Square Peg, Round Hole: Bid Protests in Nontraditional Construction Procurement

By Aaron P. Silberman

State and local government agencies are seeking to gain more control over their construction procurements by obtaining authority to conduct procurements with more flexible procurement, contracting, and project delivery methodologies. This article discusses issues raised when challenging solicitations or awards, through either administrative bid protests or court challenges (collectively referred to here as "protests"), in procurements where public entities solicit construction work through means other than the traditional low-bid procurement, firm-fixed-price contracting, and design-bid-build project delivery methods. Special protest issues arise (1) where factors other than price may be considered in procurements using a request for proposals (RFP) or "best value" methodology and in sole source contract awards; (2) where alternative contract vehicles are awarded, like cost reimbursement and indefinite-delivery indefinite-quantity (IDIQ) contracts; and (3) where alternative project delivery systems are used, such as design-build, public-private-partnerships (P3s), and lease-leaseback.

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Protests Involving Traditional Procurement Methods

Until relatively recently, most U.S. jurisdictions required use of hard bid invitations for bids (IFBs),[1] firm-fixed-price (FFP) contracts, and design-bid-build as the dominant, and sometimes sole, project procurement, contracting, and delivery methods for public construction.[2] The last thirty years have seen a significant erosion of the prevalence of these methods.[3] While in many jurisdictions they remain the primary, or even only, lawful methods for state and local government entities to obtain construction services and projects, in many others alternative methods are available and increasingly are being used.[4]

Where traditional project procurement, contracting, and delivery methods are used, the rules and remedies for protesting contract awards, administrative or judicial, are often well-established through statutes and ordinances, agency regulations, and decisional common law. Where alternative methods are used, however, application of these rules and remedies may be unclear and specific guidance may be untested or nonexistent.

In a traditional hard-bid IFB for award of an FFP contract to provide construction services, the agency seeking those services has already obtained substantial design services for the project under a separately awarded design services contract or from civil service designers. The agency then issues an IFB seeking hard bids for a fixed-price contract to perform a defined scope of work (subject to change orders and corresponding price adjustments). The agency commits to award the contract to the low responsible bidder meeting the IFB submission requirements. The IFB is focused on pricing rather than on solutions, ideas, or concepts.[5]

continued on page 9

Typically, a disappointed bidder may only protest an intended award on the ground that the protestor was the low responsible bidder meeting the IFB submission requirements, such that contract award, if any, had to be made to the protestor.[6] Some agencies also provide prospective bidders the ability to protest the terms of the IFB itself, usually before bid submission, on the ground that it unduly restricts competition (e.g., by including overly restrictive requirements), unfairly favors one or several qualified prospective bidders over others, or contains illegal requirements.[7]

Protests Involving Alternative Procurement Methods

Protesting the Choice of Procurement Method. Where law and regulation only allow agencies to use the hard-bid IFB procurement method, the agency has no discretion to use an alternative method and there can be no viable protest of the agency's use of the designated method.[8] On the other hand, where an agency has some discretion to use an IFB or some other solicitation method, such as an RFP, prospective bidders may have an opportunity to challenge the exercise of that discretion. Where a pre-award administrative protest of the solicitation is available, this may be a means to make such a challenge, though the agency may restrict the grounds for such a protest in a way that would exclude such a protest. Where no administrative protest process is available to make such a challenge, or where that process has been exhausted, some jurisdictions may provide for a court challenge of the agency's procurement method selection.[9]

Even where law or regulation provides a means to challenge an agency's choice of procurement method, such a challenge will be unlikely to succeed in most cases because agencies typically have very broad discretion in choosing how to procure goods and services, including construction.[10] An exception would be where law or regulation specifically limits the agency's discretion, for example, only allowing use of RFPs for certain types or sizes of projects, and the challenge is based on the agency's failure to adhere to those limits.[11]

Protesting Procurements Using an RFP and "Best Value" Methodology. In contrast to IFBs, an RFP typically defines the scope of work more broadly, tending more toward performance (rather than design) specifications and requests that bidders (also referred to as "offerors" or "proposers") describe how their approaches or solutions will achieve the agency's desired results. Unlike IFBs, RFPs typically allow the agency to select the awardee based on factors other than and in addition to low price, such as technical factors and qualifications.[12] RFPs should make clear the relative importance among factors and between price versus technical factors.

