Design-Build Contracts as an Alternative Method for the Construction of Public Buildings
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Can a California general law city use design-build?
It depends on what you mean by “design-build.”

I. What is Design-Build?
The term “design-build” refers to a range of alternatives to the traditional project delivery system. A useful way to look at design-build is by what it is not. Traditional design-bid-build is a segmented, sequential process where the owner first contracts with a design professional to prepare detailed, suitable-for-construction plans and specifications (or sometimes has them prepared by its in-house engineers), then uses the detailed plans and specifications to solicit competitive price bids for construction, and finally awards the construction project to the low bidder.

In design-build, one entity performs both design and construction under a single contract. Government Code § 14661(b) defines the term as follows: “‘design-build’ means a procurement process in which both the design and construction of a project are procured from a single entity.” Public Contract Code § 20133(c)(2) defines the term in identical language. The American Institute of Architects (AIA) defines the term as “a process in which the Owner contracts directly with one entity that is to provide both design and construction services.”

Usually, the design-build contract is awarded by some process other than competitive bidding. Government Code § 14661(d)(3)(A)(i) provides that “[a]ward shall be made to the design-build entity whose proposal is judged as providing the best value in meeting the interest of the department and meeting the objectives of the project.” Public Contract Code § 20133(d)(4)(B) provides that “[a] county may use a design-build competition based upon best value . . .” Public Contract Code § 20133(c)(1) defines “best value” to include “price, features, functions [and] life-cycle costs.”

Thus, design-build differs from traditional design-bid-build in two ways. First, the design and construction components are packaged into a single contract. Second, the single contract is not necessarily awarded to the low bidder after competitive bidding.

II. Why Design-Build?
A. Potential Cost Savings
Design-build has the potential to reduce over-all project cost, because the design-build contractor performing the design has a better feel for the construction cost of various alternatives, and can thus come up with a design that is less expensive to build, and has an incentive to do so. Another way to look at this advantage is that it moves value engineering (“cost reduction incentive” in Caltrans-speak) from after contract award, with the contractor proposing cost-reduction ideas and sharing the savings with the owner, to pre-award with the owner enjoying 100% of the cost savings.
B. Earlier Project Completion
Design-build may result in earlier completion and occupancy of the project, as there is no dead time between completion of design and start of construction. Further, the design-build contractor can begin construction of early phases of the project (e.g. grading, site utilities, foundations) before design of later phases (building envelope, interior partitions, HVAC, electrical) is 100% complete. This process is sometimes referred to as “fast track.”

C. Reduced Claims Exposure
Design-build eliminates the liability gap. Design professionals can obtain insurance coverage only for negligent errors and omissions, and virtually all design contracts limit the designer’s liability to such. However, there can be non-negligent errors and omissions, which cost the owner money, but for which the design professional is not liable. For example, a design professional may undertake reasonable subsurface investigations, but fail to detect a rock outcropping which will require additional work. In the traditional design-bid-build approach the owner warrants the correctness of the plans and specifications to the construction contractor under the Spearin doctrine (United States v. Spearin, 248 U.S. 123 (1981), applied in California by Souza & McCue Constr. Co. v. Superior Court, 57 Cal.2d 508 (1962)). There can be design mistakes for which the owner is liable to the construction contractor under the warranty of correctness but cannot transfer the liability on to the design professional. Even where the designer is in fact negligent, proving negligence can be difficult. The owner must obtain a certificate of merit from another design professional (Code of Civil Procedure § 411.35) and then prove that the designer failed to meet the applicable professional standard of care, which requires expert testimony. On the other hand, the contractor can usually prove that there was a defect in the plans that cost the contractor money based on fact testimony alone. Thus, the owner may have to bear the cost. Design-bid build eliminates this gap, because the design-build entity has no one but himself or herself to blame for defective plans and specifications or differing site conditions. (But see, M.A. Mortenson Co., Armed Services Board of Contract Appeals (ASBCA) No. 39,978, 93-3 BCA ¶ 26,189.)

