

AGENDA

School District #145 - Waverly Public Schools

1. OPENING OF THE MEETING

1.1. Call to Order

1.2. Open Meetings Act

1.3. Publication of Meeting

1.4. Roll Call

1.5. Pledge of Allegiance

2. APPROVAL OF AGENDA

2.1. Approve Agenda

Approval of the agenda for the meeting Passed with a motion by Board Member #1
and a second by Board Member #2.

3. Discussion Items

3.1. Facility Discussion

4. Convene Closed Session

4.1. Convene Closed Session

4.1.1. Restate Closed Session Reason

5. Reconvene to Open Session

5.1. Reconvene Open Session

To reconvene in open session Passed with a motion by Board Member #1 and a second by Board Member #2.

6. Upcoming Board Activities

6.1. Board Meetings

7. Adjournment

8. For Your Information

Meeting Notice

Notice of Special Board Meeting
School District 145 (aka Waverly Public Schools)

The School District 145-Waverly Board of Education will convene in special session at 7:00 P.M. on Monday, April 24th, 2023 in the Central Office Board Room, 14511 Heywood Street, Waverly, Nebraska.

The purpose of this special meeting is to discuss facility planning.

The agenda for this meeting, which shall be kept continually current, shall be readily available for public inspection at the School District 145-Waverly Central Office, located at 14511 Heywood Street, Waverly, Nebraska.

Posted this 20th day of April, 2023.

A handwritten signature in black ink, appearing to read "Cory Worrell". The signature is written in a cursive style with a large, stylized initial "C".

Cory Worrell
Superintendent

KAREN A. HAASE *NE, SD, IA, WY*
STEVE WILLIAMS *NE, SD*
BOBBY TRUHE *NE, SD*
COADY H. PRUETT *NE, SD, CO*



JORDAN JOHNSON *NE, WY*
TYLER COVERDALE *SD*
SARA HENTO *SD, NE*
SHARI RUSSELL, Paralegal

M E M O R A N D U M

To: Board of Education for School District 145 – Waverly

CC: Dr. Cory Worrell, Superintendent of Schools
Business Manager Mikal Shalikow

FROM: Coady H. Pruett

DATE: April 18, 2023

RE: Construction Project Delivery Methods

I. INTRODUCTION

We understand that it is likely that the school district will undertake a series of construction projects over the next several years. One of the important decisions that school leaders need to make at the outset of a potential project is the type of project delivery system that will be used for that specific construction project. Business Manager Shalikow asked our firm to provide information about the various project delivery methods available to Nebraska school districts. This memorandum provides that overview.

II. PROJECT DELIVERY METHODS

A. General Considerations

One of the first decisions a school district must make after deciding to build is to determine which construction method it will use. Unfortunately, this decision can often be made with incomplete information—often based on the person that the school district contacts first (a contractor, a construction manager, an architect, the school’s lawyer, etc.), by contacting a neighboring district that recently went through the construction process, or some other random basis. The best approach is to review and consider each of the

available methods with construction professionals to determine the best method for the project being considered by the school district.

Below, we discuss three project delivery methods available to school districts for construction projects. Each section briefly summarizes the attributes of the delivery system and then lays out some relative advantages and disadvantages that relate to that system.

We often get asked which delivery systems is “the best” or “should be used” for this project. As the discussion below should show, the most appropriate project delivery system really depends on the specific details of your projects and your goals.

B. “Traditional,” Design-Bid-Build, Competitive Bidding

The general rule in Nebraska is that school construction projects in which the total anticipated expenditures will exceed \$109,000 must be competitively bid. NEB. REV. STAT. § 73-106. Under this approach, the school hires an architect or other design professional to *design* plans and specifications that are detailed enough to allow contractors to submit a bid for the project. The design phase typically has three stages: (1) schematic design, (2) design development, and (3) construction documents.