Since an RFP typically does not define the scope of work as rigidly as does an IFB, with the former leaving offerors more room to propose different solutions to meet the agency's needs, the agency will usually have more discretion to accept and consider offers as responsive to RFP requirements than it would under an IFB. The RFP should make clear whether a requirement is "pass/fail," such that a proposal's failure to meet it will require or allow the agency to reject the proposal, or instead will impact scoring. As a general rule, where the RFP is silent and the requirement is not mandated by law, failure to meet it will impact scoring but not be a ground for rejection.

For example, in *Sayer v. Minnesota Department of Transportation*, the Minnesota Supreme Court affirmed the trial and intermediate appellate court decisions denying a challenge of a best value RFP award of a design-build contract to replace the I-35 bridge in Minneapolis to the offeror with the highest bid price and longest bid schedule.[13] The appellants contended that Minnesota Department of Transportation (MnDOT) was required to reject the proposal of the intended awardee, Flatiron-Manson, as nonresponsive because it failed to comply with RFP specification requirements that "[p]roposed work for this project shall not include additional capacity or Right of Way" and that concrete-box designs feature "[a] minimum of three webs."[14] The trial court granted the awardee's and MnDOT's joint motion for summary judgment based on its conclusion that, "under the design-build best-value procurement process, whether a proposal is responsive to the RFP 'is a product of the scoring methodology' rather than the 'proposal's strict conformity with each and every requirement of the RFP.'"[15] The court of appeals affirmed, holding that the common law definition of "responsiveness" does not apply to the design-build best-value procurement process and that MnDOT acted within its discretion when it determined that Flatiron-Manson's proposal was responsive.[16] The Minnesota Supreme Court again affirmed, with the majority opinion holding that the undisputed facts showed the awardee's proposal was responsive, regardless of the standard applied,[17] and the concurring opinion finding that those facts only showed responsiveness under the more permissive definition in the RFP, which applied under the design-build statute.[18]

Agency evaluations of nonprice factors in procurements using RFPs are by necessity more nuanced, if not more subjective, than those using IFBs.[19] The agency has a more complex and difficult task under RFPs rating offerors' different proposed solutions and qualifications than they do under IFBs confirming compliance with minimum requirements and tabulating the low-priced bid. Under an RFP, the agency also often must weigh price and nonprice factors in a best value trade-off in order to make its source selection decision; in other words, where the low-priced offeror does not submit the best-rated proposal for nonprice factors, the agency must determine whether any higher-priced proposals offer a better value because their superior technical proposals are worth their higher prices.[20] Both the technical evaluation and the best value trade-off are subject to protest if they do not conform to RFP requirements, including adherence to the stated evaluation criteria and the relative weights of different factors.[21]

Further, because under RFPs offerors are allowed and

even encouraged to propose different solutions to meet the agency's needs (as opposed to IFBs, in which all bidders propose to meet the same detailed specifications), RFPs will often provide that the agency will, or at least may, conduct discussions with offerors (typically after a down-selection eliminating lower-rated proposals). As a result of these discussions, the down-selected offerors (i.e., those in the "competitive range") are permitted to change their proposals. Where this occurs, potential grounds for protest may arise that do not exist in procurements utilizing IFBs; specifically, disappointed offerors may protest on the ground that the agency held improper discussions by providing incomplete or misleading information to the protestor or providing improper information to the intended awardee. A common example of the latter, which occurs in federal procurements but could also arise in state and local procurements allowing discussions, is where the agency provides useful information to the intended awardee but not to the other offerors, or at least not to the protestor.[22]

Protests Involving Alternative Contract Vehicles

Traditionally, most public construction contracts have been FFP contracts, where the award is at a fixed price, subject only to change if the scope of work is modified, increased, or decreased. Other contract types, such as cost reimbursement (also known as "cost-plus"), time and materials (T&M), and IDIQ have also been used in federal construction contracting, and state and local governments are exploring use of such contract types in their procurements. The same protest rules apply to all construction contracts, regardless of type of contract vehicle, but those rules were generally drafted with FFP contracts in mind. As a result, sometimes they are not so clean a fit for other contract types. Where administrative and court decisions have been issued in challenges of awards of other than FFP contracts, some approaches have been developed to meaningfully evaluate and decide the propriety of those awards.

