

PROCUREMENT OPTIONS AVAILABLE FOR PUBLIC WORKS CONSTRUCTION PROJECTS

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Joan Cox - Bio



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For the past twenty years, Deirdre Joan Cox has practiced in the construction and public contracting field. Ms. Cox's practice involves representing public and private owners, design professionals, and contractors in complex construction matters, including strategizing development and procurement approaches, the drafting of construction documents, advising clients during the course of construction, claims review and analysis, and claims resolution, including mediation, arbitration, and litigation. She assists property owners, communities, and projects to resolve the issues that occur at the intersections between funding, design, acquisition, and construction. She serves as construction counsel to a number of local agencies. She has extensive experience in state and federal court. Her efforts, from a project's early stages through trial and beyond, allow public agencies to deliver public projects on time and on budget.

Her experience includes multi-million dollar projects for cities, counties, and other municipalities, as well as hospitals, community college, school and special districts, and other commercial facilities in both bond funded projects, individual projects, and capital improvement programs. She has particular experience in lease revenue bond financing, Mello-Roos bonds, public private partnerships, and other financing mechanisms.

Ms. Cox has extensive experience in working with public entity clients in developing construction project manuals, i.e., "front-end" construction documents for all types of public works projects using delivery methods that involve competitive bidding utilizing lowest responsible, responsible bidding and "best value" concepts for traditional hard bid / design-bid-build, design-build, construction manager at risk, and lease-leaseback delivery mechanisms.

Her work includes preparing the project documentation including drafting, negotiation, structuring of delivery and procurement approaches and risk evaluation. She also assists public entity clients in administering the bidding process and facilitating the defense and handling of bid protests, subcontractor listing, project setup, and related issues that arise during the bidding / proposal process including attending hearings and assisting in creating findings and conclusions.

Stephen Cali - Bio



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Mr. Cali's practice area is primarily in commercial litigation and claims with a focus on construction, construction defect, and related matters. He represents public and private entity clients in a variety of construction projects, including design-bid-build, design-build, and heavy industry engineering procurement construction contracting, construction management, private commercial and residential developments, public works projects, and complex construction matters.

In addition to his construction litigation practice, Mr. Cali provides advice and counsel on numerous matters to public and private entities relating to design and construction contract formation, negotiations, and enforcement; bidding and bid protests; prevailing wage laws and evaluation; and statutory and municipal code interpretation and enforcement issues; and assists clients in claims preparation, review, evaluation, analysis, and resolution.

Mr. Cali also represents clients in general commercial disputes; residential, insurance, and real property disputes; legal malpractice matters; insurance disputes; product liability; and general litigation matters. He has participated in jury trials, court trials, arbitrations, and mediations throughout his legal career. Mr. Cali has also served as a judge pro tem in Alameda County Small Claims Court.

Jim Porter - Bio



Jim Porter is the Director of Public Works for the County of San Mateo. The Department of Public Works has a staff of over 300 and performs a wide array of design, construction, construction administration, operations, and maintenance services involving the County's transportation systems, buildings, general aviation airports, flood control and stormwater management, sewer collection, water distribution, lighting districts, energy conservation programs, and environmental stewardship. Jim has over 30 years of professional engineering experience, 17 of which at the Department Director level. He has a Bachelor of Science in Civil Engineering from the University of Washington, a Master of Public Administration from San Francisco State University, and is a registered Civil Engineer and Traffic Engineer in California.

Rebecca Chaparro - Bio



Rebecca Chaparro is an associate with Best Best & Krieger LLP. Rebecca's practice concentrates on all aspects of public contracting with a focus on public works construction and infrastructure construction law. Rebecca has experience in all aspects of public works construction, including construction contracting, prevailing wage law compliance, claims resolution, and construction defect. Rebecca regularly assists clients with all phases of the construction process, beginning with the preparation of construction contract documents, resolution of bid protests, subcontractor substitution, insurance and bond matters, contract administration, claim and dispute resolution, and project closeout. Rebecca received her law degree from the Sandra Day O'Connor College of Law at Arizona State University. Prior to earning her law degree, Rebecca worked as a project engineer for a Phoenix general contractor. She earned her bachelor's degree in housing & urban development from Arizona State University. Rebecca is licensed to practice law in California and Arizona.

