever closer depression

As a resul mise is virt ests of Ame turers, farm providers an mention the toring health able growth framework flows or the tions of bus U.S. produc home and a huge labor g of rock-bot Therefore, if single good trade deficit boost incom rebalancing

The new far will not b foreign tra promised re exist and po cut to the bo es of those and caucus can't disting stance. No r ranging fro merce leade gressmen a na, and Roy pleased. Th

## The long view

In 1969, Ralph Harris promised a lovely 43-acre piece of woods and wetlands on the Scituate-Glocester border to the Audubon Society. The land stayed with the Harris family until the death of Mr. Harris's second wife in 2004.

Now, with Rhode Island considerably more exurbanized today than it was in 1969, the land will go to the society.

The Alice O. Harris (Mr. Harris's first wife, who died in 1966) Wildlife Refuge will help maintain the inland-western-Rhode Island-eastern-Connecticut region as the largest semi-rural area in the megalopolitan strip between New York and Boston, unless Foxwoods and the

PROVIDENCE  
JOURNAL  
5.31.07

Rhode Island  
**PTAC**   
Procurement Technical Assistance Center

To: Sherri Carrera  
From: D. Reynolds, L. Francis



December 12, 2007

In response to your request that RIEDC, PTAC review the proposed rules changes to the State Procurement Regulations (existing Rule 8.11.2) for the effects on small business, we offer the attached Table summary and the following general comments.

General Comments

Concerning the proposed rules changes to the State Procurement Regulations (existing Rule 8.11.2) concerning the selection of a construction management contract vehicle by State Purchasing or other State Agency.

1. On its face each of the management contract vehicles limit small business competition because they are focused on risk reduction, project completion and not small business development. The lack of directed protocol addressing full and open competition or a clear rationale for restricting participation does have a significant impact on small business participation
2. To increase small business participation throughout all phases of the Agency's construction project all Construction Contract Management services contracts, either single or multiple awards should actively promote small business participation. (See comments contained in the attached table for an expanded consideration of the balance of risk and the open competition considerations in selection of contract type)
3. The contract management vehicle limits small business participation when the selected service provider uses broad authority to act independently in the role of manager to assume and evaluate the risk associated with the completion of the project. Business decisions are made that support their independence (or advantage) not necessarily the inclusion of fair and open competition.
4. To effectively address the requirements of each management vehicle requires that the Agency use the procurement process and their operational resources to direct and support the inclusion of small business opportunities by all service providers. (This often does take place in a standard contract review and report format or as a standard contract requirement)
5. The many variations in the source selection criteria and application of the Construction Contract Management services each lend themselves to distinct limitations in support of small business participation and appear in tandem to be a defense of the business decision not the method.
6. The 7 methods of contract management are not mutually exclusive and are not based upon common reference or contracting terms. The 8 specific criteria are not related to any best value or expressed advantage connected to any of the 7 contracting methods. Whenever the evaluation and selection criteria is sourced out to a service provider there is the opportunity that open competition becomes replaced or overshadowed by the strength of the existing relationship.
7. We see a need to have measurable metrics associated with the preliminary selection of management methodology. There are no guidelines for the application of criteria to best value or risk avoidance with these proposed changes. There are no inherent safeguards against bundling or exclusion of small business participation.

8. Finally, the Agency in selecting a project management contract vehicle must actively support a process that promotes increased small business and subcontract participation particularly when large management companies are doing everything in-house to support the bundling of projects. Methods should be developed to provide for inclusive source selection, new teaming arrangements, and open competition for smaller pieces of the contract. The process may also include crafting evaluation criteria that allow for new entrants into the marketplace.

	1	2	3	4	5	6	7
	Single Prime Contractor	Multiple Prime Contractors	Design and Build	Construction Manager	Construction Manager at Risk	Sequential Design and Construction	Phased Design and Construction
Principal Risk to be Minimized	Timely completion in compliance with State provided specifications via one contract	State or Agent may contract with different trades, agent may be made responsible for timely completion	Final design & construction responsibility rest with the contractor.	May become the Prime, helps design and administers the project with respect to sub-contractors and time/cost/quality	Limits the Contractor to a fixed fee as lump sum or % of construction cost with cap.	Design may be separate contract from construction and will be completed in sequence	Fast track construction begun as design progresses
When to Use	Well defined requirements with no need for design input	Better control of expenditures, flexible SOW	Time pressures require flexible schedules, incentives available	Cash flow limitations with complex projects w/o completely defined requirements.	Market prices at risk are significant, limited willing contractors	Complexity of project requires assessment of capabilities and costs prior to RFP	Time constraints outweigh potential for retrofits.
Elements	A single contract for the construction only. State provides design. May sub-contract	Multiple contracts for distinct portions of the project. BUT A single agent may get state contract and sub-contract out multiple sub-contracts	Single contract for the design, construction, and administration of the project. Likely sub-contracts.	Single contract for the construction phase, responsible for timely completion. May sub-contract.	Single contract for construction at not-to exceed price. May participate in design cost evaluations.	Single or multiple contracts for design and then construction	Single or multiple contracts for design and/or construction in phases
What the Contractor Must Do	Complete construction on time and at budget to specs provided.	Complete assigned task on time, at budget, and per SOW	Design and build to stated performance specifications	Evaluates cost/time/quality criteria of provided specs and coordinates construction	Guarantees the performance of the construction at budget	Completes design prior to any construction	Begins construction as design work progresses

Contractor Incentive (for contract type)	Limited liability for design performance, opportunity for over-runs	No requirement to provide entire SOW, Sub-contracting opportunities	Greater flexibility	Has some input into design to avoid construction problems	Generally makes more profit if expenses within contract limit and performance is met	Has limited liability	Has greater potential for rework but pace of completion if no issues of redesign
Typical Application	Projects with short delivery and less complex requirements	Greater competition and opportunity for savings for standard construction	Complex or specialized projects	More complex projects with firm fixed budget	Complex projects in escalating cost market.	Undefined specifications or no previous requirements	Extreme need for quick completion
Principal Limitations	Limited competition  Looks like contract Bundling	Requires multiple contract management	Less state control of design	Less control over costs	May limit competition	May cause delays	Risk problems in execution
Variants	May apply to #3-7	May apply to #3-7	May be single or multiple award	May be single or multiple award	May be single or multiple award	May be single or multiple award	May be single or multiple award

<p>Impact on Small Business</p>	<p>Prime will subcontract with familiar parties to reduce risk</p> <p>No privity of contract for subs</p>	<p>Privity of contract and evaluation criteria clear</p> <p>Competitive w/o single Contract agent</p>	<p>SOW normally requires enormous resources in production of design</p> <p>Technical skills of small businesses are equal cannot compete without revenue</p>	<p>Good use of expert source if coupled with skilled agency oversight focused on increased competition</p>	<p>Limits competition price as primary motive</p> <p>May support subcontract payment issues for deliverables</p>	<p>Agency requirements for small business inclusion should be part of source selection process</p> <p>Especially needed if multiple contracts are possible</p>	<p>Sourcing issues normally abandoned to risk reduction</p> <p>Need for past performance rules out new business</p>
---------------------------------	---	---	--	--	--	--	---