Protesting the Choice of Contract Vehicle. While some public entities have internal procedures or guidance regarding when to use particular contract types, e.g., recommending FFP contracts where the scope is well defined or cost-reimbursement contracts when the anticipated costs of performance are unknown and unpredictable, agencies still typically have a great deal of discretion in choosing the type of contract they want and protests challenging such decisions rarely succeed.[23] An exception is where law or regulation specifies clear limitations on when an agency may use a specific contract type and the agency violates those legal limits. Such cases, however, are rare.

Cost Reimbursement Contracts. Cost reimbursement contracts, usually cost-plus-fixed-fee, are sometimes used for construction by the federal government. This contract type permits contracting for efforts that might otherwise present too great a risk to contractors, but it provides the contractor with only a minimum incentive to control costs.[24] Cost reimbursement contracts are used in other types of procurements by state and local governments and may be considered for construction. Where state and local governments procure construction (or other goods and services) through cost reimbursement contracts, they may encounter a protest issue that has arisen in federal procurements of these types of contracts: whether the agency improperly evaluated the reasonableness of bidders' proposed costs or price.

In federal procurements, where an agency solicits proposals for a cost reimbursement contract, it will be required to perform a cost realism analysis on each proposal to ensure that the offeror will likely be able to perform at the costs indicated. If that analysis indicates that the offeror's proposed costs are unrealistic, then the agency must adjust those costs for evaluation purposes because, if it awards the contract to that offeror, it will be required to reimburse all allowable costs that the contractor actually incurs, irrespective of the offeror's proposal.[25] Thus, a cost realism analysis is required to determine whether an upward cost adjustment is appropriate.[26] The government's failure to perform a required cost realism analysis, or finding defects in such an analysis, is a frequent ground for protest of cost reimbursement contract awards.[27]

By contrast, when an agency solicits a fixed-price contract, it is not required to conduct a cost realism analysis and may only do so if it provides "reasonable notice" in the solicitation by specifically stating that low pricing will be considered as reflecting on the offeror's technical capability to perform and may be grounds for elimination from the competition.[28] Even where the agency may conduct a discretionary price realism analysis, it must be limited to the agency's technical evaluation of the proposal and may not result in any adjustment to the offeror's proposed costs.[29] Without a written notice provision in the solicitation, a realism analysis in the fixed-price context is outright prohibited and the Government Accountability Office (GAO) will not infer a notice provision from generalized solicitation language requiring the offeror to assure the agency it can meet the solicitation's technical requirements.[30] Where an agency did not provide in the RFP adequate notice that price realism would be considered but nevertheless conducted a realism analysis and used it in its evaluation, this is a proper ground for protest.[31] Likewise, a protest to the price realism of the awardee's proposal for a fixed-price contract, or the agency's failure to analyze it as part of the awardee's technical evaluation, will fail unless a written solicitation provision specifically stated that unrealistically low pricing would reflect on the offeror's technical capability and could be grounds for elimination and, even then, a reviewing tribunal likely would defer to the agency's discretion regarding the awardee's sufficient technical capability.[32]

IDIQ Contracts. The federal government has also increasing procured construction through IDIQ contracts,

which provide for an indefinite quantity of supplies or services during a fixed period of time. Historically, IDIQs have been utilized most often to obtain services, such as architecture and engineering.[33] IDIQs have more recently been used for construction, for example, by the U.S. Army Corps of Engineers for design and construction of military buildings (barracks and related structures) across the country.[34] Under an IDIQ contract, the government places delivery orders (for supplies) or task orders (for services) against a basic contract for individual requirements. Minimum and maximum quantity limits are specified in the basic contract as either number of units (for supplies) or dollar values (for services). The government uses an IDIQ contract when it cannot predetermine, above a specified minimum, the precise quantities of supplies or services that it will require during the contract period.

State and local governments have used IDIQ-type contracts in other procurements and, like the federal government, may find them desirable for some construction procurements. Where they do so, they will likely encounter special protest issues that have arisen for federal IDIQ procurements.[35] Unlike with most other construction contract procurements, agencies often award multiple IDIQs under the same procurement. If the agency does not award the number of contracts the RFP says it will, or a number within a stated range of awards, that may provide a ground for protest, though the RFP requirement must be clear.[36]