D. New Technologies
Public Contract Code § 3400 prohibits brand-name or model-number specifications unless the specification lists at least two brand names and is followed by the phrase “or equal.” This makes it difficult for traditional design-bid-build to reach innovative, proprietary products, where there may be only one brand-name and no equal. Further, substitution of a new “or equal” product for a standard product is often impracticable because of the ripple effect. The designer designs the project around the current generation products, and substitution of new “or equal” after bid can require revisions to structure, mechanical or electrical components to accommodate the new product. Who is going to pay for these ripple changes? Design-build resolves this problem. The design-build entity selects the equipment (right down to make and model number), and then designs the building around the selected equipment, which is a more logical way to proceed. In fact, the design-build entity can sometimes obtain free design assistance from equipment manufacturers desiring their new technologies to be used.
E. Over-all Project Optimization

Design-bid-build can suffer from sub-optimization, where individual project participants optimize their own positions, often at the expense of the over-all project. The total cost to the owner of a building element, such as the steel frame, includes the cost of the engineering to determine the required steel sections plus the cost of the steel. The designer has little incentive to use a sharp pencil to achieve the minimum amount of structural steel; she optimizes her own position by spending only the design time necessary to ensure that there is enough steel to meet gravity and seismic loads, often by employing conservative assumptions that may result in more steel than necessary. So, the owner may save money on design, but pay for it in steel. With design-build, on the other hand, the design-build entity has an incentive to use the optimum amount of engineering. As long as an additional dollar of engineering will save more than one dollar’s worth of steel, the design-build contractor will spend the engineering time up to the point of diminishing returns when an additional dollar’s worth of engineering saves only a dollar’s worth of steel, because both the cost of design and the cost of steel come out of the same pocket.

This is not to say that design-build results in flimsy or less-safe structures. “More” (steel, concrete, etc.) is not necessarily “better.” Simply specifying extra steel or concrete in one place because the engineer doesn’t have time or incentive to calculate exactly how much is actually required does not improve the over-all performance of the building. “A chain is only as strong as its weakest link.” If the owner wants a building with higher floor loadings, less floor deflection or resistance to a bigger earthquake than required by code, then the way to achieve this is by placing that requirement on the design-build entity up front—not by hoping that the designer will throw in some extra steel or concrete because he or she doesn’t have time in the budget to use a sharp pencil.

F. Reduced Administrative Burden

Design-build may reduce the administrative burden on the owner, as there is one solicitation, one award, and one contract to administer.

G. Earlier Cost Visibility

The total cost of the project is apparent earlier with design-build. In traditional design-bid-build, construction costs are not known until bid opening, and it is possible to spend money on design that you can’t afford to build. All too often construction bids exceed the budget and the project must be re-designed to bring it within the budget, thus delaying completion.

III. Caveats

The potential advantages of design-build do not come without risk.

A. Less Control

Under traditional design-bid-build, the owner has full control over the details of the plans and specifications, and does not publish them for bids until it is satisfied that they reflect its requirements and functional and aesthetic preferences. With design-build, the owner gives up some of this control. This concern can be ameliorated by “bridging,” i.e. advancing the level of design through the design development stage (30% or so) before award of the design-build contract. Of course, by doing so the owner may give up some of the advantages of design-build.
B. Requirement for Earlier Requirements Definition

With design-build, the owner must “lock in” its requirements much earlier. With traditional design-bid-build, if the owner is a little fuzzy on its functional or aesthetic requirements, it can clarify them during the design phase after it sees where the designer is heading. But with design-bid-build, post-award programmatic changes can be very expensive and disruptive.

C. Recommendation

So, if the City is not certain what it wants, traditional design-bid-build may be the better alternative.

IV. The Legal Environment for Design-Build

A. Historical Animosity

California public contract law has historically been hostile to design-build.

Over one hundred years ago in *Ertle v. Leary*, 114 Cal. 238 (1896) (the Placer County jail case) the California Supreme Court rejected design-build:

To permit each bidder to propose the plans and specifications according to which he will construct the building, not only prevents competition in bidding for the work, but gives to the board an opportunity for the exercise of favoritism in awarding the contract, instead of being required to let it to the lowest responsible bidder; for, since neither of the bidders can know of the plans and specifications under which others are making their bids, there is no standard by which the board can determine which is the lowest responsible bidder.

The Supreme Court’s antagonism toward design-build has found its way into the statutes governing contracting by California counties, e.g.:

Public Contract Code § 20124: “The board of supervisors shall adopt plans, specifications, strain sheets, and working details for the work.”

Public Contract Code § 20127: “All bidders shall be afforded opportunity to examine the plans, specifications, strain sheets, and working details.”

Public Contract Code § 20128: “The board shall award the contract to the lowest responsible bidder, and the person to whom the contract is awarded shall perform the work in accordance with the plans, specifications, strain sheets, and working details . . .”

These statutes prevented counties from using design-build and provided the impetus for enactment of Public Contract Code § 20133, which allows Alameda, Contra Costa, Sacramento, Santa Clara, Solano, Sonoma and Tulare Counties to use a variety of design-build.

