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WISCONSIN ADOPTS NEW "SINGLE-PRIME" DELIVERY METHOD FOR STATE CONSTRUCTION PROJECTS

Effective January 1, 2014, a fundamental change was made to the method by which public construction projects are led by the State of Wisconsin's Department of Administration. Wisconsin adopted a new single-prime delivery method to replace its former multiple-prime method. Under the former multiple-prime method, the State would contract with a principal contractor, but would also enter separate contracts directly with mechanical, electrical, plumbing, and fire protection (MEP) subcontractors. Under the new single-prime method, the State will only enter into a single contract with a general prime contractor.

Wisconsin's new single-prime delivery method is actually a unique hybrid, because the State will continue to solicit competitive public bids from the MEP subcontractors, as was done under prior law. However, the successful MEP bidders will enter subcontracts with the general prime contractor, rather than with the State.

Under the new law, all contractors must first be certified by the Division of Facilities Development before submitting any bid. The bidding process begins with the submission of competitive public bids by the MEP subcontractors. The successful low MEP bidders are then selected and identified by the Department of Administration, and the Division of Facilities Development must post the bidders' names and the amounts of the successful MEP bids on its website. Within five (5) days thereafter competitive public bids for the general prime contract must be submitted. The bidders must include the bids of the successful MEP contractors in their own bids for the general prime contract. The general prime contract is then awarded to the lowest qualified responsible bidder.

The general prime contractor is required by law to enter into subcontracts with each of the successful MEP subcontract bidders selected by the Department. The law mandates that each subcontract must contain certain terms prescribed by statute, including provisions pertaining to prompt payment, insurance and bonding, indemnification, and retainage. The law generally precludes alteration of the scope or price of the subcontract work. It is up to the general prime contractor and each of the MEP subcontractors to negotiate all other subcontract terms. Reaching agreement on the many remaining critical subcontract terms could prove problematic, however, given the arranged marriage between the general prime

contractor and each MEP subcontractor that results from Wisconsin's hybrid single-prime delivery method. The general prime contractor will probably find it difficult or impossible to dictate terms unfavorable to the MEP subcontractors, because it has no voice in the selection of the MEP subcontractors and the law does not require the MEP subcontractors to accept any terms besides those imposed by statute.

Wisconsin's new hybrid single-prime system affords protection to MEP subcontractors against bid shopping, and continues the relative autonomy they enjoyed under the old multiple prime system. Those benefits come at a price, however. The new law requires each MEP subcontractor to obtain a 100% performance bond and a separate 100% payment bond naming the general prime contractor as the obligee.

Of perhaps greatest concern to MEP subcontractors are the new law's indemnification provisions. The new law mandates the inclusion into all MEP subcontracts of certain extensive and complex indemnification terms, which generally obligate the MEP subcontractor to "defend, indemnify, and hold harmless" the general prime contractor and its principals for damages and fines for "bodily injury, sickness, disease, or death, or injury to or destruction of property, including… loss of use" arising from the performance of the subcontract work. This includes an obligation to indemnify the general prime contractor for claims arising from its own negligence or fault in providing supervision or oversight of the MEP subcontractor's work. MEP subcontractors may find that these indemnification obligations expose them to potential liability for which they may have no insurance coverage under their general liability policies.

By creating its own unique hybrid delivery method, Wisconsin has ventured into uncharted territory. Time will tell whether this experiment meets with success or failure. The new law raises many unanswered questions. Prospective bidders need to know that the rules have changed, how they have changed, and the significant implications of those changes.