Another protest issue that could arise under state or local entity IDIQs is whether there are limits on the ability of IDIQ holders to protest agency awards of orders under those contracts.[37] This issue has arisen with orders under federal IDIQ contracts. For federal IDIQ orders, a disappointed IDIQ holder may only protest award of a task or delivery order with the GAO and only then if the dollar value of the order exceeds $10 million. Prior to 2008, task orders issued under IDIQs with the federal government were not protestable, regardless of their size.[38] In 2008, Congress granted GAO the authority to hear bid protests of task orders valued at more than $10 million.[39] After this provision sunset in June 2011, the GAO held that it had authority to hear bid protests of task orders of any size.[40] In December 2011, Congress passed legislation to reinstate the $10 million threshold and apply it retroactively to the period between June and December 2011.[41] The GAO subsequently confirmed that the $10 million bid protest task order threshold was effective immediately.[42]

For orders that do not meet the $10 million criteria, the ability to file a protest is very narrow. In most instances, the disappointed bidder's only recourse is to submit a complaint to the Agency's Task Order and Delivery Order Ombudsman. Ombudsmen are appointed to review contractor complaints and ensure fairness in agency contract competitions. Their decisions are typically not reviewable, administratively or judicially.[43]

Protests Involving Alternative Project Delivery Methods

Protesting the Choice of Project Delivery Method. Because many jurisdictions historically required that public construction be delivered through design-bid-build, authorization for alternative methods typically must be authorized by specific legislation and that authorization may be construed narrowly by courts.[44] As a result, many of the protests involving alternative project delivery methods are challenges to the agency's choice to use those methods in the first place.[45] For example, in 2010, a labor union, the Professional Engineers in California Government (PECG), sued to enjoin the California DOT (Caltrans) from contracting out, using a public-private-partnership (P3), to design, rebuild, and maintain San Francisco's aging Doyle Drive approach to the Golden Gate Bridge.[46] The union argued that state law did not authorize use of a P3 on the project, contending that the law only allowed P3s on projects that Caltrans had previously managed and that are financed by tolls, but the trial and appellate courts upheld the contract.[47]

Design-Build. Under the design-build project delivery method, a public entity procures both design and construction services under the same prime contract. Compare this to the design-bid-build method, in which the public entity procures design and construction under separate prime contracts. Many state and local public design contracts are acquired under qualifications-based procurements, in which the designer is selected based on demonstrated competence and qualifications for the type of engineering and design services being procured, and at a fair and reasonable price.[48] In contrast, most public construction contracts are awarded competitively based on the lowest qualified bid or best value. Different jurisdictions require that design-build contracts be awarded based on low bid, best value, or qualifications, or a combination.[49]

Some design-build statutes require that offerors be prequalified, for example, through a request for qualifications process prior to issuance of an RFP, in order to bid on such projects.[50] Some jurisdictions allow protests challenging decisions not to prequalify an offeror. For example, a protest regarding failure to prequalify was denied by a public authority in New Jersey for the Atlantic City/Brigantine Connector.[51]

A protest issue often raised by federal design-build procurements is organizational conflicts of interests (OCIs). Where an agency contracts with an architect/engineer (A/E) to develop a preliminary design or scope of work statement to provide to prospective bidders on a design-build procurement, the A/E will have an OCI that should, in most cases, disqualify it from bidding on the design-build contract.[52] As state and local law and regulation develop in the area of OCIs,[53] it will likely give rise to protest issues in design-build procurements.

Public-Private-Partnerships. A P3 is a government service or private business venture that is funded and operated through a partnership of government and one or

more private sector companies. Under a P3 contract, a private party provides a public service or project and assumes substantial financial, technical, and operational risk in the project. In some types of P3, the cost of using the service is borne exclusively by the users of the service and not by the taxpayer; in other types, capital investment is made by the private sector on the basis of a contract with the government to provide the agreed-upon services and the cost of providing the service is borne wholly or in part by the government.

Many U.S. jurisdictions now authorize P3s, at least for certain projects or types of projects.[54] In P3 transactions, there is typically a process by which the contracting agency narrows down the field based on initial submissions by each company stating it's qualifications. Protests may challenge the agency decision to select the bidders included on this "short list."[55]

Companies competing for a P3 may have OCIs that could be grounds for a protest. OCIs usually take three different forms: (1) unequal access to information, where one company has access to competitively useful and nonpublic information; (2) biased ground rules, where a firm has played a role in drafting part of the solicitation; and (3) impaired objectivity, where the work a company performs under the contract could entail assessment of its own performance under another contract.[56] In P3 transactions, the first two types of OCIs are most likely to occur and disappointed bidders potentially can challenge an award to another company on the grounds that the contracting agency ignored an existing OCI and thus the transaction was unfair or biased. Accordingly, companies should be well aware of the competitors for a P3 transaction and be attentive to possible OCI situations.