B. Inglewood

In 1970 the City of Inglewood and the County of Los Angeles formed a joint powers authority (JPA) to construct a civic center including both city and county buildings. The agreement establishing the JPA provided that “Upon approval of the final plans and specifications . . . Authority shall call for competitive bids to let necessary construction contracts [and] award such construction contracts to the lowest responsible bidders . . .”
The JPA retained Charles Luckman Associates as architects. Luckman recommended the authority use the “Management Contract Method,” which he summarized as:

Under the traditional lump sum method of bidding [i.e., design-bid-build], contractors enter the project process upon the completion of working drawings. At this point in time they have little opportunity or incentive to contribute to cost reduction.

The Management Contracting Method…differs from this traditional lump sum method in that the contractor is brought into the building project through competitive bidding at or shortly after, the completion of preliminary plans, rather than working drawings. He is then called upon to contribute his practical expertise during the development of the working drawings [i.e. design-build with bridging], and subsequently apply this expertise during construction, in order to achieve maximum economies. He is expected to provide cost estimates from time to time during development of working drawings to determine that the project is within budget so that some of the early phases of construction can proceed prior to completion of all the drawings. This makes it possible to save a significant amount of time in the total building process. The management contractor performs none of the construction itself unless he is awarded a separate contract therefor as the lowest responsible bidder in subsequent bidding under the traditional lump sum bidding procedures.

When the construction documents near completion and as competitive subcontract bids are received, the management contractor converts his previous cost estimates into a guaranteed outside price (GOP) based on the subcontract bids. If the final construction cost, including the management contractor’s fees, exceeds the GOP, the City of Inglewood makes payment only up to the amount of the GOP. If the final cost is less than the GOP, the difference is shared by the City…and the (management) contractor.

The Authority adopted Luckman’s suggestion and advertised for bids for a management contractor. Argo submitted the low bid; Swinerton was second. A panel reviewing the bids found that Argo was capable, but the Authority nevertheless awarded to Swinerton. The trial court issued a writ of mandate restraining the City from proceeding with Swinerton, and the Supreme Court of California, en banc, affirmed the trial court, holding that:

It is true that the management contractor was to perform services and to lend his experience and expertise in the preparation of the final plans, and in that respect may be likened to an engineer or an architect whose services may be procured without strict compliance with competitive bidding requirements. [citations omitted] However, our review of the other duties and obligations which were required of the management contractor in this case, including the guarantee of the outside price based on subcontract bids, persuades us that the management contracting procedure as proposed and followed here is too closely akin to traditional lump sum general construction contracting to be held exempt from the statutory competitive bidding requirements. To hold otherwise as a broad principle would open the door to possible favoritism, fraud or corruption in the letting of other public construction contracts.
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Since [the JPA] did not comply with the mandate of section 25454 that the contract be awarded to the lowest responsible bidder, the award must be set aside. [cite].

*City of Inglewood-Los Angeles Civic Center Authority v. Superior Court* (1972) 7 Cal.3d 861, 866, 870. Although Luckman and the Court used the term “management contract,” this was in fact design-build with bridging; i.e., Luckman prepared preliminary drawings, then the JPA awarded a contract under which the construction (“management”) contractor was to participate in development of the working drawings.

The Supreme Court’s holding in *Inglewood* was that the “management” contract was really a construction contract, and therefore was required to be awarded to the low bidder under Government Code § 25454 (now Public Contract Code § 20128). The Court, however, did not seem bothered by the fact that the contract was awarded on less than complete plans and specifications.

Los Angeles and Inglewood are of course both charter cities. However, the building in *Inglewood* was contracted for by a JPA between the City of Inglewood and the County of Los Angeles, and the operative statute was Government Code § 25454 (now Public Contract Code § 20128), which is in substance the same as current Public Contract Code § 20162.

**C. Current Public Contract Code § 20162**

The primary statutory authority for public works contracting by California general law cites is codified at Public Contract Code §§ 20160 through 20174. § 20162 provides that “[w]hen the expenditure required for a public project exceeds five thousand dollars ($5,000), it shall be contracted for and let to the lowest responsible bidder after notice.”

But what is not set forth in §§ 20160 through 20174 is more important than what is there. There is no requirement analogous to Public Contract Code §§ 20124, 20127 and 20128 for plans, specifications and working details to be available for examination by the bidders or for the contractor to perform the work in accordance with such plans, specifications and working details. It appears, therefore, that in principle, a general law city can contract for public works based on less than 100% plans and specifications, i.e., procure both the design and construction of a project from a single entity, which is design-build.

However, there does not appear to by any statutory authorization for general law cities to do “best value” or competitively negotiated procurement, so such design-build contracts have to be bid and awarded to the low bidder. Thus, a general law city probably cannot realize the full potential of design-build, but design-build may nevertheless be a viable alternative for certain projects.

