

Legal Issues on PennDOT Design-Build Jobs: Part I

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The term “design-build” has distinctly different meanings depending on whether that term is used in the private contracting arena or in the PennDOT contracting arena.

In the private sector, a “design-build” contractual arrangement almost always means that a single entity will be responsible for both the entire design and the entire construction of a particular project. That arrangement in the private sector can have advantages for the Owner, not only because there is a single source of responsibility, but also because owners will not have to defend a dispute with the contractor that is caused by errors of the designer hired by the Owner. Additionally, the use of a design-build process in the private sector can often lead to an overall shorter project duration when both the design phase and construction phase are considered.

Private-sector design-build contracting also offers greater flexibility and input from the design-builder. Typically, private-sector design-build contracts involve a “design development” phase in which the design

professional provides preliminary plans, and thereafter makes changes after significant input from the Owner based on the owner’s needs. It is then common for a construction budget to be developed thereafter, after which a guaranteed maximum price contract may be agreed to, with a contingency funded by the Owner. Unlike a PennDOT design-build contract, a private-sector design professional has no “Design Manual” that it must follow, nor does a private-sector designer typically have a detailed volume of owner-provided specifications that it must follow.

In the context of PennDOT contracts, the term “design-build” is somewhat of a misnomer. Essentially, PennDOT design-build contracts are more “design-complete” projects, as virtually nothing is being designed from scratch. In all PennDOT “design-build” contracts, PennDOT provides both conceptual plans that bidders must follow and also publishes voluminous special provisions. Whatever design work that is required under the contract must comply with PennDOT’s Design Manual, Standard Drawings, and published specifications. The low bidder simply engages a design professional to complete PennDOT’s design. This process is vastly different from a private-sector design-build contract.

By their very nature, true design-build projects are not suitable for competitive bidding. Pennsylvania’s public bid laws require that bids be evaluated based on a common standard. Given the common standard requirement, it is difficult for most

public entities in Pennsylvania to legally utilize a true design-build contracting process. However, the existence of PennDOT’s voluminous design and construction specifications, combined with the fact that PennDOT engages in a preliminary design process that invariably results in the publication of conceptual plans to bidders, is what arguably allows PennDOT to legally use a “design-build” contracting process, as the design manual and the Form 408 Specifications, combined with the conceptual drawings and voluminous bid documents, establishes the “common standard.” While this specific issue has never been tested in the courts, as long as the Commonwealth can show it is applying common standard it is likely a court would uphold the process.

The unique nature of PennDOT’s “design-complete” system creates a unique set of issues. First, unlike a typical private-sector design-build contract, a PennDOT design-complete contract does not create a situation where a single entity is responsible for the entire design and entire construction of a project. Indeed, given that it is PennDOT itself that is responsible for preparing its own design manuals and Form 408 Specifications (often with requirements dictated by the Federal Highway Administration), and inasmuch as PennDOT often hires a separate design professional to perform some level of design pre-bid, it cannot be stated that a design-build contractor on a PennDOT project is fully responsible for the project’s design. The fact that PennDOT’s “design-

complete” process does not allow a single source to be responsible for all facets of design and construction effectively eliminates several of the principal advantages of using the design-build process. Indeed, on PennDOT “design-complete” projects, the Owner can still have responsibility for the aspects of the design for which it is responsible, and the Owner still may have disputes with its own designer.

Second, a PennDOT “design-complete” project is significantly different than a standard private-sector design-build contract because the PennDOT design-complete contract is awarded on a hard-bid basis, whereas virtually all private-sector design-build contracts are not. Rather, most private-sector design-build contracts provide an opportunity for: (1) preliminary design; (2) subsequent discussions with the owner regarding scope additions or reductions depending on the owner’s budget; (3) plan revisions to reflect scope changes; (4) a back-and-forth exchange of ideas before a final contract amount is agreed to; and (5) an Owner-funded contingency to pay for unforeseen conditions. That process simply cannot occur in the public-sector hard-bid context. The hard-bid nature of PennDOT’s design-complete projects requires bidders to utilize the conceptual plans and other information made available by PennDOT at the bid stage, and to base their bid on both those represented conditions and a design that ultimately will meet PennDOT’s design manual and Form 408 Specifications.

Third, the concept of including a lump sum item for a “construct roadway” and/or a “construct structure” based on conceptual drawings, without any owner-funded contingency, is unlike any scenario used on private-sector design-build contracts, and creates its own set of problems. On a standard design-bid-build project, with respect to lump sum items, the bidder has the benefit of those items being fully designed, and thus it

can perform its quantity takeoffs based both on a final design and representations of the existing conditions by the owner. Conversely, in PennDOT’s design-complete contracts, PennDOT invariably includes lump sum items in the contract for “construct roadway” and/or “construct structure.” The contractor has little choice but to “bid it as you see it” based on the information known at the bid stage. This scenario can lead to disputes between the contractor and the owner as described below.