Other grounds for post-short-list or post-award protests include a lack of meaningful discussions or one company being allowed to alter its proposal after submission. Because of the extensive negotiations that can take place during a P3 competition, lack of meaningful discussions could be a common protest ground in this area. If the government favors a particular company during negotiations, provides certain information only to select companies, or engages in significantly more extensive discussions with particular companies while not providing the same opportunities to another company, this can be grounds for a lack of meaningful discussions or improperly favoring one company over another. At times, these unequal discussions can result in a company being allowed to alter its proposal after the submission deadline. Should the government not provide that same opportunity to the other companies in the competition, then it is vulnerable to a protest.[57]

For example, in 2012, a disappointed bidder filed a court complaint challenging the Maryland Transportation Authority's award of a P3 contract for two I-95 travel plazas. The court dismissed the complaint, holding that a P3 is not a "procurement" subject to state procurement law[58] and, as a result, it was not subject to state regulations requiring separate technical and price evaluations and express rankings of evaluation factors or requiring equal discussions among bidders.[59]

Construction Manager (CM) at Risk or CM/GC. CM at risk has been touted as a delivery method that reduces the risk of bid protests because the public entity selects its CM/GC earlier in the design process, typically for a fee-based CM contract, and only later, once the design is developed, negotiates a fixed-price construction contract.[60] An agency's choice of the CM/GC method itself may be subject to challenge (see "Protesting the Choice of Project Delivery Method" above), but its award decision is less often subject to an effective protest. Procurements of CM/GC contracts typically use a combination of qualifications-based and best-value evaluation methods and so may lead to the same types of issues as in design-build procurements.[61]

One way in which protests do arise in CM/GC procurements is not in the award of the CM/GC contract but in the CM/GC's award of subcontracts. Many statutes authorizing CM/GC contracts address the reduced competition for the prime contract by requiring the CM/GC to use competitive processes, often advertised low-bid procurements, to select its major subcontractors.[62] Such requirements are uncommon in procurements of construction through other project delivery methods, such as design-bid-build or design-build.

Lease-Leaseback. Lease-leaseback is a project delivery method that, where authorized, allows public entities to avoid competitive bidding requirements that apply to procurement contracts by instead entering into two lease transactions, one leasing the entity's real property to a contractor and the other leasing the contractor-built improvement back to the entity. For example, in California, school districts are authorized by statute to let, *without advertising for bids*, their real property to contractors for nominal sums if the lease requires the lessees to construct improvements on the property for district use during the lease term and provides for title of the improvements to vest in the district upon expiration of the lease term.[63]

Two recent court challenges of lease-leaseback contracts in California have resulted in a conflict between state appellate districts. First, in *Los Alamitos Unified School District v. Howard Contracting, Inc.*, the 4th District Court of Appeal affirmed summary judgment for the district, holding that lease–leaseback agreements are exempt from competitive bidding requirements.[64] (Later that year, the 2nd Appellate District reached the same result in an unpublished decision in *McGee v. Torrance Unified School District*, relying on the *Los Alamitos* decision.[65]) Then, in 2015, in *Davis v. Fresno Unified School District*, the Fifth Appellate District reversed summary judgment in favor of the district, holding that, to qualify for exemption from public bidding, a lease-leaseback transaction must include "a financing component" and a "genuine lease" that provides for school district use of the facilities during the lease term and determining that the contract before it did not

meet these criteria and so was subject to competitive bid requirements under the Public Contract Code.[66]

Unless and until the appellate split in California is resolved (the California Supreme Court denied Fresno USD's petition for review), many lease-leaseback projects will be subject to challenge by contractors deprived of the opportunity to compete for those projects.

Conclusion

Bid protests are hard. The protestor almost always faces a difficult standard of review and burden of proof. As with many administrative remedies, protests often are creatures of statute, ordinance, or regulation with short deadlines and unforgiving requirements. A disappointed bidder may easily lose its protest rights by even the slightest failure to observe the rules, and even a successful bidder may, due to its own failure to follow the rules, find its ability to defend the award it worked so hard to obtain severely compromised, if not eliminated altogether.