Comparison of Project Delivery Methods

- Design-Bid-Build
- Design-Build
- Construction Manager at Risk
- Construction Manager Multiple-Prime (CM/GC)
- Owner Multiple-Prime
- Public Private Partnership (P3)
- Job Order Contracting (JOC)



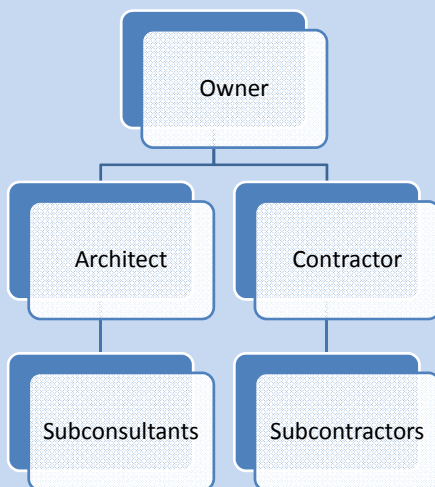
Choosing the appropriate delivery method will depend on the type of project and goals that you're trying to achieve

Selecting a Project Delivery Method

- Project Type/Complexity
- Cost
- Timing
- Construction market
- Experience/comfort level with various delivery methods
- Risk tolerance



Design-Bid-Build ("Traditional" Method)



Features:

- Three linear phases:
 - Design – Bid – Build
- Three players:
 - Owner – Architect – Contractor
- Two separate contracts:
 - 1. Owner – Architect
 - 2. Owner – Contractor

Responsibilities:

- Owner: Program, finance, management
- Architect: Prepare Plans, Specifications & Estimate
- General Contractor: Prime and subcontractor construction

Design-Bid-Build **Legal Implications**

- Authority: Public Contract Code 20160
- Architect (and Construction Manager if used) act as agent(s) for Owner
- Architect is fully responsible for estimates, constructability, and design
- One single construction contract between Owner and General Contractor
- General Contractor is bonded for entire project amount and responsible to Owner for performance of all Subcontractors

Design-Bid-Build **Characteristics**

- Prequalification of bidders is possible (and recommended), but not mandatory
- Lowest responsive, responsible bidder is selected
- Risk to timely complete project and to coordinate construction phases falls on General Contractor and not on Owner
- General Contractor is responsible for completing the project at a fixed price

Design-Bid-Build **Advantages**

- Familiar delivery method
- Defined roles / responsibilities for team
- Available for wide range of projects
- Owner can realize savings through complete and vetted bid documents (i.e., constructability reviews, estimates, and value engineering)

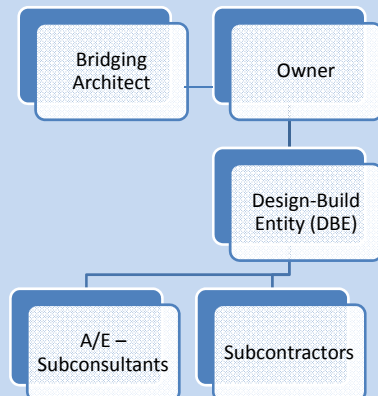
Design-Bid-Build **Disadvantages**

- Limited ability to reject bidders (absent prequalification)
- To extent errors & omissions insurance does not cover design flaws, Owner shoulders costs associated with approving a poor design ("Liability Gap")
- Limited flexibility in changing:
 - Design after approval without incurring increased costs
 - Schedule during construction without incurring increased costs

Design-Bid-Build Disadvantages

- Owner has no control / input on subcontractor selection
 - Unless part of prequalification process for major trades
- Limited Owner control over General Contractor's staff
- High potential for change orders and conflict
- No cost savings sharing
- Relationships (i.e., between Architect / CM and General Contractor) can become adversarial

Design-Build



Features:

- Integrated process overlapping design and construction
- Two primary players: Owner and Design-Build Entity
- One contract between Owner and Design-Build Entity

Responsibilities:

- Owner: Program, initial design, performance requirements, and finance
- Design-Build Entity: Final design and construction. Can include programming

Design-Build **Legal Implications**

- Authority: Public Contract Code 22160, et seq.
- Available for projects in excess of \$1 million
- Requires prequalification of prospective Design-Build Entity proposers
- Little input or control during final design and construction stages
- Owner may hold Design-build Entity responsible for construction delays and cost overruns not resulting from Owner changes

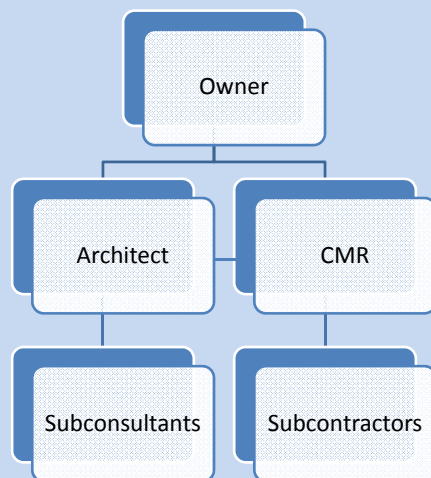
Design-Build **Advantages**

- Owner has single contract for design and construction
- Maximum price is established earlier (after bridging design), reducing risk of escalation impacts
 - Budget control
- Only Owner change orders
- Flexibility in Design-Build Entity selection through Best Value Approach (*cf.* D-B-B)