**D. Implementation under Public Contract Code § 20162**

So, it appears that in principle the general public works bidding statutes and case law permit a California general law city to contract with one entity to perform both design and construction, as long as that contract is awarded to the low bidder.

The devil, of course, is in the details.
1. **Conflicts between Public Contract Code § 20162 and Government Code § 4525 et seq.**

Public Contract Code § 20162 mandates that construction contracts be awarded the lowest responsible bidder, but (at least until the passage of Proposition 35) Government Code § 4525 et seq. required that contracts for design services be negotiated with the best qualified firm. It was virtually impossible to satisfy both criteria in one procurement.

In 2000 the voters passed Proposition 35 (the “Fair Competition and Taxpayer Savings Act”), which added several new provisions, including Government Code § 4529.12, which provides that “[a]ll architectural and engineering services shall be procured pursuant to a fair, competitive selection process . . .” This provision is being interpreted to mean that a public entity need not adhere strictly to the “select first, negotiate price second” process. The public entity may now ask design professionals and construction managers for price proposals at the same time that it requests statements of qualification, and need not necessarily select the most qualified firm.

Accordingly, a city may be able to satisfy both Public Contract Code § 20162 and Government Code § 4529.12 by prequalifying potential design-build entities in accordance with Public Contract Code § 20101, with particular emphasis on the professional qualifications of the design component of the design-build entity.

Government Code § 4525 et seq. has always applied to general law cites (§ 4525(c)), and any doubt whether it applied to charter cities was resolved by Proposition 35, which added Government Code § 4529.20, providing that “[t]hese are matters of statewide concern and when enacted are intended to apply to charter cities as well as all other governmental entities.”

2. **Compliance with the Subcontractor Listing Law**

The Subletting and Subcontracting Fair Practices Act (Public Contract Code § 4100 et seq.) requires that bidders list their subcontractors with their bids. This can be problematic for a design-build bidder. Without detailed design drawings, the subcontractors cannot precisely estimate the costs of individual segments of the work. But listing a subcontractor without a firm subcontract price puts the design-build entity at a disadvantage in subsequently pricing the subcontract work. A listed subcontractor has the prime design-build entity over the proverbial barrel. This is a manageable problem for a design-build entity with many of the same type of projects in an area, as a subcontractor can only get away with gouging the design-build entity once. Parking garages and housing are good examples, where the design-build entities work with a group of subcontractors on a repetitive basis, and subcontractors can estimate their work on a per-space or pre-square foot basis.

Government Code § 14661(e)(2) (state projects) and Public Contract Code § 20133(f) (selected counties) provide that the design-build entity shall advertise for competitive bids for subcontracts not listed with its prime bid. The problem with this approach is that it depends on specific legislative authorizations which do not apply to cities. On the other hand, as the California Supreme Court recently observed: “Competitive bidding provisions must be read in light of the reason for their enactment, or they will be applied where they were not intended to operate and thus deny municipalities authority to deal with problems in a sensible, practical way.” *Associated Builders and Contractors v. San Francisco Airports Commission*, 21 Cal.4th 352, 365 (1999). There is certainly an argument that procedure authorized for the state in Government Code § 14661(e)(2) represents a “sensible, practical way” for a city to deal with the issue of
subcontractor listing in the design-build context. However, there is no comparable explicit authority for cities to use this procedure. Thus, the safest approach may be to require listing of subcontractors at time of bid, even though this may result in either the subcontractors or the prime design-build entity including some contingency mark-up.

3. Payment Bonds

Civil Code §§ 3247 and 3248 mandate general law cites to require a payment bond “in a sum not less than one hundred percent of the total amount payable by the terms of the contract” (§ 3248(a)). However, “providers of architectural, engineering and land surveying services . . . shall not be required to post or file the payment bond” (§ 3247(c)). So, when the design services and the construction are procured under a single contract, must the payment bond be in the full amount of the design-build contract, or only in the amount of the construction portion? Logically, it would seem that 100% of the construction portion would fulfill the intent of the statute.

In order to determine the value of the construction portion, a city could use a bid form with two line items, design and construction, with award to be made to the design-build entity offering the lowest sum of the two items. The city should include language that unbalancing the bid (i.e., artificially increasing the design line item) will make the bid non-responsive.

Note that Civil Code §§ 3247 and 3248 do not apply to charter cities. Loop Lumber Co. v. van Loben Sels, 173 Cal. 228 (1916). Nevertheless, most charter cities require payment bonds, so the above discussion is relevant to charter cities.