These challenges are heightened when state or local government agencies use alternative procurement, contracting, or project delivery methods. Most protest rules, and case law interpreting them, contemplate traditional methods for public construction: low-bid IFBs, firm-fixed price contracts, and design-bid-build. Parties bringing or defending protests involving less traditional methods may find the proceedings to be a "square peg" to the rules' "round hole." PL

Endnotes

1. Also sometimes referred to as invitations to bid (ITBs) or requests for quotations (RFQs).

2. *See, e.g.*, Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co., 36 N.E.3d 505, 511–12 (Mass. 2015); Rochester City Lines, Co. v. City of Rochester, 868 N.W.2d 655, 658–59 (Minn. 2015); Sayer v. Minn. Dep't of Transp., 790 N.W.2d 151, 155 (Minn. 2010) ("Traditionally, Minnesota public construction contracts have been awarded using the lowest responsible bidder approach to procurement.").

3. Am. Ass'n of State Highway & Transp. Officials, Primer on Contracting for the Twenty-First Century (5th ed. 2006), *available at* http://tinyurl.com/qco8aun.

4. *Id.*

5. *See, e.g.*, *Sayer*, 790 N.W.2d at 155–56.

6. *See, e.g.*, Cal. Pub. Cont. Code § 10345(a)(2).

7. *See, e.g.*, Alaska Stat. § 36.30.565; Ariz. Admin. Code § R2-7-A901(C); Colo. Rev. Stat. § 24-109-102(1); Conn. Gen. Stat. § 4e-36(a); Fla. Stat. § 120.57(3)(b); Ga. Vendor Man. § 3.8.

8. Challenges may be available to halt the procurement itself, for example under statutes requiring environmental impact reviews and approvals.

9. *See, e.g.*, Cal. Civ. Proc. Code § 1085(a) ("A writ of mandate may be issued by any court to any [state or local public entity in the state] to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station.").

10. Tyler Constr. Grp. v. United States, 570 F.3d 1329, 1334 (Fed. Cir. 2009); E.W. Bliss Co. v. United States, 77 F.3d 445, 449 (Fed. Cir. 1996); Lockheed Missiles & Space Co. v. Bentsen, 4 F.3d 955, 958 (Fed. Cir. 1993).

11. *See, e.g.*, Minn. Stat. §§ 161.3414, subd. 1 ("A design-build contracting procedure . . . may be used for a specific project only after the commissioner determines that awarding a design-build contract will serve the public interest."); 161.3412, subd. 3 ("The number of design-build contracts awarded by the commissioner in any fiscal year may not exceed ten percent of the total number of transportation construction contracts awarded by the commissioner in the previous fiscal year.").

12. Sayer v. Minn. Dep't of Transp., 790 N.W.2d 151, 156 (Minn. 2010) (citing Minn. Stat. § 16C.02, subd. 4a (2008)).

13. *Id.* at 153–54. Appellants Scott Sayer and Wendell Phillippi challenged the award as illegal in an action as private attorneys general under Minn. Stat. § 8.31, subd. 3a (2008). *Sayer*, 790 N.W.2d at 154.

14. *Sayer*, 790 N.W.2d at 154–55.

15. *Id.* at 155. The RFP defined a bid as responsive if MnDOT's initial review resulted in a specified minimum technical score. *Id.* at 157.

16. *Id.* at 155 (citing Sayer v. Minn. Dep't of Transp., 769 N.W.2d 305, 310–11 (Minn. Ct. App. 2009)).

17. *Id.* at 160.

18. *Id.* at 165–66.

19. Rochester City Lines, Co. v. City of Rochester, 846 N.W.2d 444 (Minn. Ct. App. 2014), *aff'd in part*, 868 N.W.2d 655 (Minn. 2015).

20. *See, e.g.*, *Sayer*, 790 N.W.2d at 156.

21. *See, e.g.*, Cal. Pub. Cont. Code § 10345(b).

22. *See, e.g.*, Gentex Corp. v. United States, 58 Fed. Cl. 634, 653 (2003).