Once the design is complete, the school advertises and requests *bids* from contractors. Contractors bid the project exactly as designed. The bid is awarded to the lowest responsible and responsive bidder, with price typically being the most important factor. All other things being equal, the district is required to award the contract to the lowest responsible bidder. The bid period is generally the shortest phase of the process.

Once the general contractor (“GC”) is selected and has received notice from the owner, the *build* phase begins. This phase is the longest of the three phases. During this phase, the architect or other design professional’s role can range from almost no role in the process up to complete contract administration services. Common contract administration services include visiting the construction site to determine conformance with the plans, evaluating contractor requests for payment, responding to requests for information from contractors, issuing substantial completion certificates, and evaluating change order requests.

The design-bid-build process is typically considered best for less complicated projects that are budget sensitive but not schedule sensitive. The school district also has complete control over the design.

Advantages.

- The delivery method is common and familiar.
- The process is relatively easy to manage.
- The contractual relationship between all parties is uncomplicated. You have one contract with the architect or other design professional and one with the contractor. The duties of everyone are pretty clear.
- The project scope for the design and construction is fully defined.
- Creates the most bidding opportunities for general contractors and subcontractors which generally results in competitive bidding which generally results in the best price.
- Uniform and detailed plans and requirements allow the school to more easily compare bids and bid prices.
- Checks and balances. The architect can evaluate the GC and its progress, and the GC can point out design problems.

Disadvantages.

- The design, bid, and build sequence is linear which means the process generally takes longer than the other approaches.
- Budgets and estimates are created during the design phase without input from contractors, but the price is not established until the bids are received. If all of the bids exceed the estimates, the school may have to redesign and rebid the project.
- If the design is not sufficiently complete, contractors will not be able to properly bid the work. Contractors will be forced to add (sometimes significant) contingency amounts to the bids.
- This process can create adversarial relationships between the parties. When problems occur, the architect will blame the contractor and vice versa. Either the project comes to a halt, or construction continues at the risk of not knowing which party is correct. This can result in costly remedial measures and uncertainty about who will be responsible for the cost. Litigation may result from this type of dispute, and the school district has no single entity to hold responsible.
- Change orders and claims may increase the final cost.
- This method is not particularly flexible for scheduling purposes.

C. Construction Management at Risk

The *Nebraska Political Subdivisions Construction Alternatives Act*, NEB. REV. STAT. §§ 13-2901 to 13-2914 (the "Act"), provides Nebraska school districts specific alternatives to the competitive bidding requirements

discussed above. One of those alternatives is the construction management at risk ("CM@R") project delivery method.

School districts using the CM@R method must comply with the procedural requirements of the Act. Under this method, the school district contracts with a construction manager who (a) assumes the legal responsibility to deliver a construction project within a contracted price to the school district, (b) acts as a construction consultant to the school district during the design development phase of the project when the school district's architect or engineer designs the project, and (c) is the builder during the construction phase of the contract.

The successful construction manager ("CM") acts as consultant to the school district in the development and design phases, but as the equivalent of a general contractor during the construction phase. The CM enters into a contract directly with the school district, separately from the design team, and reports directly to the school district.

The CM@R method allows the school district to select a fee-based CM based upon qualifications, project approach, and fee structure before the design and bidding documents are completed. The CM works with the design team to develop and estimate the design. The CM then receives proposals from subcontractors for each portion of the work. A guaranteed maximum price (sometimes referred to as a "GMP") is submitted to the school by the CM. The final construction price is the sum of the CM's fees, overhead, contingencies, and the subcontractor's proposals. The school district retains any unused owner's contingency at the end of the project.

The Act requires the school boards to follow specific procedures that are discussed below.

Step 1: Resolution. The board must adopt a resolution selecting the CM@R project delivery method for that particular project with at least a two-thirds vote. If you decide to pursue this project delivery methods, we are happy to prepare a resolution that will include this action as well as others discussed below. You will select the relative weight for each criterion (in %) in the draft resolution, consistent with your policy on construction management at risk (described in the next step). Please note that the relative weight for each criterion in the draft resolution must stay within the maximum limits of the Act and those shown in your policy. All of the weighted amounts must add up to 100%.