E. Alternatives to Public Contract Code § 20162 (Or Not)

As the California Supreme Court observed in Zottman v. San Francisco, 20 Cal. 96 (1862), the power of a public agency to contract is measured by the mode prescribed in the applicable law, and a contract made in disregard of the prescribed mode is void. Public Contract Code § 20162 is not, however, the only prescribed mode.

1. Charter Cities

Public works contracting is a municipal affair, over which a charter city’s charter and municipal code take precedence over state law. Associated Builders and Contractors, Inc. v. San Francisco Airports Commission, 21 Cal.4th 352, 363 (1999); Public Contract Code § 1100.7. Generally, a charter city can utilize whatever procedures are authorized by its charter and municipal code. However, there are some state statutes a charter city must follow, e.g. Government Code § 4525 et seq. as amended by Proposition 35. Government Code § 4529.20 now provides that “[t]hese are matters of statewide concern, and when enacted are intended to apply to charter cities as well as all other governmental entities.” Finally, to the extent a city charter contains a provision similar to Public Contract Code § 20162, the courts are likely to follow case law construing § 20162. See, Domar Electric, Inc. v. City of Los Angeles, 9 Cal.4th 161 (1994).

2. Fee-Producing Infrastructure

In 1996 the Legislature enacted AB 2660, which added §§ 5956 through 5956.10 to the Government Code. The new legislation provides, inter alia, that:
§ 5956.2: “[T]his authority is intended to supplement and be independent of any existing authority and does not limit, replace, or detract from existing authority.”

§ 5956.4: “A governmental agency may solicit proposals and enter into agreements with private entities for the design, construction . . . of the following types of fee-producing infrastructure projects . . . structures or buildings, except structures or buildings to be utilized primarily for sporting or entertainment events.” [See section for complete list.]

§ 5956.5: “Notwithstanding Chapter 10 (commencing with Section 4525) of Division 5, or Part 2 (commencing with Section 10100) or Part 3 (commencing with Section 20100) of Division 2 of the Public Contract Code [which includes § 20162], the governmental agency soliciting proposals and entering into agreements with private entities . . . shall ensure that the contractor is selected pursuant to a competitive negotiation process. . . the governmental agency soliciting proposals is not subject to any other provisions of the Public Contract Code [i.e., § 4100] or this [the Government] code that relates to public procurements.

Thus, if a city (general law or charter) can bring its project within Government Code § 5956.4, it can engage in competitively-negotiated design-build. Note that under the last sentence of § 5956.5 the city does not have to worry about subcontractor listing.

3. Joint Powers Authorities

Government Code § 6502: “Two or more public agencies may jointly exercise an power common to the contracting parties.”

Government Code § 6509: “Such power is subject to the restrictions upon the manner of exercising the power of one of the contracting parties, which party shall be designated in the agreement.”

Thus, a city could conceivable enter into a JPA with a Public Contract Code § 20133 county and then engage in design-build pursuant to § 20133, or with the state and then use Government Code § 14661. It might even be feasible to enter into a JPA with the Regents or the State University and then use Public Contract Code § 10503(a) or § 10708.

4. Performance Specifications (Probably Not)

Despite Ertle v. Leary and Public Contract Code §§ 20124, 20127, 20128 and 20162, public building contracts have never included complete, detailed plans for sprinkler systems. The fire protection subcontractor designs the sprinkler system. Some practitioners thought that such “performance specifications” could be expanded to other building components such as the structural frame and the HVAC system. This trend would eventually have ended up at the same place as design-build with bridging, where the design is advanced to the point where the floor plans and elevations are fixed before award of the construction contract, then the construction contractor completes the design of the structural, mechanical and electrical systems.

However, in 1999 the general contractors prevailed upon the Legislature to enact Public Contract Code § 1104, which provides that “[n]o local public entity, charter city, or charter county shall require a bidder to assume responsibility for the completeness and accuracy of architectural or
engineering plans and specifications on public works projects, except on clearly designated design build projects.” So, if you want to do design-build of an entire project, you’ve got to call it “design-build.”

Public Contract Code § 1104 probably does not prohibit the traditional practice of procuring sprinkler systems under a performance specification.

5. Agency CM with Multi-prime Trade Contracts

Some of the advantages of design-build can be achieved by the city retaining a construction management (CM) firm to manage design and over-all project coordination, then the city contracting directly with several trade contractors, who are then managed by the CM. Under this approach the early phases of the project (earthwork, site utilities, foundations) can be placed under contract before design of the building shell and interior is 100% complete, and the structural steel and other long lead time components can be ordered, then the contracts for the early phases can be assigned to follow-on contractors.