23. *See, e.g.*, Tyler Constr. Grp. v. United States, 570 F.3d 1329, 1331 (Fed. Cir. 2009) (rejecting general contractor's claims for injunctive and declaratory relief against an Army Corps solicitation for IDIQ contracts on ground that IDIQs were not authorized for construction under Federal Acquisition Regulation (FAR) 16.501-2(a), 48 C.F.R. § 16.501-2(a), citing FAR 1.102(d), which provides procurement officials with the authority to use innovative approaches to satisfy the government's procurement needs so long as such approaches are not otherwise addressed in the FAR or prohibited by law).

24. FAR 16.306.

25. PAE Gov't Servs., Inc., B-407818, Mar. 5, 2013, 2013 CPD ¶ 91, at 4.

26. *See id.* (citing FAR 15.404-1(d)(1)).

27. *See, e.g.*, United Payors & United Providers Health Servs., Inc. v. United States, 55 Fed. Cl. 323, 330 (2003); Serco Inc., B-407797.3, Nov. 8, 2013, 2013 CPD ¶ 264, 2013 WL 6235559; Citelum DC, LLC, DCCAB No. P-0922, 2013 WL 1952320 (Mar. 1, 2013); Pueblo Envtl. Solution, LLC, B-291487, Dec. 16, 2002, 2003 CPD ¶ 14.

28. *PAE*, 2013 CPD ¶ 91, at 6 (citing, *inter alia*, FAR 15.404-1(d)(3)); *see also* Triad Int'l Maint. Corp., B-408374, Sept. 5, 2013, 2013 CPD ¶ 208, at 11; SAMS El Segundo, LLC, B-291620.3, Feb. 25, 2003, 2003 CPD ¶ 48; CSE Constr., B-291268.2, Dec. 16, 2002, 2002 CPD ¶ 207.

29. *See PAE*, 2013 CPD ¶ 91, at 4, 6.

30. *See id.* at 6–7.

31. *See, e.g.*, Ceres Envtl. Servs., Inc. v. United States, 97 Fed. Cl. 277, 306 (2011); Lilly Timber Servs., B-411435.2, Aug. 5, 2015, 2015 CPD ¶ 246; Milani Constr., LLC, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87; *CSE Constr.*, 2002 CPD ¶ 207.

32. *See, e.g.*, Cohen Fin. Servs., Inc. v. United States, 112 Fed. Cl. 153, 166–67 (2013); *Triad*, 2013 CPD ¶ 208, at 11.

33. *See Indefinite Delivery, Indefinite Quantity Contracts*, U.S. Gen. Services Admin., http://tinyurl.com/clr7qo2 (last visited Dec. 15, 2015).

34. *See* Tyler Constr. Grp. v. United States, 83 Fed. Cl. 94, 95 (2008), *aff'd sub nom.*, 570 F.3d 1329 (Fed. Cir. 2009).

35. *See, e.g.*, KWR Constr., Inc. v. United States, No. 15-156C, 2015 WL 4463255, at *5, *8 (Fed. Cl. July 21, 2015); Colt Def., LLC, B-406696, July 24, 2012, 2012 CPD ¶ 302; Planned Sys. Int'l, Inc., B-405292.3, July 10, 2012, 2012 CPD ¶ 203; Dorado Servs., Inc., B-402244, Feb. 19, 2010, 2010 CPD ¶ 71; ICON Consulting

Grp., Inc., B-310431.2, Jan. 30, 2008, 2008 CPD ¶ 38; Doyon-American Mech., JV, B-310003, Nov. 15, 2007, 2008 CPD ¶ 50.

36. *See, e.g.*, WinStar Commc'ns, Inc. v. United States, 41 Fed. Cl. 748, 762 (1998) (concluding that "failing to consider the benefits of multiple awards" rather than a single award is unreasonable); Usmax Corp., B-407273.20, Feb. 6, 2014, 2014 CPD ¶ 81; Short & Assocs., B-406799, Aug. 31, 2012, 2012 CPD ¶ 251; Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180.

37. A different and unique protest issue under state or local government IDIQs could arise where a different state or local entity awards the IDIQ than that which awards orders under that contract: what entity's protest rules apply and who has jurisdiction to hear a protest of the award of the order?

38. Technatomy Corp., B-405130, June 14, 2011, 2011 CPD ¶ 107, at 2–3.

39. *Id.* at 3.

40. *Id.* at 1.

41. Kevcon, Inc., B-406418, Mar. 7, 2012, 2012 CPD ¶ 108, at 3.

42. *Id.* at 2–3.