Design-Build Disadvantages

- Owner has limited involvement after award
- Owner intent and input (bridging design) is generally complete at time RFP is issued
- Quality control is responsibility of Design-Build Entity
 - Solution: Owner may include construction administration scope for Bridging Architect

Construction Manager @ Risk



Authority:

- Public Contract Code § 22146 (counties only)

Features:

- Three linear phases: Design, bid, build
- Three players: Owner, Architect, CM-General Contractor
- Two separate contracts: Owner to CM-constructor, Owner to designer
- Provides an “off-ramp”

Responsibilities:

- Owner: Program, finance
- CM at Risk: Provides pre-construction and project management services, design assist prior to construction, is prime to the subcontractors
- Architect: Traditional A/E services

CM @ Risk Legal Implications

- Available for County projects in excess of \$1 million (PCC § 20146)
- Contractual relationship between Owner and each of the parties
- Architect responsible for completing project design, but Owner is responsible for any flaws in approved design
- CM @ Risk places risk for price and schedule on CM early in project

CM @ Risk Characteristics

- Owner selects Architect based on qualifications and fee (Government Code § 4525)
- Owner selects CM based on best value, including experience, project plan, safety, and price prior to design being completed (PCC §20146)
- CM has design-assist role with architect early in project
- Guaranteed Maximum Price (GMP) is established early

CM @ Risk **Characteristics**

- Owner, Architect, and CM work together to complete trade subcontractor bid packages for each aspect of the project
- Competitive Bid for subcontracts
- CM coordinates the bidding, the work, and the relationship among all parties

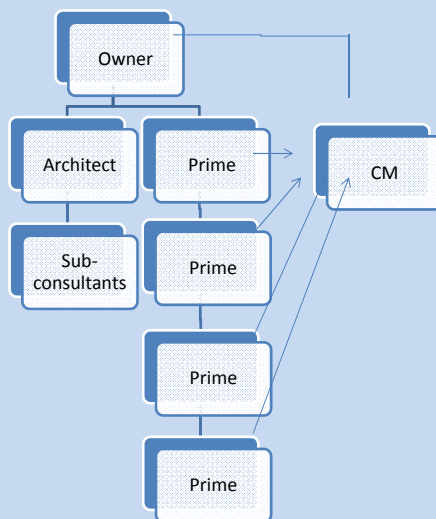
CM @ Risk **Advantages**

- Owner selects Architect based on qualifications
- Owner selects CM based on best value
- Early CM involvement to vet design, control budget and schedule
- All work except CM and A/E competitively bid
- GMP established early
- Increases likelihood of high quality, timely project completion at budgeted cost

CM @ Risk Disadvantages

- Design team may not incorporate all input from CM during design
- Perception that price competition is limited because of best value selection approach
- Less Owner control over project after CM selection

CM/GC (Multiple Prime) Contracting



Features:

- Similar to CM @ Risk
- Initially, multiple prime players: Owner, architect, CM, multiple primes (subcontractors)
- Multiple prime contracts are then assigned and novated to CM

Responsibilities:

- Owner: Program, finance, manage (Owner as contractor)
- Architect: Normal A/E services
- CM: Design-assist, construction management and oversight of construction by subcontractor trades after assignment and novation

CM/GC (Multiple Prime) **Characteristics**

- Owner contracts directly with Architect
- Owner contracts directly with CM
- Architect and/or CM assist Owner in preparing trade bid packages
- Owner enters into multiple design-bid-build construction contracts, then assigns and novates the contracts to CM
- Multiple prime contracts assigned to CM subject to protections of subcontractor listing law
- CM then oversees work of all (sub)contractors

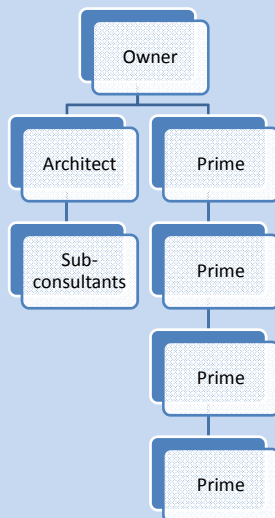
CM/GC (Multiple Prime) **Advantages**

- CM and Architect selection based upon qualifications (Government Code § 4525)
- Projects can be delivered on fast track
- CM involved in budget and design development
- Owner selects (sub)contractors
- CM responsible to deliver project on budget and on schedule