Step 2: Policy. The Act contemplates that after the board adopts the resolution described in Step 1, then the board must adopt a policy that contains specific procedures the district must follow when using the CM@R method of construction. So, if/when you decide to adopt the resolution described in Step 1, we recommend that you follow that adoption by adopting a policy on CM@R. If you have already adopted such a policy, then we recommend reviewing and ratifying (or updating) that policy after adopting the resolution described above. That will bring any pre-existing CM@R policy current and follow the procedures contemplated by the Act.

Step 3: Request for Proposals. At least 30 days before the deadline for receiving and opening proposals, the district must (a) prepare and publish a Notice of the Request for Proposals (RFP) for the CM@R contract and (b) file the Notice of the RFP with the Nebraska Department of Education. We are happy to prepare the Notice of RFP for publication, the Proposal Instructions, and our recommended contract documents for the agreement between the school district and the successful CM.

Step 4: Selection Committee. The district must each establish a selection committee composed of at least five persons. The district must refer proposals for recommendation to the selection committee. The composition of the committee is controlled by statute, and must include at least one person from each of the following categories:

1. Members of the governing body;
2. Members of the administration or staff of the school;
3. The board's architect or engineer;
4. Any person having special expertise relevant to the selection of a construction manager under the Act; and
5. A district resident other than a person in subparagraphs 1-4.

The person selected in subparagraphs 4 and 5 may not be a person who is employed by the district or who has a financial or other interest in a construction manager who has a proposal being evaluated. The resolution from Step 1 will include a provision for appointing this selection committee.

Step 5: Evaluation of Proposals by Selection Committee. The selection committee must evaluate the proposals taking into consideration specified criteria and subject to a maximum percentage of total points for evaluation (based on your resolution) which may be assigned to each criterion as follows:

1. The financial resources of the construction manager to complete the project (can be up to 10%);

2. The ability of the proposed personnel of the construction manager to perform (can be up to 30%);
3. The character, integrity, reputation, judgment, experience, and efficiency of the construction manager (can be up to 30%);
4. The quality of performance on previous projects (can be up to 30%);
5. The ability of the construction manager to perform within the time specified (can be up to 30%);
6. The previous and existing compliance of the construction manager with laws relating to the contract (can be up to 10%); and
7. Such other information as may be secured having a bearing on the selection (can be up to 20%).

The percentages listed above must be modified so that they add up to 100%. On your project(s), we recommend that these criteria weights be set at the time that you adopt your resolution for this project, and that they are consistent with your policy. Obviously, this will all occur prior to the Notice of RFP being published.

The selection committee then makes a recommendation to the board regarding the proposals. We can provide you with a basic scoring rubric for your use.

Step 6: Evaluation of Proposals by the Boards. After receiving the recommendation from the selection committee, the school board is required to:

1. **Evaluate and rank** each proposal using the same criteria as the selection committee, "taking into consideration" the selection committee's recommendation.
2. Attempt to **negotiate a construction management-at-risk contract** with the highest ranked construction manager and may enter into a contract after negotiations. These negotiations may include a determination of the manner by which the construction manager selects a subcontractor and may require the any subcontracted work be awarded by competitive bidding. If the

board is unable to negotiate a satisfactory contract with the highest ranked construction manager, it may terminate negotiations and begin negotiations with the second ranked construction manager. This process can be repeated with the third ranked construction manager.

3. The board must **file a copy of an executed contract with the Nebraska Department of Education** within 30 days after its full execution. The construction manager must file all contract modifications and change orders within 30 days of completing the project.
4. If the board does not negotiate a satisfactory contract with any of the ranked construction managers, it may modify the request for proposals and **solicit new proposals or cancel** the construction management at risk process.