43. Orbis Sibro, Inc. v. United States, 117 Fed. Cl. 446, 453 (2014); Wildflower Int'l, Ltd. v. United States, 105 Fed. Cl. 362, 371, 380 (2012).

44. *See, e.g.*, Cal. Pub. Util. Code § 103395 (allowing CM/GC upon certain findings); Colo. Rev. Stat. § 30-20-1104 (same regarding integrated project delivery).

45. *See, e.g.*, U.S. Dep't of Transp., Fed. Highway Admin., Current Design-Build Practices for Transportation Projects § 2.1 ("General Design-Build Program Information: Greenville County, South Carolina (Jan 2002)"), http://tinyurl.com/pyu4mns [hereinafter FHWA D-B Report] (contractor sued Greenville, South Carolina, challenging its use of design-build); Sloan v. Greenville Cnty., 590 S.E.2d 338, 344 (S.C. Ct. App. 2003); Prof'l Eng'rs in Cal. Gov't v. Dep't of Transp., 129 Cal. Rptr. 3d 255, 257 (Ct. App. 2011).

46. *Prof'l Eng'rs*, 129 Cal. Rptr. 3d at 257.

47. *Id.* at 260–63.

48. *See, e.g.*, Cal. Gov't Code § 4526; *see also Qualifications-Based Selection Resource Center*, Am. Council of Eng'g Cos., http://tinyurl.com/zzxdgme (last visited Dec. 15, 2015) (reporting that "46 state governments, and many localities throughout the country" use qualifications-based selection for A/E procurements).

49. *See, e.g.*, Alaska Stat. § 36.30.200 (low bids or, upon appropriate finding, best value); Ark. Code Ann. § 27-67-206(j)(2) (qualifications-based); Fla. Stat. § 287.055 (9) (best value or qualifications-based).

50. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 28-7363 to -7365; Minn. Stat. § 161.3420, subd. 3 (2008).

51. FHWA D-B Report, *supra* note 45, § 3.4 ("Protests Relating to Design Build Procurements").

52. Energy Sys. Grp., B-402324, Feb. 26, 2010, 2010 CPD ¶ 73; B.L. Harbert-Brasfield & Gorrie, JV, B-402229, Feb. 16, 2010, 2010 CPD ¶ 69; SSR Eng'rs, Inc., B-282244, June 18, 1999, 99-2 CPD ¶ 27.

53. *See, e.g.*, Davis v. Fresno Unified Sch. Dist., 187 Cal. Rptr. 3d 798 (Ct. App. 2015), *review denied* (Aug. 26, 2015).

54. *See, e.g.*, Ariz. Rev. Stat. Ann. § 28-7703; Colo. Rev. Stat. § 43-1-102; Md. Code Ann., Educ. § 4-126; N.C. Gen. Stat. § 143-64.31.

55. *See, e.g.*, 74 Pa. Cons. Stat. § 9109(m).

56. *Cf. Davis*, 187 Cal. Rptr. 3d 798.

57. For an example of a protest of the prequalification in a federal P3 procurement, see Cmty. P'ship LLC, B-286844, Feb. 13, 2001, 2001 CPD ¶ 38, at 1–3 (GAO protest of Army prequalification in procurement for privatization of military housing).

58. Host Int'l, Inc. v. Md. Transp. Auth., No. 24-C-12-001507, slip op. at 17–19 (Md. Cir. Ct. 2012), *available at* http://tinyurl.com/njh82q6.

59. *Id.* at 21–25.

60. *See, e.g.*, Cal. Pub. Util. Code § 103397.

61. *See, e.g.*, Patrick Cliff, *Scoring Sparked School Bid Protest*, Bull. (Mar. 8, 2009), http://tinyurl.com/gwup4n3 (contractor protest of school district CM/GC award).

62. *See, e.g.*, Portland, Or., City Code § 5.34.890.E.11; Utah Div. of Facilities Constr. & Mgmt., Procurement Manual for CM/GC's and DFCM Program Directors Managing CM/GC Projects (2005), *available at* http://tinyurl.com/hof7p2b.

63. Cal. Educ. Code § 17406(a).

64. 178 Cal. Rptr. 3d 355, 357 (Ct. App. 2014).

65. No. B252570, 2015 WL 301918, at *1, *5 (Cal. Ct. App. Jan. 23, 2015).

66. 187 Cal. Rptr. 3d 798, 804 (Ct. App. 2015), *review denied* (Aug. 26, 2015).