

## Client ALERT

The Pennsylvania Supreme Court ruled last week that the Department of General Services (DGS) may issue a Request For Proposals (RFP) when it procures contracts for complex construction projects – or those with allocations of over \$5,000,000 - when doing so is “advantageous” to the Commonwealth. This marks a drastic change in the near century long policy requiring DGS to award all substantial state construction projects to the lowest responsive and responsible bidder. Aside from the obvious changes that this will bring about in how Pennsylvania awards most of its construction contracts, it will also affect the way construction companies work with the Commonwealth on state projects due to the Commonwealth’s ability to base awards on more than just the lowest number given at bid time.

### What are these other evaluation factors and how will they affect your business?

•DGS has released guidelines for RFP’s which explain how they will score each proposal. This score includes not only price, but also technical specifications, and another factor called the “Disadvantaged Business Submittal Score.” Each of these criteria is weighted according to DGS’ guidelines and the scores are added up to a maximum of 100 points.

### How will this affect my company’s contract negotiations with the state?

• Contract negotiations may change quite a bit. Under the new policy, the Commonwealth will be able to whittle down the choice of contractors to a few candidates and negotiate with them simultaneously. Pitting competing companies against each other in multiple rounds of negotiation is a situation which can likely lead to overreaching by the Commonwealth and unfavorable contracts for construction companies. The Commonwealth is forbidden to share your bid information with the other bidders; however, in this new arena, it pays to be aware of your rights and the requirements that Pennsylvania must follow.

### How will this change how we prepare our bid documents?

- This new policy will require you to think creatively in order to not just come up with the best number, but come up with the best proposal in the context of the

complicated criteria announced by DGS. In addition, this will intensify the need for your company to protect its proprietary bid information and seal off your crucial employees with insider knowledge from your competitors. But, you should look at this change as an opportunity for your company. A company that is prepared and educated on DGS’ new policy will have a strong competitive advantage over those companies that take the “business as usual” route.

### How can this affect my company’s legal relationship with the state?

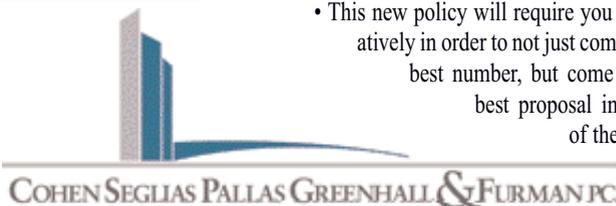
•Just as in any other significant policy change, not all the possible effects have been anticipated. For example, imagine being in a settlement negotiation with the same state official that you know will be involved in judging the next RFP. This new policy has the potential to create numerous opportunities for abuses of authority, and it is important that construction companies protect themselves by learning their rights and the corresponding limitations on the Commonwealth’s power.

### What should my company do to get ready for this new process?

•Just as in the past, you will be in competition with other companies for the same jobs. Your company should familiarize itself with the new process and new criteria being used in order to gain a competitive advantage over the other bidders. In addition, you should make sure your company is aware of the numerous legal pitfalls that this new policy will open up. When the business environment changes, the companies that react the quickest thrive; therefore, you should embrace this opportunity to separate your company from the pack.

Cohen Seglias is available to help you familiarize yourself with this new process and to guide you through negotiations or disputes with DGS.

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