The CM@R is typically considered best for large or new construction projects that are subject to change or time sensitive. They are also well-suited for projects which require a high level of construction management due to complexity, multiple phases, or multi-disciplinary coordination.

Finally, when a CM is on board during the design development, the value that a CM provides can be significant. Rather than using speculative cost estimating when making design decisions, the school districts receives the advantage of having the CM provide cost estimates that the CM will be expected to stand by (or at least get close to) as the GMP is developed. To be clear, there is often some changes between the cost estimates and the later-finalized GMP. But we believe that it is beneficial to have the party that provides the cost estimates to be the party that will undertake the actual construction.

Advantages.

- The construction manager is selected based upon qualification, experience, and training.
- The construction manager will provide the school with design phase assistance in budget and planning.
- The school may control the budget throughout the project.
- Subcontractors are screened prior to hiring.
- The schedule is faster than in the traditional method with fast-track construction more feasible.
- The GMP is established early in the process albeit later than in the design-build method.

- Design team and contractor work together.
- Changes to the design and scope of the project are feasible.
- Possibility of reduced changes and claims once in the construction phase.

Disadvantages.

- The school may have difficulty determining whether optimum price was paid for the work done.
- Costs of the project can be higher than the traditional method due to reduced competition in the pricing of contractor overhead, fee, and subcontractor costs.
- Costs often increase due to the GMP being too vague or broad.
- The construction manager has the ability to expand the budget in hopes of creating future savings.

D. Design-Build

Another alternative to competitive bidding under the Act is design-build. Under this method, the school district uses a qualification-based selection process to contract with a design-builder (an architect and contractors as one entity) to furnish (a) architectural, engineering, and related design services and (b) labor, materials, supplies, equipment, and construction services to deliver a complete project. The school first hires a performance criteria developer ("PCD"), usually an architect or engineer, who assists the school in hiring a design-build entity. During the negotiation process, the design-builder agrees to complete the project and provide additional services for a fixed price or guaranteed maximum price ("GMP"). The design-builder then develops the drawings that satisfy the criteria and complete the design while staying below the agreed upon price. The design-builder then awards subcontracts. The team works together throughout the project, and construction begins before final design is complete, thus allowing completion in a shorter time frame.

The Act requires the school board to follow specific and detailed procedures including the following:

1. The board must adopt a resolution selecting the design-build delivery system with at least a two-thirds vote.
2. The board must adopt policies which contain specific procedures the district must follow when using the design-build method of construction.

3. The district must follow specific procedures to select and hire a PCD to assist it in the development of project performance criteria, requests for proposals, evaluation of proposals, evaluation of construction under the design-build contract to determine adherence to the performance criteria, and any additional services requested by the district to represent its interests in relation to a project.
4. The district must prepare and publish requests for letters of interest that describe the project in sufficient detail to permit a design-builder to submit a letter of interest.
5. The district must review the letters of interest with the PCD and select at least three (sometimes two) prospective design-builders in accordance with the district's policy to "prequalify" them to receive and respond to the request for proposals.
6. The district must prepare and publish a notice of a request for proposals ("RFP") for the design-build contract. The district must file the notice of the RFP with the Nebraska Department of Education and send a copy to the prequalified design-builders only.
7. The district must refer proposals for recommendation to a selection committee. The composition of the committee is controlled by and subject to specific statutory requirements.
8. The selection committee must evaluate the proposals taking into consideration specified criteria and subject to a maximum percentage of total points for evaluation which may be assigned to each criterion.
9. The district finally selects a design-builder and negotiates a contract. *However, the district may only proceed to negotiate and enter into a design-build contract if there are at least two proposals from prequalified design-builders.* The district is required to rank the design-builders in order of preference according to the RFP and taking into consideration the selection committee's recommendation. If the district cannot negotiate a satisfactory design-build contract with the highest ranked design-builder, the district may negotiate with the second highest ranked design-builder. If the district cannot negotiate a satisfactory design-build contract with the second highest ranked design-

builder, the district may negotiate with the third highest ranked design-builder, if any. If the district is unable to negotiate a satisfactory contract with any of the ranked design-builders, the district may revise the RFP and solicit new proposals or cancel the design-build process. The district must file a copy of all design-build contract documents with the Nebraska Department of Education if an agreement is reached.