Finally, given the vast differences between a private-sector design-build contract and a PennDOT design-complete project, questions arise with respect to how the various risk-shifting provisions in the Form 408 Specifications apply on PennDOT’s design-build projects. These risk-shifting provisions include, for example, the differing site conditions clause set forth in Section 110.02(b), the contract provisions providing an entitlement to be paid for items



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that experience a “significant change in character” of the work pursuant to Section 110.02(d), the right to be compensated for utility relocation delays pursuant to Section 105.06(b) of the Form 408 Specifications, as well as the right to be paid for typical site access delays such as delays due to right-of-way not being available and delays due to third-party approvals (i.e. permit delays).

While there are many legal questions that arise out of PennDOT’s “design-complete” process, unfortunately, there is very little specific guidance from Pennsylvania’s Courts on these issues. Given that PennDOT’s use of “design-complete” contracts is a fairly new phenomena, and given that most disputes do not result in a Court decision, there is an absence of case law directly on point with respect to many of the issues discussed herein.

Similarly, legal jurisprudence from other states with respect to PennDOT’s design-complete projects is not particularly useful, as competitive bid laws vary from state to state. In addition, most design-build jurisprudence is based on private-sector contracts, and not public contracts where there are many design requirements already in place that a design builder must follow.

The contract documents themselves also provide little guidance on the issues discussed herein. The Form 408 Specifications have not been updated to discuss design-build contracts, and the Special Provisions that most districts include when the design-build process is used are aimed more at such things as designer approval, review times for submissions, etc., and do not address the risk shifting/design responsibility issues

discussed herein. With these caveats in mind, Part I of this series will briefly discuss two of the overriding issues on PennDOT design-complete projects, while Part II of this series will discuss the risk-shifting provisions referenced above in more detail.

PennDOT District Preferences

One issue on PennDOT design-build contracts that often arises is what occurs when a particular PennDOT district has a preference for designing or constructing an item in a particular fashion that may not necessarily be the same as other districts. Disputes arise when such items are not specifically addressed in the contract documents, and when the Design Manual and Form 408 Specifications will technically allow another approach. If a particular district has a preference to having an item designed or constructed in a certain



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manner, it is obviously free to include that as a contract requirement, and bidders can be guided accordingly. However, if the design manual allows a different approach, and the district subsequently will not approve that approach but insists on its own preference, that scenario should entitle the contractor a change-order for a changed scope of work, as the bidder should have the ability to construct any design that is permitted by the Design Manual and the contract documents.

The issue of “district preferences” highlights the fundamental disconnect that often occurs on PennDOT “design-complete” projects. The public owner, which is used to being able to completely control the design and construction process as it does on design-bid-build projects, believes that it is justified in directing that a certain technical approach be utilized. Conversely, the contractor, which bid the project a certain way, takes the position that it bid the project with a certain final design in mind, and that it should be permitted to construct the project in accordance with that design, regardless of whether a particular PennDOT district has a particular preference as to how something should be built. In this case, the contractor has the much stronger legal position. That fact, however, will not prevent disputes from happening, as it is not uncommon for particular districts to impose certain preferences, and as the fight over the cost of such changes is often not worth pursuing. The best practice is for the district to identify particular design preferences in the contract documents, which should avoid all disputes. Alternatively, if bidders are aware that there is an item that varies from district to district, it is also good practice to ask several probing questions during the bid question-and-answer process, which should help pin down the Owner as to their position prior to bids being submitted.