There are two types of construction managers. An agency CM is a consultant to the owner; an agency CM is not in the chain of privity between the owner and the construction contractor(s), and does not guarantee the cost of the work. An at-risk CM, on the other hand, is essentially a brokering general contractor. The at-risk CM is either in the chain of privity between the owner and the trade contractors, or guarantees that the aggregate price of the trade contracts will not exceed some maximum figure.

The authority for retaining a CM is found in Government Code § 4525 et seq. § 4529(e) defines “construction project management” as “those services provided by a licensed architect, registered engineer, or licensed general contractor,” and the Attorney General has concluded that “when a state or local agency wishes to contract with a firm to perform construction project management services, it is required to select from among licensed architects, registered engineers, or licensed general contractors whose services meet the requirements of section 4529.5 for management and supervision.” 78 Op.Atty.Gen.Cal. 48 (1995). § 4592.5 in turn provides:

Any individual or firm proposing to provide construction project management services pursuant to this chapter shall provide evidence that the individual or firm and its personnel carrying out onsite responsibilities have expertise and experience in construction project design review and evaluation, construction mobilization and supervision, bid evaluation, project scheduling, cost-benefit analysis, claims review and negotiation, and general management and administration of a construction project.

Under § 4529.10 (as added by Proposition 35), the term “architectural and engineering services” includes “construction project management services,” and under § 4529.12 “architectural and engineering services shall be procured pursuant to a fair, competitive selection process,” which is being interpreted as meaning that the agency may ask for price proposals concurrently with qualification submittals, and can take price into account in selecting the firm.

Thus, a city can now competitively negotiate a design and CM contract, taking into account both qualifications and price.
Then, the design/CM firm can manage the design and “package” the project into several trade contracts and handle the logistics of advertising for bids. However, the bid opening and award must be done by the city under Public Contract Code § 20162 or applicable charter provision.

6. At-Risk CM (Not!)

Government Code § 4525 et seq. is referred to as California’s “Little Brooks Act” and is modeled after the federal procedure for contracting with architect and engineers (A/Es). Inglewood, discussed above at pages 4-5, was decided in 1972, and in 1987 Gov’t Code § 4525 et seq. was amended by SB 1419 to apply to “construction project management” as well as architecture and engineering.

The floor statement for SB 1419 included the following statement:

The construction manager performs the same functions as the general contractor on a public works project, and it seems appropriate that the function only be provided by an architect, engineer or licensed contractor.

Some attorneys and construction management firms (but not the author) interpret part of this paragraph (“the construction manager performs the same functions as the general contractor on a public works project”) to mean that § 4525 et seq., as amended in 1987, authorizes negotiated, at-risk construction management contracts. Such a reading of SB 1419 would mean that in enacting SB 1419, the legislature overruled Inglewood. However, there is no mention of Inglewood in the legislative history of SB 1419. To the contrary, the legislative analyst’s August 14, 1987 analysis of SB 1419 states that “[t]his bill simply extends to construction project managers provisions in existing law that generally apply to professional appointments. Thus, there should be no fiscal effect.” Architects and engineers could not receive negotiated construction contracts before SB 1419, so construction project managers cannot now receive negotiated construction contracts.

Accordingly, it is the author’s opinion that Gov’t Code § 4525 et seq. does not provide authority for negotiated at-risk CM, and that Inglewood is still good law and prohibits negotiated, at-risk CM contracts – at least where the applicable law (e.g., Public Contract Code § 20162) requires competitive bidding of construction contracts.

7. Graydon

In Graydon v. Pasadena Redevelopment Agency, 104 Cal.App.3d 631 (1980), the Court of Appeal affirmed the Superior Court’s refusal to overturn a sole-source negotiated contract for a publicly-owned and financed (through tax increment bonds) parking garage, in coordination with and as part of a privately-sponsored retail mall project. The court then observed that “[t]he ability of the Agency to pay its bonds, dependent in large part upon the flow of tax increment monies resulting from the completion of the retail center, was thus directly linked to the award of the questioned contract.” Id. at 645.

Thus, Graydon can be (liberally) interpreted as standing for the proposition that an agency can negotiate a contract for a building that is part of a debt-funded project, if the delay incident to traditional design-bid-build competitive bidding would jeopardize the funding for the project.
V. Validation

Given that there is no explicit statutory authorization for cities to use design-build, a city wishing to use the procedure might consider validating the contract.

Chapter 9 of Title 10 of Part 2 of the California Code of Civil Procedure (commencing with § 860) provides that a public agency may bring an in rem action to determine the validity of certain actions.