Many of the steps identified above are also subject to specific statutory timelines.

The design-build method is typically considered best for time sensitive new construction projects, projects with smaller user groups or less need for user reviews, and portions of ongoing construction projects resulting from design changes.

Advantages.

- One entity is responsible for design and construction.
- Selection of the design-builder is based upon specific criteria, including qualifications and experience.
- The contractor provides input in the design phase for budget and planning.
- The project can be completed faster than the traditional method and slightly faster than the construction manager at risk method.
- Guaranteed price is available earlier in the process.
- The final price generally matches the quality of the project (but can also be a disadvantage).
- Change orders written for design-builder errors and omissions are covered through an allowance in the GMP (owner is still responsible for other changes).

Disadvantages.

- The potential exists for reduced quality and conflict between school district and design-builder because the design-builder is one entity. In other words, there are no checks and balances between the contractor and architect.
- The school district may have difficulty determining whether an optimum price was paid for the work done.
- Initial costs are likely higher than the traditional bid method.

- The process results in an inflexible budget making changes more difficult and expensive to make once the phased construction has begun.
- The process is more complex than the traditional bid method.
- The school district has no input on the selection of the proposed design team.
- Cheaper projects may result in poorer quality.
- The speedier construction process may result in more mistakes.
- Staff and users have reduced time for reviews which may result in quick decision making.

E. Owners' Representatives

In addition to the project delivery systems described above, school districts can choose to engage consultants or advisors to assist the school district in managing its projects. There are some companies that serve as owner's representatives on projects, bringing construction management experience to the project but serving to look out solely for the school district's interest.

Some of these owner's representatives can be construction management firms. But, "construction management" often means different things to different people because this relationship can be organized in a variety of ways. The arrangements described below should be contrasted with the CM@R project delivery system described above. The most significant difference is that the consultants described in this section do not generally engage in the actual construction of the project.

1. Construction Manager as Advisor

The construction manager ("CM") is a construction expert who protects the school district's interests and takes the lead in coordinating the design and construction services. The school district maintains separate contracts with the architect and a contractor. The CM's authority may vary under this approach, but the CM as advisor generally has no financial authority or responsibility. The CM does not directly perform the design or construction work. The CM's contractual duties include the obligation to supervise, coordinate, and inspect the work in its capacity as the school district's agent. The CM may also provide services in areas such as design, scheduling, estimating, environmental compliance, permitting, site investigation, value engineering, bid solicitation, contractor qualification review, bid proposal analysis and review, budget and cost control, and other services. Since the

CM does not contract directly with the contractors or architect, the CM is not responsible for their acts or omissions. The CM is not responsible for the means or methods of construction and does not guarantee a maximum project price, time, or quality of the work.

2. Construction Manager as Agent

This approach is similar to CM as advisor except that either (1) the CM contracts directly with the architect and general contractor as the school district's agent or (2) the school district enters the contracts and assigns them to the CM. Since the CM is in contractual privity with the architect and contractor, it will be responsible for their acts and omissions. In theory, this increases the CM's interest in ensuring that the project is completed properly.

III. CONCLUSION

This memo provides a broad overview of the process for using each of the three project delivery methods. Each method has its own advantages and disadvantages that the school should weigh when making a decision to build. In terms of frequency, we most often see school districts use either the "traditional" competitive bidding method or CM@R. In our experience, school districts use design-build on a less frequent basis, but there are certainly some projects where school districts have used design-build. Of course, we will be happy to assist you in any way you decide to proceed. If you have any questions or if there is anything that you would like to discuss, please do not hesitate to have your Board President or the Administration contact me at coady@ksbschoollaw.com or (402) 817-8879. We look forward to working with you.