CM/GC (Multiple Prime) Disadvantages

- Prior to Assignment and Novation:
 - Higher Owner risk since Owner holds contracts
 - High level of Owner involvement; Owner must manage and coordinate multiple contracts
 - Owner responsible for schedule changes and cost overruns and for deciding whether to accelerate and incur increased costs or incur delays and increased costs
- Final price not established until all bids received
- Owner responsible for any flaws in approved design

Owner Multiple Prime Contracting



Features:

- Three linear phases: Design, bid, build
- Multiple prime players: Owner, architect, multiple primes (subcontractors)
- Many contracts
 - Owner to designer
 - Owner to multiple prime (trade) contractors

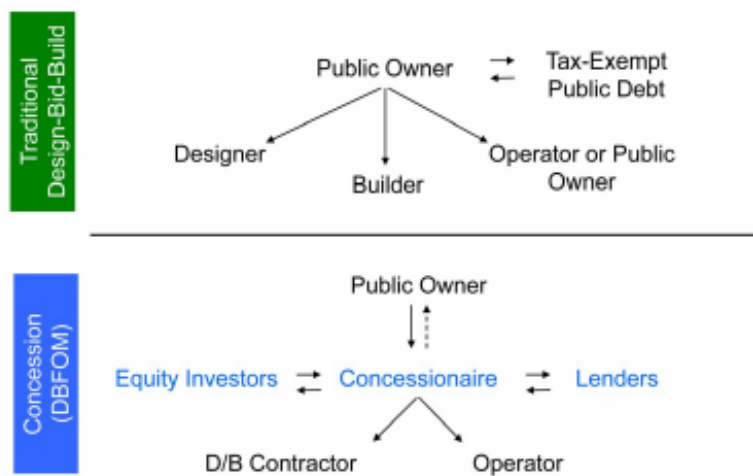
Responsibilities:

- Owner: Program, finance, manage (Owner as contractor)
- Prime specialty subcontractors: Provide independent construction services to Owner
- Architect: Normal A/E services

Owner Multiple Prime Contracting

- Advantages
 - Owner controls selection of all project participants
 - Owner total project control
- Disadvantages
 - Higher Owner risk since holds all contracts
 - High level of Owner involvement: Owner must manage and coordinate multiple contracts
 - No single performance or payment bond
 - Multiple adverse parties

Public Private Partnerships (P3)



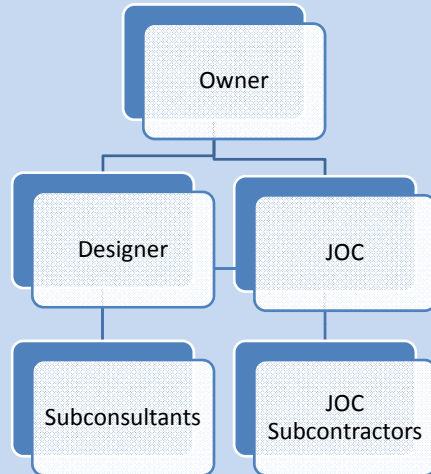
Public Private Partnerships (P3)

- Authority: Government Code § 5956 (“Infrastructure Financing Act”)
- Commonly known as Design-Build-Finance-Operate-Maintain (D-B-F-O-M)
 - *Cf.* D-B statute that precludes Operations and Maintenance (PCC § 22164(a)(2))
- Private sector designs, builds, and finances an asset, then provides operations and maintenance services under a long-term agreement

Public Private Partnerships (P3)

- Most feasible for much larger, fee-producing projects to ensure concessionaire profit margin within Owner budget constraints
- Ineligible for state grant funding
- Typically financed by concessionaire
- Repaid by tolls (roads), rates (utilities), or “availability” payments
- P3’s in other states may involve public financing through bond measures

Job Order Contracting



Authority:

- Counties: Public Contract Code 20128.5
- School Districts: Public Contract Code 20919.15

Features:

- Three linear phases: Design, bid, build
- Three players: Owner, designer, JOC
- Two separate contracts: Owner to designer, Owner to JOC
- Can only be used for maintenance
- Individual JOC cannot exceed \$4.55M

Responsibilities:

- Owner: Program, finance
- Designer: Traditional A/E services
- JOC

Selection Methodologies

- Low Bid
 - Design-Bid-Build
 - Owner Multiple Prime
 - CM Multiple Prime (CM/GC)
 - Lowest responsive responsible bidder
- Best Value Selection
 - Design-Build
 - CM at Risk
 - Owner's Bridging Documents provided to prequalified proposers.
 - Selection based on qualifications, design, price, and safety
- JOC (maintenance only)
 - Construction cost catalog
 - Tasks determined from design



Always Remember...

- Complexity of project
- What's most important to you
 - Time
 - Cost
 - Control
 - Comfort level with various project delivery methods
 - Tolerance for risk
- External factors
 - City/Council or Board desire for quick delivery (but at what cost?)



QUESTIONS?