Note that chapter 9 only sets forth the procedure for conducting a validation action. In order to validate the design-build contract, there must be separate substantive law authorizing the use of the procedure for the contract. In the case of a city, this authorization is found at California Government Code §§ 53510 and 53511:

§ 53510. As used in this article “local agency” means county, city, city and county, public district or any public or municipal corporation, public agency or public authority.

§ 53511. A local agency may bring an action to determine the validity of its bonds, warrants, contracts, obligations or evidence of indebtedness pursuant to Chapter 9 (commencing with Section 860) of Title 10 of Part 2 of the Code of Civil Procedure.

Note that there are really two types of validation procedures -- a validation procedure initiated by the public agency pursuant to CCP § 860, and a challenger-initiated anti-validation procedure, which is subject to a 60-day statute of limitations under CCP § 863. Thus, a public agency can do nothing, wait 60 days, and if no action has been filed challenging the contract, proceed. So why should a public agency go to the trouble of initiating a validation action under CCP § 860? Because under § 860 the agency (hopefully) gets two rulings from the court: (1) that this is the type of contract covered by the validation statutes, and (2) that the contract is valid. If the agency does not bring a § 860 action, then a late-filing challenger will argue that the contract is not of the type covered by the validation statutes and thus not protected by the 60-day statute of limitations.

The key question in deciding whether the validation statutes apply to a design-build contract is the scope of “contract” as used in § 53511. Interpretation of the word in court decisions ranges from the very narrow -- that “contract” is synonymous with “bonds, warrants, obligations of indebtedness” -- to a broader interpretation that “contracts” encompasses construction contracts - - at least those funded by private capital such as bonds or contractor equity.

An example of the narrow interpretation is found in City of Ontario v. Superior Court, 2 Cal.3d 335 (1970), wherein a taxpayer challenged the City of Ontario’s bond funding and sole-source contracting for the Ontario Motor Speedway. The taxpayer did not serve his complaint in the manner prescribed by the validation procedure until the 88 days after the contract award. The City of Ontario argued that § 53511 made §§ 860 et seq. applicable, so that the taxpayer’s action was time-barred. The taxpayer argued that § 53511 did not apply, because “contract” meant “bonds.” The Supreme Court of California observed that the legislative history of § 53511 characterized the measure as allowing “a local agency to bring an action to determine the validity of evidences of indebtedness,” and that this does not include “contracts.” Id. at 343. In dissent, Justices Burke and McComb pointed out that this interpretation renders the word “contract” superfluous. Id. at 350. At any rate, the Supreme Court of California did not actually hold that
“contract” is restricted to bonds. What the Supreme Court actually held was that “the question of whether chapter 9 [the validation procedure set forth at Code of Civil Procedure §§ 860 et seq.] applies to the case at bar presents a ‘complex and debatable’ issue,” and that there was therefore “good cause” for the taxpayer’s failure to comply with the service by publication requirements of the validation procedure. Accordingly, the statement in City of Ontario that § 53511 does not include contracts is arguably dicta.

The other end of the spectrum is occupied by Graydon v. Pasadena RDA, 104 Cal.App.3d 631 (1980). On November 2, 1977, the RDA awarded Ernest W. Hahn a sole-source negotiated contract for a publicly-owned parking garage, to be built under a shopping center to be built in air rights over the garage. On January 26, 1978 (85 days later), taxpayer Graydon filed an action challenging the contract as being awarded without competitive bidding. The trial court ruled that Mrs. Graydon’s action was barred by the 60-day limitation of § 863. The appellate court observed that “the heart of the dispute between [Mrs. Graydon] and [the Redevelopment Agency] focuses on whether this is a ‘contract’ of the type intended to be covered by the provisions of sections 860, 863, 864 and 869.” Id. at 642. The appellate court held in the affirmative. Id. at 646 (“We hold that chapter 9…applies and that this action…is barred by the 60-day limitation provisions of sections 860 and 863”).

Note also the second sentence of § 864:

Bonds and warrants shall be deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance authorizing their issuance, and contracts shall be deemed authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance approving the contract and authorizing its execution.

Thus, the Legislature understood the word “contracts” to include matters other than bonds.

In summary, validation is a useful device for reducing the risk of a design-build contract. However, you need to build the time for the validation action into the project schedule, which of course detracts from one of the advantages of design-build. On the other hand, some sophisticated design-build entities may insist on a validation action, as the design-build entity is the party with the most to lose if the contract is subsequently declared void ab initio. See, e.g., Miller v. McKinnon, 20 Cal.2d 83 (1942).