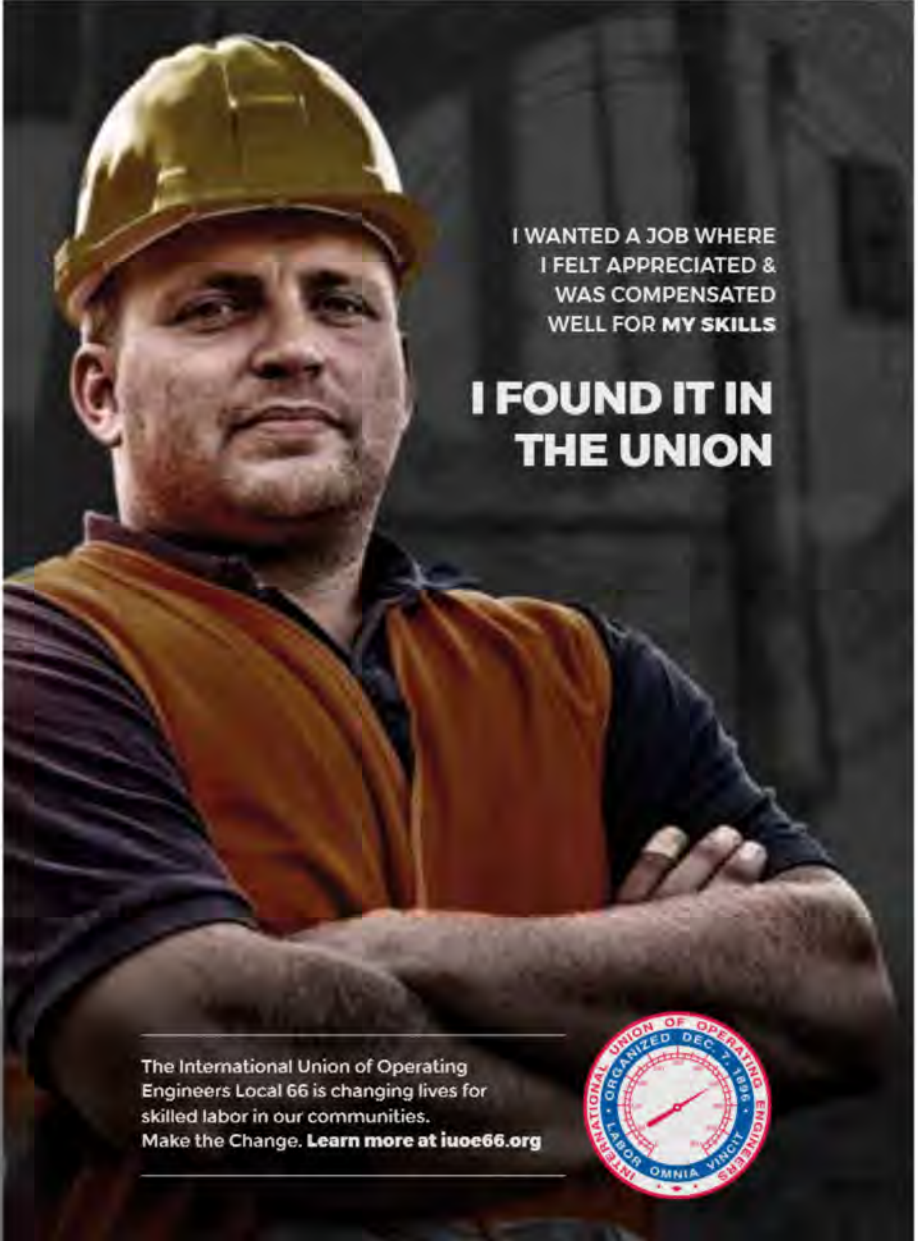
Quantity Disputes

A second global issue that often results in disputes on PennDOT design-complete projects arises out of situations where there is a large quantity difference between the expected

work at the bid stage and the work ultimately required after final design. As stated above, this phenomena arises out of a bid process that mandates that contractors follow both conceptual plans and the Design Manual, etc., when bidding a project, combined with the fact that PennDOT uses lump sum items to pay for “construct roadway” and “construct structure” items. Bidders take the position that they are obligated to follow the conceptual plans, and must base their bid on the information available to it at the bid stage

without any contingency. Indeed, bidders are instructed to follow conceptual plans in designing and constructing the project. Conversely, PennDOT will take the position that on design-build projects, the contractor should assume all risk of variances between the information available at the bid stage versus what must be constructed following final design.


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is expected at the bid stage versus what is required after final design is largely fact specific. If, for example, a bidder makes a mistake simply by either misreading conceptual information made available at the bid stage, and/or not accounting for items that are contractually required (i.e. cure times, etc.), then the bidder would likely be responsible for the differences between what it bid and what was required in final design.

Conversely, the use of a design-build process does not absolve the public owner of all contractual responsibility. If, for example, the conceptual plans misrepresent the existing site conditions, and if the conditions are ultimately discovered to be different than what was represented in bid documents, then the public owner should be responsible for the extra costs incurred as a result of that

material change. The use of a design-build process does not require the contractor and/or its design professional to complete a 100-percent final design in the few weeks allowed during the bid stage, nor should the public owner expect it to do so. Thus, a hard bid will necessarily be based on the best information available to the contractor during the bid stage, and must necessarily be based on the design the contractor expects to complete under the Design Manual. If site conditions are encountered that differ materially from those represented and/or those that can be reasonably expected, it should be the Owner – not the contractor – that is responsible for those changes. When that scenario occurs, however, it is not unusual for the public owner to push back with respect to paying for those costs.



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