VI. Contract Forms

A competitively-bid design-build contract has much in common with a standard municipal construction contract, and must include all of the statutorily-mandated provisions, i.e.:

- Audit (Government Code § 8546.7)
- Prevailing Wage (Labor Code §1770 – including charter cities, City of Long Beach v. Dept. of Ind. Rel., 2003 Cal.App.LEXIS 1050 (July 14, 2003))
- Payment Bond (Civil Code §3247 – except charter cities, Loop Lumber v. van Lohen Sels, 173 Cal. 228 (1916))
- Licensing (Public Contract Code § 3300, Business & Professions Code § 7028.15)
• ADR on claims of $375,000 or less (Public Contract Code § 20104)
• Differing Site Conditions (Public Contract Code § 7104)
• Trench Shoring (Labor Code § 6705)
• Utility Relocation (Government Code § 4215)
• Workers Comp (Labor Code § 1860)
• Substitution of Securities for Retention (Public Contract Code § 22300)
• Antitrust Claim Assignment (Public Contract Code § 7103.5)
• Subcontractor Listing (Public Contract Code § 4100)

The most significant difference is that the design-build contract must include a scope statement encompassing design, along the lines of the following:

The Project shall consist of a [describe it completely and precisely – what’s included and what isn’t].

Contractor shall prepare complete designs, working drawings, specifications and shop drawings for the Project, and shall furnish the services of all necessary supervisors, architects, engineers, designers, draftsmen, and other personnel necessary for the preparation of those drawings and specifications required for the Project.

Contractor shall provide all labor, materials, equipment, tools and supplies required for construction of the Project in accordance with drawings and specifications prepared by the Design/Builder and the Project scope.

Contractor shall supervise and direct the work, and shall furnish the services of all supervisors, professionals, mechanics and other personnel necessary to design and construct the Project.

The design-build contract should also include a provision making the city an intended third-party beneficiary of all contracts between the design-build entity and its trade subcontractors and design professionals.

Several organizations, including the AIA, the Design-Build Institute of America (DBIA) and the Engineers Joint Contract Documents Committee (EJCDC) have developed standard forms for design-build contracts, although for use in the private sector where design-build contracts are usually negotiated. Therefore, each of these standard forms requires modification to use in competitively-bid design-build contracts (in addition to incorporation of the statutorily-mandated provisions).

AIA Document A191, Standard Form of Agreements Between Owner and Design/Builder, is widely used. A191 is a two-part form. Part 1 of the A191 provides for furnishing the preliminary design, budget, and schedule necessary to prepare and submit the design-builder’s proposal for Part 2, which provides for completion of the design and construction.

A191 contemplates that the owner will contract with the same entity for both Part 1 and Part 2. This is problematic in the public sector, in that Government Code § 87100 provides that:
No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

and Government Code § 82048 provides that:

“Public official” means every member, officer, employee or consultant of a state or local government agency. [emphasis supplied]

See, Kirchmann v. Lake Elsinore Unified School Dist. (1997) 57 Cal.App.4th 595. Thus, if an entity were to participate in developing the scope of a design-build contract under A191 Part 1, that entity would probably be ineligible to bid on the completion of the design and construction under A191 Part 2. Accordingly, on competitively-bid municipal design-build procurements, the preliminary studies contemplated by Part 1 of A191 should be accomplished in-house or under a Government Code § 4525 professional services contract, then the design completion and construction contemplated by Part 2 of A191 can be competitively bid.

VII. Conclusions

There is no explicit statutory authority for general law cities to use design-build, similar to the Public Contract Code § 20133 authorization applicable to certain counties. However, the primary statutory authorization for contracting by general law cities does not include requirements similar to those requiring counties to solicit bids based upon completed plans and specifications, so an authorization such as § 20133 is arguably not necessary. Accordingly, general law cities can probably competitively bid design completion and construction in one contract, based upon a preliminary design (i.e., “bridging”).

The recommended over-all approach is to:

1. Negotiate a professional services contract under Government Code § 4525, with a scope similar to AIA A191 Part 1, for the preparation of preliminary drawings defining the over-all size and shape of the project and a preliminary cost estimate and schedule. (Or do this in-house.)

2. Simultaneously with Step 1, prequalify design-build entities pursuant to Public Contract Code § 20101.

3. Put the project description developed in Step 1 out to bid to the bidders prequalified in Step 2 for price bids. Require the bidders to list their subcontractors pursuant to Public Contract Code § 4104. Ask for two line items, design and construction, with award to be made to the prequalified bidder submitting the lowest sum of both items pursuant to Public Contract Code § 20162. Watch out for unbalanced bidding (i.e., front-loading the design).

Consider validation.